

# MILRC Media Law Resource Center

## MEDIA LAW LETTER

Associate Member Edition

2006:4

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# MLRC Calendar

PLEASE VISIT [WWW.MEDIALAW.ORG](http://WWW.MEDIALAW.ORG) FOR MORE INFORMATION

**January 25, 2007**

Los Angeles, California  
Southwestern Law School

**“Legal Challenges of Integrating Traditional  
Media and Entertainment Into a Digital Environment”**

Fourth Annual Conference Presented by Southwestern Law School’s Donald Biederman  
Entertainment and Media Law Institute and the Media Law Resource Center

**BROCHURE & REGISTRATION AVAILABLE AT [WWW.MEDIALAW.ORG](http://WWW.MEDIALAW.ORG)**

**September 17-18, 2007**

London, England  
MLRC London Conference

**International Developments in Libel,  
Privacy, Newsgathering & New Media**

## MLRC's Annual Dinner November 8, 2006

### Panel Discusses Reporting on National Security Under Threat of Indictment

On Wednesday, November 8, 2006, Scott Pelley of CBS News moderated a discussion on the current climate for reporting on national security and military issues with journalists Dana Priest of the Washington Post, James Risen of The New York Times, Pierre Thomas of ABC News and David Remnick, editor of the New Yorker.

The panel was part of MLRC's 26th annual dinner celebration at the Sheraton New York Hotel and Towers, 811 7th Avenue on 53rd Street.

Over 600 attendees heard the panel discuss the hovering specter of criminal leak investigations and direct criminal charges – and how reporters and their editors approach their work on national security and intelligence issues in the current environment.

Panelists discussed the controversy surrounding Dana Priest's report on the CIA's secret prisons in Eastern Europe, James Risen's reports on the Treasury Department's anti-terror bank monitoring program and the New Yorker's reports on military operations in Iraq and Afghanistan. Pierre Thomas also spoke about the threat of jail he faced for protecting his source in the Wen Ho Lee case.

*“What do journalists think about the sobering possibility that their reporting might subject them not only to harassment and jail time for failing to reveal a source, but to actual indictment as co-conspirators under laws that were written for spies and traitors? I don't think I'm over-stating it to say that these are complex questions with profound implications for journalism, democracy, and the future of the First Amendment.”*

— Henry Hoberman, MLRC Chair

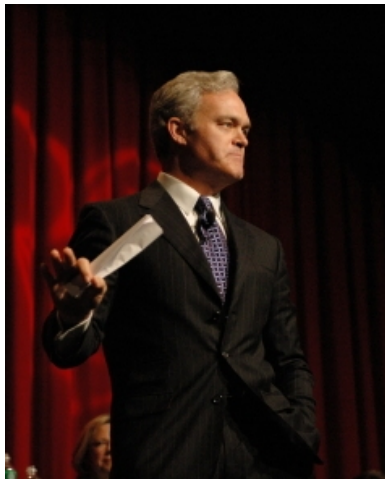


MLRC Chair Henry Hoberman



(from left to right) David Remnick, Dana Priest, Pierre Thomas and James Risen

PHOTOS BY JULIENNE SCHAER



Scott Pelley

**Scott Pelley:** *“James, why should you not be enjoying your Pulitzer Prize behind bars?”*

**James Risen:** *“Well, you know, I think the First Amendment came first; before the Espionage Act.”*

**David Remnick:** *“[Abu Ghraib] was irrefutable and it was horrible, and it was no question that we were going to publish it the earliest possible date.”*



David Remnick

**James Risen:** *“It is important for us as Americans to begin to think about changing the rhetoric that we use about leaks and about reporting on classified and national security information. I mean, I think, when I got into this business a long time ago, a whistleblower was someone who was kind of respected in society.”*



James Risen



Pierre Thomas

**Pierre Thomas:** *“Our society is built in part on the public having information. It’s what my bosses ask me to do every day when I come to work; which is ‘find out things about how the government is operating.’ And, essentially every day, people are telling me things they shouldn’t be telling me.”*

**Dana Priest:** *“People who had never met me before were actually calling me a traitor. And when I got over that viscerally, I said to myself and my kids, ‘You know, this really is all about the debate.’ And even though the debate is awkward and painful at the moment, I, in general, always had faith that the debate would be the prominent feature that we would remember when this era was over.”*



Dana Priest



## MLRC Annual Meeting Nov. 8, 2006

The meeting was called to order by Henry Hoberman, chairman of the MLRC Board of Directors.

Mr. Hoberman welcomed everyone to the meeting and began by describing the two proposed amendments to Article III, Section 2 of the by-laws. The first proposed amendment would increase the maximum number of directors from nine (9) to eleven (11) and would give the DCS president full voting rights on the board.

Sandy Baron, executive director of MLRC, explained the second proposed amendment, meant to alter the language of Article III, Section 2, to comply with the New York not-for-profit corporations law regarding the filling of vacancies on the Board of Directors.

Next, Mr. Hoberman explained that the real substantive change to Section 2 of the by-laws was the proposal to give the DCS President a vote on the board of the directors. Mr. Hoberman said that the proposed amendment was in recognition of the contribution that the DCS members make to MLRC, and that the Board felt that affording the DCS President with a voting position was overdue.

### *Elections*

Mr. Hoberman explained that Mr. Wimmer was the DCS President until his recent move to Gannett, and that the Board was delighted to have him join them. Mr. Hoberman also explained that due to the proposed by-law amendment adding to the maximum number of directors, the formation of the Board in its current time cycle would not fit the staggered terms that the board has had in the past. For this reason, Mr. Hoberman explained, Mr. Wimmer and Mr. Richieri are nominated to one year terms, with the expectation that they will be re-elected for two year terms at the next annual meeting. Mr. Huber, Ms. Rivlin and Ms. Weiner are nominated for two year terms. Finally, Mr. Hoberman, Marc Lawrence-Apfelbaum of Time Warner Cable, and Stephen Fuzesi, Jr. of Newsweek, Inc. were elected to a two year term at the last meeting.

Following these descriptions, Mr. Hoberman made a motion to approve the list of directors. Hal Fuson seconded the motion. All present voted in favor and Ms. Baron voted the 32 proxies, which had been retained and brought to the meeting, in favor of the new directors.

Next, Mr. Hoberman made a motion to approve the by-law Amendments that had been discussed. Mr. Fuson seconded the motion. All present were in favor of the amendments. Ms. Baron also voted the 32 proxies in favor of the amendments.

### *Financial Report*

After the voting was complete, Mr. Richieri gave the financial report. Mr. Richieri said that the financial reports spoke to a "strong financial discipline." He also explained that the MLRC has been gradually building funds to create a form of endowment, and now has over \$1 million that the Board can begin to think about putting to work in creative ways.

Ms. Baron followed up by giving credit to Debra Seiden of the MLRC staff for working on the finances of the organization from day to day.

Next, Ralph Huber gave the report of the Strategic Planning Committee. Mr. Huber began by acknowledging the committee members, including Mr. Hoberman and Mr. Richieri, as well as those who are not on the Board, Robin Bierstedt, Kelli Sager and Karole Morgan-Prager.

Mr. Huber said that the committee has been looking at the direction in which the MLRC is headed. A key issue has been the state of the media membership in light of media consolidation. Mr. Huber said that he and Dale Cohen have undertaken to examine and analyze the membership dues and see if the MLRC should be taking a different approach to how it assesses dues. For example, the committee has looked at whether the MLRC should adopt a more formal dues structure. Mr. Huber said that the committee has been helped by Ms. Baron and Ms. Seiden, who have provided historical information about how the MLRC has collected revenue. The committee hopes to report on its findings about membership dues early next year.

Mr. Huber said that the committee has also been looking at how MLRC should reach out to non-traditional media and the international media community, and how those efforts could be tied to revenue.

Mr. Huber said that generally the MLRC has no critical problems to address, and that the committee was mostly looking at how the organization can add value to its members and the public by its expanding its areas of expertise. The committee is eager for input.

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## MLRC Annual Meeting

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Next, Kurt Wimmer gave the report of the Defense Counsel Section. Mr. Wimmer explained that Peter Canfield will be rotating up to be President of the DCS executive committee for next year. Robert Nelson of Hall Estill in Oklahoma will be added to the board as Treasurer. As Mr. Wimmer is no longer defense counsel, having joined Gannett, he will not be serving as a past president; James Stewart has agreed to keep that position for another year.

Mr. Wimmer said that the Pre-publication/Pre-broadcast Committee has been publishing a lot of reference material and that the Entertainment committee has also been doing good work. Mr. Wimmer said that the Model Shield Law Task Force was indebted to Ms. Baron and Maherin Gangat, who worked in detail with the model law and coordinated with the DCS and the media members in the effort.

Next, Ms. Baron gave the Executive Director's report. She thanked the Board and the former Board members for being so active and for all of their hard work. Ms. Baron also thanked the DCS, and pointed those present to the list of publications, which had been distributed at the beginning of the meeting.

Ms. Baron began the report by discussing the conference in Alexandria, V.A. There was a record crowd and the evaluations were still circulating, but would be tabulated. Ms. Baron thanked those involved with the planning. Some of the MLRC committees contributed a great deal to the conference, including the Ethics Committee, which coordinated boutiques at the conference and produces a monthly article in the MediaLawLetter. The Internet Committee also ran two boutiques and produced a series of articles for the conference, which are available on the website. Pre-pub/Pre-broadcast reports were also used as working tools in a boutique session during the conference; and the International Committee ran the opening sessions on privacy and copyright. Ms. Baron also thanked Tom Kelley, who conducted the Trial Tales session.

Ms. Baron said that the MLRC is in the planning stages for the now-annual set of sessions in Los Angeles with Southwestern Law School. The conference will be on January 26th. Last year at the Southwestern Conference there were two sessions on product placement, a session on how to make a deal for product placement and a session on legal issues to consider when products are used when no deal is made, indecency regulation, and blurring fact and fiction, as well as a reception. Ms. Baron invited all to attend the 2007 conference, which will include sessions on the intersections of traditional and new

media: deal issues, fair use, and the blogging. Brochures for the conference should be going out soon.

The California chapter, which was intended to try and serve the special needs and issues of California, has been meeting quarterly. The California Chapter meetings include short takes on various issues. Recently, the Chapter has discussed access issues, legislative proposals in California, indecency, and subpoenas. Any member in California is welcome to participate.

The London 2007 conference is in the planning stages and will be held Sept. 17th and 18th. If anyone has questions or ideas, they should contact David Heller of the MLRC staff.

Ms. Baron thanked Susan Buckley and the panel for the afternoon's symposium on the Espionage Act. She also referred to the publication list, and mentioned a few publications, including the Pre-pub/Pre-broadcast's Checklist, the Legislative Affairs Committee's monthly news column, the Newsgathering Committee's **PANIC BOOK**.

Ms. Baron then asked David Tomlin to speak about the Newsletter Committee. Mr. Tomlin said that the committee has continued to serve its traditional function of providing ideas and writers for Dave Heller. The committee has had three teleconferences to talk generally about the newsletter and has made a modification to the publication on the website: the index has direct links to the articles, instead of requiring the reader to scroll through pages.

Mr. Tomlin said the committee had begun to discuss whether to change the format of the MediaLawLetter so that it resembles an internet publication rather than a replica of a print publication. Finally, Mr. Tomlin noted that David Hooper has volunteered to take on the writing of a column on noteworthy events in the U.K.

Ms. Baron then continued, mentioning the successful work of the ALI Task Force and the Task Force on the Model Shield Law.

She asked members to keep an eye out for the MLRC's change of address card, noting that the organization will be moving around December 1st. Ms. Baron concluded by thanking the staff of the MLRC.

Maherin Gangat then spoke about the Task Force on the Model Shield Law. The shield law that recently passed in Connecticut was based in large part on the law developed by the Task Force. Ms. Gangat has kept up with other states that are interested in passing shield laws and provided them with

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### MLRC Annual Meeting

*(Continued from page 6)*

the model law. These other states include Washington, Missouri, Texas and, more recently, Kansas and Massachusetts. The only state that seems doubtful to resume its interest this term is Missouri.

Ms. Gangat then gave the report on the MLRC Institute Speaker's Bureau, a project underwritten by a grant received by the MLRC Institute last year intended to educate the public on the reporter's privilege. The Institute presentations are conducted in venues such as bookstores, colleges and high schools. These presentations are conducted by lawyers from the member firms and the reporters from their publications. So far, there have been roughly 40 such presentations.

Ms. Gangat said that the Institute is currently under consideration for another grant, and has been discussing adding a second topic to its series. So far, suggested topics have included covering wars, access to national security, libel, censorship, and covering the courts in trials. Ms. Gangat asked that anyone with ideas please contact her. Also, anyone who is interested in giving a presentation or knows of a venue should contact Ms. Gangat as well.

Mr. Hoberman encouraged people to look at the substantive information used by the Institute (available on the MLRC website).

Next, David Heller continued the report on the Institute, discussing a recent power point presentation the Institute is developing on basic defamation principles. The interactive presentation is designed for bloggers and reporters or any members of the public who might be interested, and is based on a reporting hypothetical, followed by a series of questions. Mr. Heller welcomed anyone who would like to see the presentation to email him.

Eric Robinson then mentioned that the Employment Committee has put together a basic legal primer, which had been distributed at the beginning of the meeting and is available for order and on the website.

Mr. Hoberman then announced that the Board had elected Ralph Huber as the next chairman of the Board of Directors. He thanked Sandy Baron for her tireless work and all members for another great year in the most challenging of times.

There being no further new business, the meeting was adjourned.

### **RECENTLY PUBLISHED MLRC BULLETINS**

#### **MLRC 2006 ARTICLES & REPORT ON SIGNIFICANT DEVELOPMENTS**

*With An Update on Criminal Libel Developments*

**2006 ISSUES NO. 3/4, PARTS I, II & III**

#### **REPORTER'S PRIVILEGE ISSUES: CONTINUING ATTACKS IN 2006**

*Maherin Gangat*

#### **THE FOUR MYTHS SURROUNDING THE COMMON LAW REPORTER'S PRIVILEGE**

*Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr., and Michael Dore*

#### **THE GOOGLE LIBRARY PROJECT**

*Allan R. Adler*

#### **THE GOOGLE LIBRARY PROJECT: BOTH SIDES OF THE STORY**

*Jonathan Band*

#### **NEW CHALLENGES AND FAMILIAR THEMES IN THE RECENT CASE LAW CONSIDERING SECTION 230**

*Samir Jain and Colin Rushing*

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## UK & EUROPEAN LAW UPDATE

### The Other Side of the Pond

By David Hooper

#### *Privacy*

The UK law of privacy continues to take shape. Arguments were heard last month in the *Douglas v- Hello!* appeal to the House of Lords. Michael Douglas and Catherine Zeta-Jones are no longer in the case, but still at issue are the respective rights between rival celebrity magazines. The Lords decision is likely to define a number of conflicting decisions about the law of privacy and to rule on the extent to which celebrity magazines can prevent spoilers by their competitors.

Also in Her Majesty's courts – this time the Court of Appeal – with a panel of three judges which included the Lord Chief Justice and the Master of the Rolls (the top Judge of the Court of Appeal) was Her Majesty's son seeking to uphold the ruling by Mr Justice Blackburne against the *Mail on Sunday* which had published extracts from the Prince's journal which referred to the handover of Hong Kong about the British to the Chinese as “the great Chinese takeaway” and referred to the Chinese leadership as “appalling old wax-works.”

At press time, the Court of Appeal issued its judgment affirming that the newspaper's publication of the Prince's journal, which was leaked by one of the Prince's employees, was a breach of privacy. *Associated Newspapers Ltd v Prince of Wales* [2006] EWCA Civ 1776 (21 December 2006). As stated in the judgment:

The information at issue in this case is private information, public disclosure of which constituted an interference with Prince Charles' Article 8 rights. As heir the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The [trial court] judge rightly had regard to this factor when he said at paragraph 133:

“Not the least of the considerations that must be weighed in the scales is the claimant's countervailing claim to what was described in argument as ‘his private space’: the right to be able to commit his private

thoughts to writing and keep them private, the more so as he is inescapably a public figure who is subject to constant and intense media interest. The fact that the contents of the Hong Kong Journal are not at the most intimate end of the privacy spectrum does not, to my mind, lessen the force of this countervailing claim. The claimant is as much entitled to enjoy confidentiality for his private thoughts as an aspect of his own ‘human autonomy and dignity’ as is any other.”

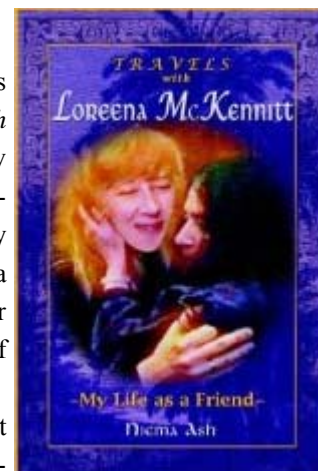
The information in the Journal was disclosed to the Newspaper by Ms Goodall. She was employed in Prince Charles' Private Office in circumstances and under a contract that placed her under a duty to keep the contents of the Journal confidential. [The Prince's barrister] Mr Tomlinson emphasised in his submissions to the judge the strong public interest in preserving the confidentiality of private journals and communications within private offices. He was right to do so. There is an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they have assumed. Both the nature of the information and of the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles.

[2006] EWCA Civ 1776 ¶¶ 70-71.

#### *Unauthorized Biographies*

The Court of Appeal this month also gave judgment in *Ash v McKennitt* [2006] EWCA Civ 1714 (14 December 2006), affirming that an unauthorized biography of Canadian folk singer Loreena McKennitt written by a former friend Niema Ash was a breach of privacy.

The Court of Appeal judgment is also notable for the strong support given to the trial court ruling by Mr Justice Eady (2005) EWHC 3003 (QB) – no doubt a welcome relief after his mauling by Lord Hoffman in the *Jameel* case.



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**UK & EUROPEAN LAW UPDATE**

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Ash had written a book about McKennitt called with no obvious irony *Travels with Loreena McKennitt – My Life as a Friend*. The last part of the title seemed singularly inappropriate. The book contained, among other things, information about McKennitt's personal relationships, her home, her feelings after the death of her fiancé, her health and diet, her emotional vulnerability and a property dispute with Ash which had been settled on confidential terms. See also *MLRC MediaLawLetter* Feb. 2006 at 35.

Relying on the European Court of Human Rights' decision in *Von Hannover v Germany* Mr. Justice Eady undertook a balancing test looking at the public interest in the disclosures. He found the disclosures by Ms Ash particularly distasteful and a very wide range of information was viewed as private information including serious matters such as details of Ms McKennitt's health and of her emotions following a tragic bereavement, as well as seemingly quite anodyne incidents on their travels, details of a recording contract and the details of Ms McKennitt's home.

The Court of Appeal firmly upheld Eady's approach. Where there is an apparent conflict between Article 8 and Article 10 of the European Convention of Human Rights the approach of the court will be that neither article has precedence over the other, an intense focus is necessary upon the comparative importance of the specific rights claimed in the individual case where a conflict arises between the values under Articles 8 and 10, the court must take into account the justification for interfering with or restricting each right and the proportionality test must be applied to each.

What emerges from the judgment is that if an author makes claims, as had Ash, about information "having been confided to" her or her "friend revealing her innermost self to me," she is digging a pit for herself in terms of privacy. The courts will uphold the misuse of private information whether what is said is true or false. If a balancing exercise is carried out by the Judge correctly and the Court of Appeal certainly felt it had been by Mr Justice Eady, the Court of Appeal is most unlikely to interfere.

What is also clear is that the fact that a celebrity may have talked about a particular zone of their private life will not necessarily entitle others to publish more information

about it. Furthermore the public interest defence will be a high hurdle to surmount, evidence of hypocrisy alone may not be sufficient to defeat a claim for privacy. A claimant will not have to reveal whether the information is true or false. The question in a case of misuse of private information was whether the information is private, not whether it was true or false.

***Privacy for Adulterers***

The specter of *Von Hannover v Germany* struck again on in the decision of Mr Justice Eady in *CC v AB* [2006] EWHC 3083 (QB) (04 December 2006). CC's identity is apparently widely known in the world of sport. This particular sportsman has apparently been scoring not on the field of play but with someone's else's wife (Mrs AB). AB had seemingly embarked on a campaign of harassment against CC and had plans to sell his story to a tabloid newspaper and spilling the beans.

AB was enjoined from the harassment and from being able to tell his story raising questions as to whether this could be the end of kiss and tell stories. CC seems to have persuaded the Judge that the revelation of his affair would harm his wife (Mrs CC) and young children, matters which one suspects were not at the forefront of CC's mind when he reached for his zipper.

The decision is in marked contrast of the case involving another footballer called Gary Flitcroft which was originally known as *A -v- B* [2002] EWCA Civ 337. There may well have been aspects of the wronged husband's (AB) behavior which required to be restrained but as in the *McKennitt* case, discreditable behavior on the part of the defendant does seem to have resulted in an alarming extension of the law of privacy.

Mr Justice Eady acknowledged that it was a "striking proposition that a spouse whose partner had committed adultery owed a duty of confidence to the third party adulterer to keep quiet about it – even without any voluntary assumption of such an obligation." He felt, however, there was:

"a powerful argument that the conduct of an intimate or sexual relationship is a matter in respect of which there is a reasonable or legitimate expectation of privacy. Accordingly, anyone who obtains such information would be expected to recognise that either

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## UK & EUROPEAN LAW UPDATE

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from the nature of the information itself or from the circumstances in which it was imparted. If that is so for journalists or for scandalmongers in general, it is a matter for consideration whether, and to what extent a ‘cuckolded’ husband is under a lesser obligation.”

The Judge contrasted the conflicting European Convention rights applying “both careful scrutiny and an intense focus to the evidence” and on balance he felt it was right to “restrain the sale of celebrity tittle-tattle in which there was no real public interest”, although he recognized that AB should be entitled to discuss it with relatives, friends, doctors or counselors with whom he might wish to discuss his marital breakdown.

Even an adulterous relationship may attract a legitimate expectation of privacy, the Judge felt, and he was of the view that the European Convention did not require adulterers to be condemned and to have this reasonable expectation of privacy removed from them.

### ***Other Developments in Privacy Law***

An interesting example of the tactics of claimant’s lawyers is to be found in the case of X and Y and the persons who provided information about the status of the claimant’s marriage. *X & Y v Persons Unknown* [2006] EWHC 2783 (QB) (08 November 2006).

This was another decision of Mr Justice Eady. One of quite a large group of a celebrity’s friends had given the press information about the state of the celebrity’s marriage. The unidentified couple got a John Doe injunction on the basis that this was private information with a reasonable expectation of privacy.

The claimants however wanted the papers to serve the injunction upon their actual source rather than the claimants having to give notice of the injunction to all their friends who might have supplied the information to the press. which he wished not to have to do himself as this would have raised this confidential issue with a number of his friends who had no involvement whatsoever in tipping off the press. Mr Justice Eady was reluctant to make such an Order.

### ***Newsgathering***

The *News of the World* royal editor faces a jail sentence after admitting plotting to intercept voicemails of the Royal

Family, politicians and a mish-mash of footballers and celebrities. He faces a jail sentence of up to two years.

Simultaneously the Information Commissioner Richard Thomas has urged a greater use of prison for personal information dealers. Ironically some investigators called Anderson and Clifford who had been convicted of impersonating the people whose information they sought to obtain such things as unlisted telephone numbers and bank account details very recently received relatively mild community penalties including a 150 hours of community service.

At the same time, changes to the Computer Misuse Act 1990 have tightened up the law relating to hacking in a way which arguably could catch legitimate IT developers. This is under the Police and Justice Act 2006 <http://www.rpc.co.uk/Default.aspx?SID=1097&IID=0>

### ***Contempt of Court***

Abu-Hamza had been convicted in February 2006 of 11 charges of incitement to murder and race-hate offences. *R -v- Abu-Hamza* [2006] EWCA Crim 2918. He had been the subject of extensive prejudicial pre-trial publicity but the Lord Chief Justice was of the view that the Judge had correctly appreciated the prejudicial effect of such publicity but that he had taken appropriate steps to neutralize the effect of those matters and that the trial had accordingly been fair.

There are currently 34 alleged terrorist cases before the courts involving 99 UK defendants. Cases are taking up to 2 years to come to court and can last up to 12 months. The Court of Appeal in the *Barot* case [2006] EWCA 2692 held that the details of his involvement in a bomb plot should be published when he received a 40 year jail sentence, even though this might affect other trials. Increasingly the courts rely on the good sense of juries to exclude prejudicial material and on the fact that the memory of such details fades over time.

### ***Access to Court Documents***

The Department of Constitutional Affairs has settled the case brought against it by the Law Society in respect of the change effected by Rule 5.4 of the Civil Procedure Rules giving greater access to court documents. The Law Society filed a challenge in September arguing that the new rule giving wider access to pleadings could not be applied retrospectively.

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## UK & EUROPEAN LAW UPDATE

(Continued from page 10)

The DCA is paying the Law Society's costs and has in effect agreed that the rules which came into effect on 2 October 2006 shall not apply retrospectively.

Newspaper groups plus the BBC, Bloomberg and the Australian Broadcasting Corporation had intervened in the case agreed to meet their own legal costs. The case was notable for the puzzling feature of the Law Society intervening in such a dispute in which many lawyers may have wondered whether their money could have been better spent by their regulatory body. The DCA was also left with a certain amount of egg on its face not handling this subordinate legislation properly.

### **Open Justice**

The retired judge Lady Butler-Sloss in charge of the inquest into the death of Princess Diana has now reversed her original decision that the preliminary hearings scheduled for 8 and 9 January 2007 should be held in private. Not only is this a victory for open justice but it may help change the minds of at least some who have bought into the lunatic conspiracy theories that surround this tragic accident.

### **Copyright**

On 27 November the report of the Committee chaired by Andrew Gowers, a former Editor of the Financial Times into the operation of the copyright law in the face of technological advances was published.

The extent to which the UK can change its copyright law in the light of its EU obligations is limited but a number of proposals are made for the strengthening of the enforcement of IP rights by clamping down on piracy and the trade in counterfeit goods, reducing the costs of registering and litigating IP rights for businesses large and small and improving the balance and flexibility of IP rights to allow individual businesses and institutions to use content in ways consistent with the digital age.

There are 54 recommendations in the 141 pages and the recommendations have been widely welcomed by bodies such as the Publishers Association although not by musicians who were lobbying unsuccessfully for copyright protection for sound recordings to be increased from 50 to 95 years.

### **Other Developments in the UK**

On 12 October 2006 ICSTIS the Premium Service Regulator announced that it was to carry out a review of the quiz TV sector and this has operated in connection with the House of Commons Select Committee Inquiry. This is a fast-growing sector where smooth-talking presenters chosen for their looks rather than their brains put up beguilingly simple questions which gullible members of the public are invited to dial in on premium rate lines to answer. They get to generate enormous phone bills but receive no chance to answer the questions.

### **Link Law**

An interesting point came up in the case of *Hamer and Hughes -v- Hopkins* in the Bristol Mercantile Court on 24 November 2006. If you purchase domain names to divert enquiries to your business, can you be in breach of anti-competition covenants regulating what the new business can do?

Yes said the judge Sir Mark Havelock-Allan QC when granting an interim injunction restraining Wendy Hopkins from using the relevant domain names when she had set up a rival law practice using her own name in competition with the Wendy Hopkins Family Law Practice which she had left. The case had started somewhat inauspiciously when the learned Judge told the parties that he did not have Google on his computer, he only had Yahoo!

### **Denmark: National Security**

On 4 December 2006 three journalists at the Danish newspaper *Berlingske Tidende* including the Chief Editor were acquitted of charges of endangering national security. They had published leaked Danish intelligence reports that there was no evidence that Iraq had weapons of mass destruction at the time of the US-led invasion.

The Intelligence Officer who had unlawfully leaked this embarrassingly truthful information had been jailed for four months. Four month prison sentences had also been sought against the journalists but the Copenhagen City Court ruled that they had acted in the public interest.

Judge Peter Lind Larsen ruled that the considerable public interest in the information outweighed the govern-

(Continued on page 12)

**UK & EUROPEAN LAW UPDATE***(Continued from page 11)*

ment's concerns that its intelligence gathering operation were jeopardized. Prior to the invasion the Danish Prime Minister had told Parliament that he was convinced that Saddam Hussein had weapons of mass destruction. The case was understandably hailed as a victory freedom of the press.

***EU Internet***

There is an interesting report by the European Parliament's Culture and Education Committee which was adopted on 28 November. This aims to give effect to the Safer Internet Action Plan (<http://ec.europa.eu/saferinternet>). It aims to protect minors against harmful content on the internet and to create a new Kid.eu domain with content specifically aimed at children. The proposal also provides for the establishment at European level of minimum principles for exercising the right to respond for the internet and mobile telephones.

***Other Developments in Europe***

The International Chamber of Commerce has established a consolidated and expanded version of its advertising and marketing codes in its ICC consolidated code for advertising and marketing communication practice. This attempts to bring the previous separate ICC codes - sales promotion,

sponsorship, director marketing, use of electronic media and the environment under one roof and to update in the light of the development of new media.

***The Audio-Visual Services Directive***

On 13 November 2006 the European Parliament's Culture and Education Committee adopted a report on the draft directive drawn up by Ruth Hieronymi. The Council of Ministers have also adopted the proposal put forward by Finland which currently holds the EU presidency and the opinion of the European Parliament is expected in December 2006.

***ECHR***

The European Court of Human Rights held that the Article 10 rights of the Austrian Broadcasting Corporation had been infringed when an injunction had been granted by the Vienna Commercial Court in 1999 against it under Section 78 Copyright Act for publishing a photograph of a convicted neo-Nazi upon his release from prison. *Osterreichischer Rundfunk -v- Austria* - 7 December 2006 Application No, 35841/02.

*David Hooper is a partner with Reynolds Porter Chamberlain in London.*

***Ash v McKennitt [2006] EWCA Civ 1714 (14 December 2006)***

One of the most interesting portions of the Court of Appeal's Judgment is its discussion of whether the author of the unauthorized biography was entitled to write about her "shared experiences" with the claimant.

28. Ms Ash argued that all of the matters set out above were not merely Ms McKennitt's experience, but her own experience as well. That gave her a property in the information that should not be subordinated, or at least should not be readily subordinated, to that of Ms McKennitt. This argument is of relevance to Ms Ash's claim under article 10, that she is entitled to tell her own story that includes her various experiences with Ms McKennitt, but as I understood it the contention is also relied on to say that the information was not confidential in the first place.

29. Some support was sought from passages in the judgment of this court in *A v B plc* [2003] QB 195. We shall have to return to that case in more detail when addressing article 10. It is sufficient here to say that it concerned a married professional footballer [A] who sought to prevent publication by a newspaper [B] of his casual sexual relations with two women [C and

*(Continued on page 13)*



*(Continued from page 12)*

D]. C and D had sold their story to B. In the course of a wide-ranging review of how a court should handle such a claim, this court said that the right of protection of one party to a bilateral relationship might be affected by the attitude of the other party, and continued, at its § 43(iii):

Although we would not go so far as to say there can be no confidentiality where one party to a relationship does not want confidentiality, the fact that C and D chose to disclose their relationships to B does affect A's right to protection of the information. For the position to be otherwise would not acknowledge C and D's own right to freedom of expression.

By the same token, it was suggested, Ms Ash's decision that her shared relationship with Ms McKennitt should not be treated as confidential undermined Ms McKennitt's contention that it was confidential.

30. On the facts of our case, as found by the Judge, that argument was wholly misconceived. First, the relationship between Ms McKennitt and Ms Ash, testified to in many places, and not least in the Judge's citations from the book set out in §17 above, was miles away from the relationship between A and C and D. In the preceding paragraph I deliberately and not merely conventionally described the latter as a relationship of casual sex. A could not have thought, and did not say, that when he picked the women up they realised that they were entering into a relationship of confidence with him. Small wonder that Lord Woolf said, *A v B* at §45:

Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential.

Lord Woolf would have been unlikely to say the same about the relationship between Ms McKennitt and Ms Ash.

31. Second, [Mr. Justice Eady] made a series of factual findings about the relationship that completely destroy this argument. While Ms Ash had been involved in some of the matters revealed, and (which is rather different) a spectator of many others, the book, which is what this case is concerned with, is not in any real sense about her at all. She gives vent to many complaints about Ms McKennitt; but the interest of those is that they are complaints about Ms McKennitt, and not at all that the complaints are made by Ms Ash. The Judge made that clear in two passages, in §§ 68 and 89 of the judgment:

68. It would appear that the fundamental purpose of the book, which Ms Ash has described on its cover as "a must for every Loreena McKennitt fan", was to provide information to her admirers which would not otherwise be available. Much of the content of the book would be of no interest to anyone, I imagine, but for the fact that Ms McKennitt is the central character.

89. As I have already suggested, whatever Ms Ash's true appreciation of the situation may be, from her perspective, it is difficult for an outsider to understand how the book would be of any interest to the general reader if it were not for the fact that Ms Ash is giving an account of her intimate dealings with a person who is known to many millions of people, throughout the world, interested in folk music and her music in particular. Returning to the Boswell/Johnson analogy, one may characterise the exercise to that extent as largely parasitic. It is the central role of Ms McKennitt, and the revelations about her, which provide the main reason for people to acquire the book. It is, I have no doubt, why her name appears in the title.

32. Those conclusions, which were neither challenged nor could have been, confirm that the matters related in the book were specifically experiences of and the property of Ms McKennitt. Ms Ash cannot undermine their confidential nature by the paradox of calling in aid the confidential relationship that gave her access to the information in the first place.

Plaintiff was represented by Carter-Ruck and barristers Desmond Browne QC and David Sherborne of 5RB. Defendant was represented by David Price and Korieh Duodu of David Price & Associates.

## Ontario Court Strikes down Anti-Leak Provisions as Unconstitutional

### *State Secrets Law Violated Canadian Charter*

By Stuart Svonkin

In a landmark decision issued on October 19, 2006, Justice Lynn Ratushny of the Ontario Superior Court of Justice struck down Section 4 of Canada's *Security of Information Act* (SOIA) as unconstitutional. *O'Neill and Ottawa Citizen Group Inc. v. The Attorney General of Canada* (Court File No. 11828).

In her decision, Justice Ratushny held that the so-called "anti-leakage" provisions of the SOIA – which made it a criminal offence punishable by up to 14 years in prison to communicate, receive, or retain "secret official" or "official" government information – violated guarantees of freedom of expression and fundamental justice provided under the *Canadian Charter of Rights and Freedoms*.

The case was the first constitutional challenge to Section 4 of the SOIA ever mounted. The provisions of Section 4 have their roots in the British *Official Secrets Act* of the late nineteenth and early twentieth centuries. In the aftermath of the September 11, 2001 attacks in the United States, those provisions were reenacted as part of Canada's *Anti-Terrorism Act*.

#### **Background**

As previously reported in the September 2006 MLRC MediaLawLetter, the case stemmed from a November 8, 2003 newspaper article, entitled "Canada's Dossier on Maher Arar," published in the *Ottawa Citizen* and written by *Citizen* reporter Juliet O'Neill.

O'Neill's article addressed the Royal Canadian Mounted Police (RCMP) investigation into Arar, a Canadian citizen who was deported to Syria by U.S. authorities, and referred to information leaked by Canadian security officials. As part of a government investigation into the leak, in January 2004 the RCMP obtained and executed search warrants against the *Citizen's* offices and O'Neill's home. The warrants were based on, and sought evidence related to, alleged offences under Section 4.

Lawyers for O'Neill and the *Citizen* applied to the Ontario Superior Court of Justice to have the warrants quashed. The application was based on a number of grounds, including that Section 4 was unconstitutional, that the warrants comprised an abuse of process, and that the warrants were improperly issued and therefore invalid. The Canadian Civil Liberties Association (CCLA), the Canadian Broadcasting Corporation, and several other media entities intervened to join in the constitutional challenge. The case was argued in Ottawa during the last two weeks in August.

#### **Statute Was Overbroad**

The Court's decision was a resounding victory for O'Neill, the *Citizen*, the media, and civil liberties. The

Court determined that Section 4 was impermissibly overbroad and accordingly violated freedom of expression and freedom of the press as protected by the *Charter*. This determination was based in part on the conclusion that critical terms in the anti-leakage

provisions – including "secret official", "official", and "authorized" – lacked any definition, either in the SOIA or in any binding classification scheme.

The Court observed that "the consequence of this is that [the offense provisions] are standardless .... In their present state, the impugned sections give the state the unfettered ability to arbitrarily protect whatever information it chooses to classify as 'secret official' or 'official' or unauthorized for disclosure and to punish by way of a criminal offence those 'speakers', 'receivers' and 'listeners' who come within that protected sphere."

The Court specifically noted that the British *Official Secrets Act*, which was the progenitor of Section 4, was amended in 1989 to address the very problems of overbreadth that plagued the Canadian measure.

The Attorney General of Canada offered three main responses to the contention that Section 4 was unconstitutionally overbroad. The first argument was that the scope

*(Continued on page 15)*

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**Critical terms in the  
anti-leakage provisions –  
including "secret official",  
"official", and "authorized"  
– lacked any definition**

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## Ontario Court Strikes down Anti-Leak Provisions as Unconstitutional

(Continued from page 14)

of Section 4 had been narrowed by provisions of the *Access to Information Act*, Canada's freedom of information statute.

The Attorney General's second argument was that the common law provided a "public interest defense" to a charge under Section 4 that limited the reach of the law. Finally, the Attorney General suggested that the application of the statute was circumscribed by means of prosecutorial discretion.

The Court rejected all three arguments, concluding that none of the mechanisms suggested by the Attorney General cured the constitutional infirmities in Section 4 identified by the applicants and the interveners. The Court concluded that Section 4 "fails to define in any way the scope of what it protects and then, using the most extreme form of government control, criminalizes the conduct of those who communicate and receive government information that falls within its unlimited scope including the conduct of government officials and members of the public and of the press."

As a result, the Court ruled, Section 4 unreasonably and unjustifiably chilled constitutionally protected expression.

The Court also accepted the applicants' argument that Section 4 was void for vagueness. Relying on many of the same reasons discussed in its analysis of overbreadth, the Court held that Section 4 failed to provide appropriate guidance to members of the press and the public, as well as to law enforcement officials, as to what types of conduct and expression were subject to prosecution. On that basis, the Court concluded that Section 4 violated the *Charter's* guarantee of fundamental justice.

The CCLA advanced an additional attack on Section 4, based on the contention that two of the three offenses at issue in the case – the "communication" and "retention" offenses – lacked the fault or *mens rea* element required for "true crime" offenses as a matter of constitutional law.

The Attorney General objected to this argument being made, among other reasons because the argument was not being pursued by O'Neill or the *Citizen*. At the hearing, that objection was argued and overruled, and the Court allowed the CCLA to argue the *mens rea* issue. In its decision, the Court concluded that the communication offence and all but

one of the retention offences under Section 4 lacked the required fault element and, as strict liability "true crime" offences, were inconsistent with the *Charter*.

The Court also determined that the warrants and the threat of prosecution against O'Neill were part of an unsuccessful attempt to intimidate the reporter to reveal her confidential source of the official information referenced in her article. The Court accepted the applicants' contention that this improper purpose constituted an abuse of process and a violation of the constitutional right of freedom of the press. This was a separate and additional basis, the Court concluded, for quashing the warrants. Finally, the Court found that the warrant applications were not inconsistent with criminal law requirements and that the issuing Justice had reasonable and probable grounds to issue the warrants.

As a result of the Court's rulings on the constitutional and abuse of process grounds, the warrants were quashed and Section 4 was struck down. The Attorney General has 30 days from the date of the decision to appeal the ruling.

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***The warrants and the threat of prosecution were part of an unsuccessful attempt to intimidate the reporter to reveal her confidential source.***

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*John B. Laskin and Stuart Svonkin of Torys LLP acted for the Canadian Civil Liberties Association. Juliet O'Neill and the Ottawa Citizen Group Inc. were represented by Richard G. Dearden and Wendy J. Wagner of Gowling Lafleur Henderson LLP and David M. Paciocco of Edelson & Associates. The Attorney General of Canada was represented by Robert J. Frater, Marian Bryant, and Steve White. The Canadian Broadcasting Corporation was represented by Edith Cody-Rice, its Senior Legal Counsel.*

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## Keeping a Lid on Secrets – The UK Approach

By Marietta Cauchi

The statement this past Spring by American Attorney General Alberto Gonzales that the press could be subject to criminal liability for disclosing classified information has evoked parallels to the UK's notorious Official Secrets Act. The UK's Official Secrets Act has been in place for nearly 100 years and has been used to criminally punish leakers and to enjoin the press from disclosing official secrets broadly defined.

The Act was most recently revised in 1989 following the high profile Spycatcher case where the government stopped publication of the memoirs of Peter Wright, a former intelligence agent in the U.K., despite its publication elsewhere, and prosecuted two civil servants for leaking information to the press. *See Attorney-General v Guardian Newspapers No. 1 1987 3All ER 316/No. 2 1988 3All ER 545; R v Ponting 1985 Crim LR 318; R v Tisdall 1984 6 Cr. App.R. 155.*

In 1989, the scope of the Official Secrets Act was narrowed to limit the classes of official information protected. But the Act still broadly criminalizes disclosures about the security and intelligence services. There is also a ban on disclosing material about Britain's defense and international relations if "it endangers the interests of the United Kingdom abroad" or "seriously obstructs the promotion or protection of those interests."

And it still applies to disclosure by the press and public if they know or have reasonable cause to believe, that the information is protected against disclosure.

### **Official Secrets & Article 10**

The Spycatcher case eventually ended up in the European Court of Human Rights which held that the UK's actions in obtaining injunctions against newspapers after the information had already been published abroad had violated the right to freedom of speech under Article 10 of the European Convention on Human Rights. *See The Observer and Guardian v the United Kingdom (Spycatcher Case), Judgment of 26 November 1991 Series A No 216.*

Lord Lester, who represented newspapers in the Spycatcher case, said: "The European Court of Human Rights made it clear in Spycatcher that a prior restraint is the most

draconian form of interference with free speech and requires the most compelling justification."

Cases under the Official Secrets Act are rare and have mainly been brought against government officials who have leaked information to the press – rather than against the publishers. The recent high-profile prosecution of former MI5 British secret agent David Shayler has put the issue again firmly on the legal map.

Shayler was convicted in 2002 for passing classified information and documents to the press. *R v Shayler 2 WLR 754 2002*. Represented by Liberty, the UK civil liberties organization, Shayler pursued his case to the House of Lords where he argued that the absolute prohibition on disclosure breached Article 10 of the ECHR.

During litigation there was some discussion about whether a defense of necessity should be available for the Act to comply with Article 10. Necessity is a common law doctrine, defined as pressure of circumstances compelling one to commit an illegal act.

The Court of Appeal, while ruling out the availability of the broad general public interest defense, had ruled that a defense of necessity was available when a defendant committed an otherwise criminal act to avoid an imminent peril of danger to life or serious injury. However on the specific facts of his case the Court of Appeal said that this defense was not available to Shayler. *R v Shayler*, 1WLR 2206 2001.

The House of Lords didn't agree that a defense of necessity was available under the Official Secrets Act and suggested that there were other routes Shayler could have taken including application for judicial review *See R v Shayler*, 2002 UKHL 11.

The House of Lords also ruled that the relevant provisions of the Official Secrets Act were not incompatible with the right of free expression under Article 10, citing a number of cases where the European Court had recognized "the need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion." *See, e.g., Engel v The Netherlands (No 1) (1976) 1 EHRR 647, paras 100-103; Klass v Federal Republic of Germany (1978) 2 EHRR 214, para 48; Leander v Sweden (1987) 9 EHRR 433, para 59; Hadjianastassiou v Greece*

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## Keeping a Lid on Secrets – The UK Approach

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(1992) 16 EHRR 219, paras 45-47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, CD 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, CD 83-84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40.

According to the Lords:

The special position of those employed in the security and intelligence services, and the special nature of the work they carry out, impose duties and responsibilities on them within the meaning of article 10 .... the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to publish is not abused and that proper disclosures are not stifled.

*R v Shayler* 2002 UKHL 11 at ¶ 36.

### Other Recent Case

Shayler's case was followed in 2004 by that of Katherine Gun, a translator at the GCHQ, the electronic surveillance arm of the British intelligence, who was sacked for leaking a secret email to the Observer newspaper.

Gun claimed that the email was from the US National Security Agency and asked British officers to bug the United Nations offices of countries voting on war against Iraq. Gun had to wait eight months between her arrest and the decision to charge her and another three months until the case came before the court on an initial hearing – all the while facing a prison sentence of up to two years under the OSA.

In a statement when she was charged, Gun claimed that any disclosures that may have been made were justified because they exposed serious illegality and wrongdoing on the part of the US government which attempted to subvert our own security services. She also said the disclosures could have helped prevent wide scale death and casualties amongst Iraqi civilians and UK forces in the course of an illegal war.

At the initial hearing and in an embarrassing climb-down for the government, the case was dropped and a 'not

guilty' verdict entered when the prosecution offered no evidence at Gun's initial hearing in court. The prosecution attorney was reported to have declined to give a reason other than to say there was "no longer sufficient evidence for a realistic prospect of conviction," because the prosecution could not disprove the defense of necessity.

### Prosecuting the Press?

Loud alarm bells rang again at the end of last year when the Attorney General – who is the chief legal adviser to the Government and has the final decision on whether to prosecute under the Act – threatened newspapers with prosecution for publishing the contents of memo memorializing a 2004 meeting between President Bush and Prime Minister Blair.

An article in the Daily Mirror under the front-page headline "Bush plot to bomb his ally" reported that Bush had suggested bombing TV station al-Jazeera.

The threat of criminal prosecution against the press is rare – media defendants are more usually parties to injunction proceedings to restrain publication of confidential information, for example, in the Spycatcher case and various cases deriving from Shayler's disclosures.

The government did not follow through on its threats against the press, but charged civil servant David Keogh and former government researcher Leo O'Connor with violating the Official Secrets Act by leaking the document.

The case against Keogh and O'Connor is ongoing. No date has been set for trial, but in a preliminary hearing conducted in secret Mr Justice Aikens agreed with the government that disclosure of the memo would have serious consequences for national security.

*Marietta Cauchi is a lawyer and reporter for Dow Jones in London.*

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

Call us, or send us a note.

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## Strip Search Lays Bare the Law of Privacy

### *ECHR Says Govt Search Violated Article 8*

By David Hooper

Those attending the international law session at the NAA/NAB/MLRC Media Law Conference in September may recollect discussion of a breaking judgment on privacy law given by the European Court of Human Rights the day before the conference started. *Wainwright v. United Kingdom*, ECHR No. 12350/04 (Sept. 26, 2006).

In *Wainwright*, the ECHR held that the UK violated Article 8 of the European Convention.

At issue was an over-zealous and needlessly humiliating strip search of Mary Wainwright and her son Alan when they visited another son of Mrs Wainwright held on remand in jail on a charge of murder.

That son was also suspected of being involved in a prison drugs ring. This led to the unduly intimate searching of Mary and Alan Wainwright. Matters were exacerbated by the fact that Alan suffered from cerebral palsy with severe arrested sexual and intellectual development to the extent that he was a patient within the meaning of the Mental Health Act.

An English County Court found that there was a sloppy disregard of the normal procedures for such searches which were conducted without any feelings for the privacy of Mary and Alan and the court awarded £2,600 damages for battery (assault) and Alan recovered £4,500. Each sum was deemed to include £1,000 aggravated damages. The incidents occurred in 1996 so it was ten years before the proceedings were concluded in Europe.

The Court of Appeal of England & Wales set aside the judgment in favour of Mary and awarded Alan £3,750. This ruling was upheld by the House of Lords.

### ***House of Lords Ruling***

On appeal, the claimants asked the House of Lords to declare that there is a general tort of invasion of privacy in UK law making the searches actionable. In an opinion written by Lord Hoffman, the House of Lords refused to do so. *Wainwright v Home Office* [2003] UKHL 53 (Oct. 16, 2003). Analyzing the issue under both common law and the UK's obligations under the European Convention on Human Rights, Lord Hoffman concluded, "it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another."

### ***ECHR Ruling***

The European Court of Human Rights which included the English judge Sir Nicolas Bratza, disagreed with this view. The requirement to submit to a strip search would generally constitute an interference with the right of privacy under Article 8 of the Convention and it would therefore have to be justified as being "in accordance with the law" and "necessary in a democratic society."

Here there were highly invasive and potentially debasing procedures to persons who were not convicted prisoners or under reasonable suspicion of having committed a criminal offense. The search, though, was not outrageous enough to constitute a violation of Article 3 of the ECHR, which prohibits torture, and inhuman or degrading treatment or punishment" but the court felt that the searches were not proportionate to the legitimate aims of the prison service in the manner in which they were carried out and they were not "necessary in a democratic society."

The question therefore was whether the Wainwrights had an adequate remedy so as to comply with Article 13 of the Convention. This provides that "everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The European Court felt that there was a breach of Article 13. The fact that the House of Lords had found that negligent action carried out by the prison officers did *not* ground any civil liability and that there was no general tort of invasion of privacy meant that the Wainwrights did not have available to them a means of obtaining redress for the interference with their rights under Article 8 of the Convention. The European Court awarded each Applicant 3,000 (£2,000) and 17,500 costs (£11,700)

In effect, the *Wainwright* decision extends the boundaries of privacy, suggesting that there should be a general tort of invasion of privacy that extends beyond disclosures of personal information.

*David Hooper is a partner with Reynolds Porter Chamberlain in London. The applicants in Wainwright were represented by solicitor David Reston and barrister Ian Christie of 5RB.*

**“If at First You Don’t Succeed ...”**

**Second Circuit Finds Artist’s Latest Use of Another’s Photography To Be Fair Use**

By Toby Butterfield and Lisa Digernes

In three cases decided a decade ago, courts found artist Jeff Koons liable for willful copyright infringement for incorporating other people’s work into his own. In October 2006, the Second Circuit reviewed another case involving Koons’s “appropriation art,” holding this time that it was fair use for Koons to create a collage using part of a photograph created by plaintiff Andrea Blanch. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (Sack, Katzman, Murtha, JJ.), *affirming*, 396 F.Supp.2d 476 (S.D.N.Y. 2005).

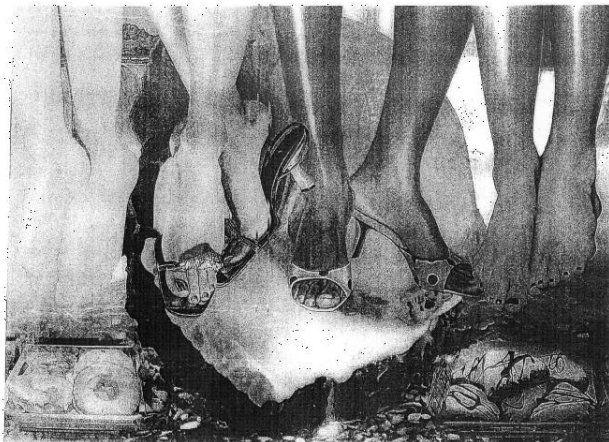
The three earlier cases all involved sculptures Koons exhibited in his “Banality Show” at Sonnabend Gallery in New York. Two sculptures were exact 3-D reproductions from photographs on post cards Koons bought. One portrayed a couple and their puppies (but did not include the photograph’s background); another showed two boys in a farmyard trying to push a large be-ribboned pig into a gift box. In the third case, Koons’s sculpture featured a cut-out image of a stuffed doll next to a sculpture based on the character “Odie” from *Garfield*. *See Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992); *Campbell v. Koons*, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. 1993); and *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

A fair use defense was rejected in each of these cases. The different result in the Second Circuit’s new decision illuminates what uses courts now find to be “transformative.”

**Background**

The plaintiff in the recent case, Andrea Blanch, has been a photographer for over twenty years. In 2000, Blanch created a

photograph entitled “Silk Sandals” as part of an editorial six-page article entitled “Gilt Trip” about metallic makeup that appeared in *Allure* magazine. The photograph shows the lower part of a woman’s bare legs crossed at the ankles. Gucci sandals with an ornately jeweled strap are on her feet, which rest on a seated man’s knee in an airplane cabin.



PHOTO

Koons admitted that he copied, scanned and superimposed the legs, feet and Gucci sandals from the photograph, and incorporated them into a collage, which he then gave to his assistants to make the painting “Niagara” at issue in this case.

“Niagara” was part of a seven-painting series commissioned by Deutsche Bank for \$2 million, and displayed first at the Deutsche Guggenheim Berlin and subsequently at the Guggenheim Museum in New York.

In the painting, Koons merely altered the orientation of the legs from a 45-degree angle in the photograph to vertically downward. Koons described “Niagara” as featuring “four pairs of women’s legs and feet which dangle over a landscape. Below them is a monstrous chocolate-fudge brownie, served with a mound of ice cream and flanked by trays of glazed donuts and apple Danish pastries.”

According to Koons, his painting comments on “the ways in which some of our most basic appetites - for food, play, and sex - are mediated by popular images.”

Koons’s “Niagara”



Plaintiff’s Photo

**Four Fair Use Factors**

Purpose and Character of Use: In a decision written by Judge Robert Sack, the court emphasized that the most important part of the first fair use factor is whether defendant’s use is “transformative.” Crediting Koons’ explanation, the

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### “If at First You Don’t Succeed ...”

(Continued from page 19)

court found that he used Blanch’s image for a “sharply different” purpose than Blanch’s purpose in creating the image.

While Blanch wanted “to show some sort of erotic sense” and get “more of a sexuality to the photographs,” Koons used the image as “a fodder for his commentary on the social and aesthetic consequences of mass media.” The court also viewed the character of the uses as different: The court found Blanch’s fashion photograph was “created for publication in a glossy American ‘lifestyles’ magazine,” unlike Koons’ “massive painting” commissioned by a leading world bank and exhibited in art-galleries.

While Koons made a substantial profit from the sale of his work, the court discounted the commercial use because the work was transformative, and did not even comment on the commercial aspects of Deutsche Bank’s commissioning of the work. The court also found that Koons’s failure to seek permission for the copying was not in bad faith. In contrast, in *Rogers v. Koons*, *supra*, the court found bad faith because Koons had torn the copyright notice off the postcard before copying.

**Nature of the Copyrighted Work:** The Second Circuit disagreed with the district court’s description of Blanch’s photograph as “banal rather than creative,” and accepted the work as a creative work. However, the court then discounted this factor because the defendant’s use was transformative.

**Amount Used:** According to Blanch, her key creative decisions in the shoot “were the choice of an airplane cabin as a setting and her placement of the female model’s legs on the male model’s lap.” Koons extracted the legs, feet and sandals from the photograph. Again crediting Koons’s professed purpose, the court found that he copied “only that portion of the image necessary to evoke ‘a certain style of mass communication,’” and that this was “reasonable in relation to the purpose of the copying,” although Koons took approximately one-third of the photograph.

**Market Effects:** The court found that this factor greatly favored Koons, because Blanch had never pub-

lished or licensed the photograph after publication in *Allure*, and never licensed any of her photographs for use in other visual art works. Koons’s use therefore did not “cause any harm to her career or upset any plans” for the photograph or for any other Blanch photographs.

### Conclusion

The court quoted considerably from Koons’s affidavit explaining his reasons for taking parts of Blanch’s photograph, but did not find it necessary to decide whether “Niagara” was a parody or satire, because Koons justified his borrowing as a commentary on mass communication. The court therefore did not need to “depend on [its] poorly honed artistic sensibilities” to decide whether Koons had a “genuine

creative rational for borrowing Blanch’s image,” or whether Koons merely borrowed the image “to get attention or to avoid the drudgery in working up something fresh.” In contrast, in *Rogers v. Koons*, the court refused to accept Koons’s sculpture as a parody under the fair use defense.

The court gave heavy weight to the transformative purpose and nature of “Niagara.” So what did Koons do differently this time? Unlike earlier cases, this time Koons took only parts of plaintiff’s photograph, changed them by placing them at a different angle, and incorporated them in a collage with other elements.

However, the court seems to shift the transformative analysis from the nature of the transformation to the purpose of the person making it. Such a shift could create a slippery slope. Many photographs are created for a narrow purpose, for example sports or commercials, and a user can easily profess a different purpose than that of the copyright proprietor. If a magazine cover featuring a male sports figure’s photograph is later used in an ironic collage billboard advertisement for women’s cologne, the purpose is clearly different; but is that use fair?

*Toby Butterfield is a partner and Lisa Digernes an associate at Cowan, DeBaets, Abrahams & Sheppard LLP in New York. Plaintiff was represented by Robert W. Cinque, Cinque & Cinque, P.C., N.Y. Jeff Koons was represented by John B. Koegel, The Koegel Group, N.Y.*

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**Koons justified  
his borrowing as a  
commentary on mass  
communication.**

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## Diet Book Protected By First Amendment

In an interesting decision, a federal court in New York dismissed products liability and related claims against the popular diet book *Dr. Atkins' New Diet Revolution*. *Gorran v. Atkins Nutritionals Inc.*, 05 Civ. 10679, (S.D.N.Y. Dec. 11, 2006) (Chin, J.). Dismissing all claims, the court held that the book was noncommercial speech entitled to full First Amendment protection

### Background

The plaintiff, a 53-year old businessman, went on the popular low-carbohydrate Atkins Diet in the spring of 2001. After just two months on the diet his cholesterol level shot up from 146 to 230. But he stayed on the diet for over two more years until he had an angioplasty – to unclog one of his coronary arteries.

Plaintiff sued Atkins Nutritionals, Inc., and the estate of its founder Dr. Atkins, for products liability, negligent misrepresentation and deceptive conduct under Florida law. Plaintiff alleged the diet's high-fat, high-protein, low-carbohydrate regimen was dangerous. And he alleged that the diet book and the company's related food products were "defective and unreasonably dangerous."

The claim was originally brought in Florida where plaintiff resides, but was transferred to New York in connection with Atkins Nutritionals' bankruptcy. Defendants moved under Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings dismissing the complaint.

### District Court Ruling

Granting the motion, Judge Denny Chin described plaintiff's claims as "meritless."

Defendants' books and food products are not defective or dangerous products within the meaning of products liability law. Pastrami and cheesecake – large amounts of which Gorran admittedly consumed – may present risks, but these are risks of which consumers are aware. The average consumer surely anticipates that these and other high-fat or high-protein foods may increase cholesterol levels

and the risk of heart disease. Moreover, the Diet consists of advice and ideas. The concepts may be controversial and the subject of criticism, but they are protected by the First Amendment.

The products liability claim failed because the diet book was not a "product." Furthermore assuming that Atkins food products could even be considered unreasonably dangerous over an extended period of time, plaintiff only consumed \$25 worth of protein bars, pancake mix, and pancake syrup. This was not sufficient, as a matter of law, to have caused his heart disease.

Plaintiff's negligent misrepresentation claim failed because defendants owed no duty of care to plaintiff under traditional negligence law. In addition, the claim failed because the diet book is noncommercial speech entitled to full First Amendment protection even though it recommends the company's own food products. The book discusses, among other things, how the diet works, why weight loss occurs, general nutritional guidelines, and disease prevention.

This same rationale barred plaintiff's claim against defendants for similar information on the company's website. Even though the website contained significant advertisements for defendants' products, "plaintiff's complaints relate solely to the non-commercial aspects of the Website – speech that is afforded full First Amendment protection."

Finally, the court dismissed plaintiff's statutory deceptive trade practices claim brought under Fla. Stat. §501.204 (1) (2006). The court noted that claims for personal injury are not compensable under the Florida statute which only recognizes "economic damages related solely to a product or service purchased in a consumer transaction."

In a footnote, Judge Chin noted that he "had success with its own, much simpler diet, which can be described in four words: 'Run more, eat less.'"

Plaintiff was represented by Daniel Kinburn, Physicians Committee for Responsible Medicine. Defendant Atkins Nutritionals was represented by Bruce Daniel Ainbinder, Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York.



## FCC Revisits Indecency and Profanity Rulings Following Remand from the Second Circuit

### *New Order Dismisses Two Complaints, but Finds CBS in Violation for Nicole Richie, Cher Witticisms*

On November 6, 2006, the FCC released an order, revisiting allegations of indecency and profanity on four television programs: the *2003 Billboard Music Awards*, the *2002 Billboard Music Awards*, *The Early Show*, and *NYPD Blue*. See FCC Order, available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-166A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-166A1.pdf)

At issue was the following:

1. On the *2003 Billboard Music Awards*, which aired on Fox Television Network at 8pm EST, sometime celebrity and *Simple Life* star Nicole Richie, who was presenting an award, made the following statement: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." This observation came after co-presenter Paris Hilton noted on air that the telecast was live, so Ms. Richie had better "watch the bad language" and after Fox managed to bleep out one apparent curse word from Ms. Richie's prior line.
2. On the *2002 Billboard Music Awards*, which also aired on Fox at 8pm EST, Cher, who was receiving an award, said: "People have been telling me I'm on the way out every year, right? So fuck 'em."
3. *The Early Show*, which aired on CBS at 8:10 am EST, with the viewer complaint coming via a station in Pittsburgh, PA, featured *Survivor: Vanuatu* contestant Twila Tanner's reflection that she "knew [fellow contestant Chris Daugherty] was a bullshitter from Day One."
4. Finally, the complaints concerning *NYPD Blue* cited use of the word "bullshit" in several episodes first airing in Kansas City, Missouri at 9pm, CST.

#### **Background**

The FCC had previously addressed these four instances in a March 2006 Order and "found that the broadcasts ... apparently violated the statutory and regulatory prohibitions against airing indecent and profane material." The broad-

cast parties then sought review from the circuit courts. The Second Circuit consolidated the petitions for review, and then remanded to the FCC after that body asked that it be able to review its order due to procedural complaints made by the broadcasters.

#### **November 2006 Order**

The remand resulted in the November Order, which held, in short, that broadcasting the statements made by Nicole Richie and Cher violated 18 U.S.C. § 1464 and the FCC regulations regarding broadcast indecency. The commission

also found that these two instances were in violation of the § 1464 "prohibition on the broadcast of 'profane' utterances." The FCC did not, however, propose forfeiture sanctions for either of these violations.

As for *The Early Show*, the commission deferred to CBS's assessment that the offending comment was made during a "bona fide news interview" and dismissed the complaint, noting that Ms. Tanner's comment was "neither actionably indecent nor profane in [that] context."

Finally, the FCC dismissed the *NYPD Blue*-related complaints on procedural grounds because the complaints were "filed by the same individual from Alexandria, Virginia, where, . . . the material was aired during the safe harbor" time period.

#### **FCC Commentary**

In its analysis of the two *Billboard Music Award* complaints, the FCC focused extensively on Fox's actions. In general, the commission noted, "with respect to programming aired during the safe harbor [broadcasters' practices] reflect their recognition that airing the 'F-Word' and the 'S-Word' on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium."

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### FCC Revisits Indecency and Profanity Rulings Following Remand from the Second Circuit

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Along these lines, the Fox President of Entertainment himself had testified before Congress that Nicole Richie's comments "contained 'inappropriate language.'" Indeed, Fox had edited out Ms. Richie's comments for the showings in the Mountain and Pacific Time zones. For the FCC, each of these factors counseled towards finding them indecent.

The FCC also refused to excuse Fox based on "the live, unscripted nature of the material." The commission reasoned that Fox "well knew" that "Ms. Richie frequently used indecent language in inappropriate contexts." As the broadcasting home of *The Simple Life*, Fox had bleeped nine expletives proclaimed by Ms. Richie during three episodes of the show. Still, Fox did not indicate to the FCC that it had warned Ms. Richie about her language or had taken any other cautionary steps before broadcasting the Billboard Music Awards.

Fox had implemented a five-second time delay, but not all of Ms. Richie's language was screened via this method. Indeed, the commission noted, Fox should have known this would be the case since it had used the same time delay and editing system the year before, when Cher was on the air.

A more careful delay, such as one "of five, ten, or even fifteen seconds" would not, according to the FCC, "meaningfully affect[] the value of this programming or significantly implicate[] First Amendment values." This award show was not "breaking news" and due to the nature of the broadcast medium, live television "is not literally live[,]" so adding about five seconds to the delivery would not impede the "viewer's experience."

The FCC addressed other constitutional concerns as well, reiterating the continuing relevance of *Pacific* regardless of current technological changes. "The broadcast media continue to have 'a uniquely pervasive presence' in American life[,]" the commission noted. Some 15.4 million American households still "rely exclusively on broadcast television" and, according to the Kaiser Family Foundation, "68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections." Children, the commission continued, re-

main a prevalent audience for broadcasters, and unlike the internet, television is accessible to children below the reading age level.

According to news reports, CBS will appeal the FCC's decisions regarding the two Billboard Music Awards shows to the Second Circuit.

In other FCC news, CBS was in the Third Circuit at the end of November, appealing the \$550,000 fine it received from the FCC for the broadcast of the now-infamous Janet Jackson "wardrobe malfunction." The FCC's September 2004 Order concluded that the halftime incident was indecent and that "even assuming that neither CBS nor MTV had advance knowledge that Ms. Jackson's breast would be exposed during her broadcast performance, the record clearly established that officials of CBS and MTV did have prior knowledge of, indeed were intricately involved in the planning process for, and tacitly approved, the sexually provocative nature of the Jackson/Timberlake segment." (Order available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-209A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-209A1.pdf))

Before the Third Circuit, CBS argued that it did not participate in the planning of the Jackson/Timberlake segment and that the exposure of Ms. Jackson's breast was unexpected.

## California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

By Patrick Carome and Colin Rushing

The Supreme Court of California and the Northern District of Illinois have each recently issued decisions examining the limits of 47 U.S.C. § 230 (“Section 230”), the federal statute that has been construed by courts throughout the country to provide broad immunity for online intermediaries from most claims based on third-party content. In the closely watched case of *Barrett v. Rosenthal*, S122953 (Cal. Nov. 20, 1996), the court reaffirmed the broad immunity that has been recognized by a broad range of federal and state courts.

In *Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, No. 06-C-0657 (N.D. Ill. Nov. 14, 2006) (hereafter “CLC”), however, while the court ruled in favor of Craigslist – the online intermediary asserting the defense – it nonetheless articulated a narrower vision of Section 230 than has prevailed in the courts. Thus, while *Barrett* and *CLC* each upheld the respective defendant’s claim of immunity, the *CLC* decision does suggest that there are still quarters in which the widely accepted, broad reading of Section 230 may meet with skepticism.

### **Broad Immunity for Nearly Ten Years**

Section 230(c)(1), the statutory provision that was at issue in *Barrett*, *CLC*, and the other leading cases governing online intermediary liability for third party content, broadly provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added).

Beginning with *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), and including decisions from the United States Courts of Appeals for the Third, Ninth, and Tenth Circuits, as well as the Supreme Court of Florida and numerous federal district courts and intermediate state appellate courts throughout the country, courts have concluded that this language broadly immunizes online intermediaries from claims based on third-party content.

See, e.g., *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir.), *cert. denied*, 124 S. Ct. 200 (U.S. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir.), *reh’g denied*, 351 F.3d 904 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (U.S. 2004); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1013-17 (Fla.), *cert. denied*, 534 U.S. 891 (2001).

### **Reaffirming Zeran and its Progeny**

In 2003, in the *Barrett v. Rosenthal* case, the California Court of Appeal (an intermediate appellate court) rejected *Zeran* and adopted a construction of Section 230 that, if followed in California, would have substantially transformed

the landscape for online intermediaries subject to jurisdiction in that state by generally eliminating immunity whenever the intermediary allegedly had notice of the purportedly tortious content.

But on November 20, 2006, the Supreme Court of California reversed the Court of Appeal and con-

firmed that *Zeran* had accurately gauged Congress’s intent. In particular, the California Supreme Court explicitly agreed with *Zeran* in concluding that Section 230 immunity applies even where the defendant allegedly knew or should have known of the allegedly tortious content. Moreover, the *Barrett* court also recognized that the protections of Section 230 extend to “users” of interactive computer services who act as intermediaries for other people’s content — even when such users actively select the allegedly tortious content for redistribution online.

### **Background**

In *Barrett*, the defendant asserting Section 230 immunity was not the typical defendant in a Section 230 case, such as AOL or Google, who provides a service through which third-party content from millions of different sources flows every day.

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***The California Supreme Court explicitly agreed with Zeran in concluding that Section 230 immunity applies even where the defendant allegedly knew or should have known of the allegedly tortious content.***

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## California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

(Continued from page 24)

Instead, the defendant in *Barrett* was an individual, Ilena Rosenthal, who operated and participated in an Internet discussion group concerning non-traditional forms of health care. The Plaintiffs in the case, two doctors, alleged that Rosenthal committed libel by distributing defamatory statements in e-mails and Internet postings, and that she continued to do so even after being warned that the statements in question were false and defamatory.

Rosenthal was not the originator of the statements at issue; rather, she had received them from others and then selected them for electronic redistribution to others in her discussion group. The doctors brought suit, and Ms. Rosenthal responded with an Anti-SLAPP motion in which she asserted, among other defenses, that she was immune from liability under Section 230.

Although she prevailed at the trial court, Ms. Rosenthal lost in the intermediate appellate court. See *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004), *rev'd*, S122953 (Cal. Nov. 20, 2006). In a lengthy opinion, the Court of Appeal attacked the entire body of law construing Section 230, including case law from the Ninth Circuit and other California Courts of Appeal, and concluded that those courts had all interpreted Section 230 incorrectly.

Specifically, the intermediate appellate court held that the protections of Section 230 were not available when the defendant allegedly was on “notice” of the allegedly tortious content at issue.

The Supreme Court of California then granted Ms. Rosenthal’s petition for review to consider three issues: whether the Court of Appeal’s theory was correct; the definition of the term “user” in Section 230(c)(1); and whether the protection afforded a “user” depends on whether the user engaged in “active” or “passive” conduct.

### §230 and Liability on “Notice”

Making the same argument advanced by the plaintiff in *Zeran* and the dissenters in *Doe v. AOL* in the Florida Supreme Court, 783 So. 2d at 1018-28 (Lewis, J., dissenting), the Court of Appeal in *Barrett* had held that Section 230 does not apply to claims in which the defendant allegedly had “notice” of the harmful nature of the content.

Purporting to rely on pre-Section 230 case law, the Court of Appeal concluded that such a notice-based claim

did not “treat” a defendant as a “publisher,” because it instead was based on the defendant’s status as a “distributor” of content. According to this view, so-called “distributor” liability can be imposed on those whose sole role is to disseminate content published by someone else, such as bookstores and newsvendors.

Under the common law of many if not most states, as well as the First Amendment, such “distributors” enjoy protection from liability unless it can be shown that they knew (or, perhaps, should have known) about the harmful nature of the content at issue -- that is, that they had “notice” of the content.

The Court of Appeal in *Barrett* sought to transform this form of heightened protection for information clearing-houses into a theory of “distributor liability” under which a claim would not “treat” a defendant as a “publisher” if it is alleged that the defendant “knew or should have known” about the content. According to this view, holding the defendant liable in such a case would “treat” it not as a “publisher or speaker” (the relevant words of the statute) but instead as a “distributor” (a word not used in Section 230).

In a lengthy opinion, the California Supreme Court rejected the Court of Appeal’s narrow reading of Section 230 on numerous grounds. In particular, the court acknowledged that so-called “distributor liability” still requires treating the defendant as a publisher. To take the most obvious example, one of the elements of a defamation claim is publication of the allegedly harmful content — as a result, holding a distributor liable for defamation (on the theory it was on notice of the content but nevertheless distributed it) still requires finding that it published the content.

Moreover, the California Supreme Court agreed with *Zeran* that a claim based on alleged “notice” of harmful content puts the defendant squarely in the role of a “publisher,” because such a defendant would have to carry out a quintessential duty of a publisher: deciding what to do with the content (e.g., whether to retract it). Slip Op. at 13-16.

The California Supreme Court also recognized that a regime of notice-based liability would fundamentally undermine Congress’s main goals in passing Section 230. As

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## California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

(Continued from page 25)

numerous courts (including the Fourth Circuit in *Zeran*) have recognized, one of those main goals is to encourage service providers to engage in active *self*-regulation. Congress recognized that a regime that permits notice-based liability punishes those service providers who take the most robust steps to identify and screen out, block, or remove harmful content, because those very steps are likely to put service providers in the position of having “notice” of harmful content.

As the California Supreme Court explained: “Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability.” Slip Op. at 21. In other words, by eliminating the risk of liability based on “notice” of harmful content, Section 230(c)(1) gives service providers freedom to engage in robust self-regulation of their own services.

Finally, the California Supreme Court also recognized that a regime of “notice-based” liability would necessarily chill online speech and harm the development of new electronic media, contrary to Congress’s second key purpose. In particular, the court observed that it would be nearly impossible for service providers to determine which content is tortious and which is not and thus service providers would face powerful incentives to remove content once anyone complained about it, stifling robust speech and possibly causing service providers to scale back or even stop offering the types of services that could expose them to claims.

### Protection for “Users”

As noted above, *Barrett* was one of the few cases in which the defendant asserting immunity was an individual “user” of an interactive computer service. The *Barrett* court, like other courts to consider the issue, however, easily determined that the term “user” in Section 230(c)(1) necessarily included individual users of interactive computer services such as Ms. Rosenthal. This flows logically and naturally from the text of the statute and is a difficult conclusion to avoid.

Next, the state Supreme Court considered whether the immunity should be restricted only to circumstances in which a user’s role with respect to tortious third-party content is “passive” -- that is, when the user does not play an “active” role in the selection of that content. Basing its decision on the language of the statute and Congress’s intent, the court rejected the view that this distinction was relevant to the analysis.

As the court explained, there is nothing in the language of the statute suggesting that Section 230 protects only users who engage in “passive” conduct. In fact, the court reasoned, distinguishing between active and passive users would have a perverse effect: a user who engaged in “active” deletion of content may find herself deemed to have also “active[ly]” selected the remaining, non-blocked content for dissemination, while a “passive” intermediary who screened and reviewed nothing could find itself immune. *Id.*

Accordingly, the court concluded that Section 230’s protection extends to users -- whether or not their role in disseminating someone else’s content was “active” or “passive.”

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***The California Supreme Court also recognized that a regime of “notice-based” liability would necessarily chill online speech and harm the development of new electronic media.***

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### *CLC v. Craigslist*

In *CLC*, the defendant was craigslist – an entity that, unlike Ms. Rosenthal, has the characteristics of the more common sort of Section 230 defendant, namely, an online service provider that serves as a platform for the communications of many thousands, if not millions, of individual users.

craigslist offers different sites for different geographic regions, each accessible through [www.craigslist.org](http://www.craigslist.org) or directly by its own URL (such as [chicago.craigslist.org](http://chicago.craigslist.org)). On each site, craigslist offers a bulletin board service, with different categories and subcategories (such as personals, for sale, and housing) on which individual users can post various types of or other content.

While craigslist does not engage in pre-screening of user posts, it does have a robust form of self-policing on the part of its user community: users have a mechanism to flag what

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## California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity

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they perceive to be inappropriate or off-topic content, and such content is automatically removed if it is flagged by a sufficient number (pre-set by Craigslist) of users.

The *CLC* case concerned notices posted by users in the housing category of Craigslist's Chicago page. According to the plaintiff, a group that advocates for fair housing rights (among other things), a small fraction of Craigslist users had posted notices for housing that expressed preferences "on the basis of race, color, national origin, sex, religion and familial status" in violation of the federal Fair Housing Act. Slip Op. at 7-9.

Rather than sue the individual users, however, CLC alleged that Craigslist was liable under 42 U.S.C. § 3604 (c), a provision of the Fair Housing Act that prohibits a person from "mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

In its threshold motion for judgment on the pleadings, Craigslist asserted that Section 230 barred this claim, because the cause of action was based entirely on third-party content – namely, ads posted by users – and Craigslist's sole alleged role was in providing an electronic forum for that content.

The district court agreed with Craigslist that Section 230(c)(1) bars CLC's claim. In doing so, the court rejected a number of the plaintiff's assertions about the scope of Section 230, including its argument that the statute does not provide any protection against *federal* statutory claims. See Slip Op. at 11-12, 27.

### ***A New and Confusing Standard?***

But the court did *not* completely agree with Craigslist's view of the scope of Section 230. Perceiving shortfalls in the widely accepted analysis of the *Zeran*

court, the district court "decline[d] to follow *Zeran's* lead" and took a different tack. Rather than providing immunity from all claims, the Illinois court concluded that Section 230 applies only to claims in which "publishing" is an explicit, technical element.

The district court's approach seemed to be based on *dicta* in a previous decision of the Seventh Circuit, *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), in which Judge Easterbrook ruminated about two alternative approaches to Section 230. (Ultimately, the Section 230 issue was not reached or decided in that case, because the panel affirmed the lower court's order of dismissal, which had been based on Section 230, on alternative state law grounds.)

One of Judge Easterbrook's hypotheses in that *dicta* seemed to suggest that Section 230's prohibition on treating an online intermediary as a "publisher or speaker" of someone else's content might apply only to claims, for example defamation, for which "publishing" is an explicit element.

The district court in the *CLC* case acknowledged that Congress passed Section 230 (at least in part) to overrule a state trial court

decision in which Prodigy, the provider of an early online service, was held potentially liable for defamation based on the third-party content one of its electronic bulletin boards specifically *because* had general practices and policies regarding the self-regulation of content on its service.

Thus, as the district court in *CLC* recognized, Congress passed Section 230 "to address the problem of holding liable for defamation ICSs that reviewed third-party content . . . while leaving free from liability ICSs that did not review content." Slip Op. at 24. The *CLC* court seems to have concluded, however, that Congress was *principally* interested in providing immunity only from defamation claims or from other claims for which "publishing" is an explicit, technical element. *Id.*

The *CLC* court readily acknowledged that its narrow interpretation of Section 230(c)(1) is contrary to the holdings of numerous other courts, and its opinion did not cite any precedent (other than the *Doe v. GTE dicta*) for that interpretation.

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***Rather than providing immunity from all claims, the Illinois court concluded that Section 230 applies only to claims in which "publishing" is an explicit, technical element.***

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**California Supreme Court and Illinois Federal Court Address Scope of Sec. 230 Immunity**

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In explaining its holding, the district court observed that it would have been unusual for Congress to grant absolute immunity for service providers “that do not screen any third-party content whatsoever,” given the heading of Section 230(c) (“Protection for “Good Samaritan” Blocking and Screening of Offensive Material”) and Congress’s apparent intent to protect those who *did* remove content. *Id.* at 24-25.

At the same time, however, the court *did* recognize that service providers enjoyed absolute immunity from certain types of claims -- under the *CLC* court’s approach, service providers enjoy protection from *all* claims in which publishing is an element, but enjoy no protection from claims in which it is not.

Ultimately, the district court concluded that craigslist enjoyed protection from the FHA claim because the language of the FHA provision on which *CLC* based its suit prohibited *craigslist* from “publishing” the discriminatory advertisements. But a tension in the court’s narrow (some might say hyper-technical) reading of Section 230 is revealed in the final footnote of its opinion, in which the court acknowledged that the same provision also prohibits “mak[ing]” and “print[ing]” allegedly discriminatory advertisements.

The court concluded that craigslist did not “make” the allegedly discriminatory notices at issue in the case because they originated, as the complaint alleged, from third parties. Slip Op. at 27 n.18. The court also concluded that craigslist did not “print” the ads because the role it plays with respect to third-party postings does not fall within “any reasonable interpretation of that word.”

The need for such close analysis of the specific legal elements of the claim being asserted by a plaintiff contrasts sharply with the approach followed in *Zeran* and its progeny. The virtually uniform approach of all those courts has been to examine whether the plaintiffs’ claims turn on an allegation that

the online intermediary disseminated content that originated with a third-party.

In this regard, the district court seems not to have heeded the warning of other courts, including the Fourth Circuit in *Zeran*, that determining whether immunity is available based on fine distinctions in how plaintiff couches her claims would simply encourage artful pleading by plaintiffs and disserve Congress’s key policy objectives. Under the *CLC* court’s unprecedented approach, however, the protection would not be based on the nature of the online intermediary’s role but rather on whether a statutory or a common law definition of any given

cause of action fortuitously includes or omits the words “publisher” (or “speaker”) or some variation thereof.]

**Upshot?**

The decision in *Barrett* continues and reinforces the trajectory of the Section 230 case law. The vast majority of courts continue to conclude that Congress

deliberately chose language that would encompass all types of online intermediaries, all types of content, and all forms of online services and media.

At the same time, however, the decision in *CLC* reveals that some courts remain uncomfortable with this broad immunity. In fact, given the Seventh Circuit dicta in *Doe*, district courts in that jurisdiction (such as the *CLC* court) may be encouraged (or feel compelled) to challenge *Zeran* and its progeny. Such decisions are, at least for now, still outliers and the law is becoming increasingly settled in favor of broad immunity.

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## Internet Gambling Prohibition and Enforcement Act

By Anthony S. Traymore

The Internet Gambling Prohibition and Enforcement Act (“Internet Gambling Act”) was signed into law by President Bush on October 13, 2006. The new law is actually a combination of two bills: The Internet Gambling Prohibition Act and The Unlawful Internet Gambling Enforcement Act of 2006.

The Internet Gambling Act was enacted to “modernize” the Wire Act. The Wire Act was enacted in 1961 and it generally made it a federal crime to use wire communications to transmit or assist betting on sporting events. *See* 18 U.S.C. § 1084. (Available at: <http://uscode.house.gov/download/pls/18C50.txt>).

There was some disagreement about whether the Wire Act extended to online casino gambling, like Internet poker. The Internet Gambling Act clearly brings all Internet gambling activity under its purview by implementing the following:

- Expands the definition of “communication facility” to cover all transmissions made over the Internet or wirelessly. This eliminates the ambiguity over the application of the Wire Act to Internet or wireless transmissions.
- Expands the definition of “bets and wagers” to include all “games subject to chance”. This definition was revised to cover the predominant forms of Internet gambling – sports wagering, casino-style gambling and lotteries.
- Expands the territory encompassed by the act to include transmissions within the territorial jurisdiction of the United States and to or from “any place outside the jurisdiction of any nation” to or from the United States.
- Broadens the scope of the prohibited transmissions to include bets or wagers or “information assisting in the placing of bets or wagers.” This eliminates the argument that Internet gambling transactions did not take place in the United States because the bettor’s account was maintained offshore.
- Prohibits the acceptance or processing of any credit transaction, electronic funds transfer, check or similar instrument, or the proceeds of any other form of financial transaction. This section clearly implicates third party payment processors like PayPal or Neteller.
- Increases the maximum prison term for violation of the Wire Act from two years to five years and adds an injunction remedy which would permanently prohibit anyone convicted of violating the act from participating in any gambling business.

- The Internet Gambling Act also provides for limited civil remedies against ISPs. An ISP may be ordered to remove Internet gambling websites or block hyperlinks to such websites that are transmitting money to Internet gambling websites provided that the government notifies such ISP of the exact hyperlinks to take down or IP addresses to block. However, the limitation of remedies against an ISP does not apply if the ISP is acting in concert with an Internet gambling operation.

The act also amends Chapter 53 of Title 31 of the United States Code, focusing primarily on the prohibition of processing financial transactions related to unlawful Internet gambling. Lastly, the act provides for the development of governmental regulations, policies and procedures to enable businesses to identify and block money transactions to and from Internet gambling websites.

### *Prior Enforcement Activity*

Prior to the enactment of the Internet Gambling Act, beginning in 2003 and continuing through 2006, the Department of Justice had already taken aggressive measures against media companies, publishers, radio stations, and website operators, advising these entities that accepting advertising from Internet gambling websites would rise to the level of aiding and abetting such operations in violation of the Wire Act, the Travel Act and the Interstate Telephone Act of 1964. *See* Wire Act, 18 U.S.C. § 1084 (1961); Travel Act, 18 U.S.C. § 1952 (1961); Interstate Telephone Act, 18 U.S.C. § 1055 (1964). *See also* 18 U.S.C. § 2 (for definition of aiding and abetting).

The 2003 version of one such letter from the DOJ states, in pertinent part:

As you are no doubt aware, advertisements for Internet gambling and offshore sportsbook operations are ubiquitous on the Internet, in print ads and over the radio and television. The sheer volume of advertisements... is troubling because it misleads the public in the United States into believing that such gambling activity is legal, when, in fact, it is not. Because of the possibility that some of your organization’s members may be accepting money to place such advertisements, the Department of Justice, as a public service, would like you to be aware that the entities and individuals placing these advertisements may be violating various state and

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## Internet Gambling Prohibition and Enforcement Act

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federal laws and that the entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities....

Notwithstanding their frequent claims of legitimacy, Internet gambling...operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1055 of Title 18 of the United States Code, each of which is a Class E felony....Broadcasters and media outlets should know of the illegality of offshore sportsbook and Internet gambling since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.

See Letter from John G. Malcolm to National Association of Broadcasters, *Re. Advertising for Internet Gambling and Offshore Sportsbooks Operations* (June 11, 2003).

### *Sporting News*

On June 11, 2003, the DOJ sent a letter to Magazine Publishers of America, the owner of *Sporting News*, warning that advertisements promoting Internet gambling and offshore sports betting operations were illegal. While in a public statement, a representative of the *Sporting News* stated that it stopped running the advertisements after receipt of the letter, it actually continued to run the advertisements for more than six months thereafter.

While the United States never filed a complaint in this matter, on or about January 19, 2006, *Sporting News* agreed to a \$7.2 million settlement with the United States comprised of a \$4.2 million fine and \$3 million in public service advertisements aimed at dissuading people from gambling over the Internet.

### *Discovery Communications*

In 2003-2004, the DOJ took action over a promotional arrangement between Tropical Paradise Enterprises, S.A., owner and operator of ParadisePoker.com, and Discovery Communications, Inc. In April 2004, the FBI seized a \$3.25 million advance payment that Discovery received from Tropical for advertising services to be provided to Tropical in the promotion of ParadisePoker.com.

### *U.S. v. BETonSPORTS*

The most recent activity by the DOJ is certainly the most troublesome for advertisers and promoters of Internet gambling

websites. On June 1, 2006, the United States filed an action against BETonSPORTS PLC, its CEO and other individuals involved in the operation of or in relation to its business. Most troublesome for advertising agencies and media companies, three companies that provided advertising and marketing services to BETonSPORTS: Mobile Promotions, Inc., Direct Mail Expertise, Inc. and DME Global Marketing and Fulfillment (collectively, "DME") were named as defendants in the case—along with their owner, William Hernan Lenis and other employees of DME.

In addition to the alleged violations of the Wire Act and Travel Act, the prosecution alleges racketeering conspiracy, mail fraud, tax evasion, interference with administration of Internal Revenue Laws, forfeiture and, of course, aiding and abetting violations of each of these offenses.

The fact that marketing firms and their agents are named as defendants and are being prosecuted as "part of the enterprise" with respect to the racketeering conspiracy charges is particularly troubling in that it potentially opens up advertising agencies and media companies to a host of charges which may be encompassed under the umbrella of the racketeering conspiracy charge – for all of which they could be found jointly and severally liable.

### *Impact of the Statute*

The Internet Gambling Act eliminates any ambiguity over whether the operation of Internet gambling websites are illegal in the United States. In response, several of the largest Internet poker websites, including Party Gaming, the operator of Party Poker, have indicated that they will shut down operations in the United States.

With the illegality of these businesses established by the Internet Gambling Act, the DOJ may be even more aggressive than in the past in its pursuit of United States entities affiliated with or providing services to Internet gambling businesses. Because there are significant jurisdictional and service of process hurdles to overcome to prosecute overseas operators, the DOJ will likely target affiliates located in the United States, including media and advertising companies that promote Internet gambling websites.

*Anthony S. Traymore is an associate at Reed Smith LLP in New York.*

## CYBER LAW ROUNDUP

### The Perils of Blogging

#### *Harassment Law, Prior Restraints Applied to Fringe Bloggers*

**Katherine M. Vogele**

Although courts have recognized that First Amendment protection extends to speech on the Internet, there have been recent cases applying harassment and intimidation laws to bloggers – with harsh results.

A new federal bill signed into law this year even makes it a crime to anonymously transmit communications by the Internet with the “intent to annoy, abuse, threaten, or harass any person.” With little consideration for the First Amendment in some recent cases, courts have ordered the removal of these Internet-based publications and, in some cases, even jailed the proprietors of the websites.

This article is an end of the year overview of some of the most notable cases; for a more comprehensive review of lawsuits against bloggers, readers should see the MLRC’s website, [www.medialaw.org](http://www.medialaw.org).

#### *Ohio v. Baumgartner*

One such convoluted case found its way to trial recently in state court in Cuyahoga County, Ohio. Elsebeth Baumgartner’s saga began in 1999, when the attorney, pharmacist, and mother of two began speaking out against what she perceived to be a corrupt public school board by leveling accusations at public meetings and by filing lawsuits accusing board members of corruption, racketeering, and drug trafficking.

Numerous members of the school board sued for defamation, and those trials were presided over by retired Judge Richard Markus. Judge Markus had been appointed to her cases after the first four judges had recused themselves, allegedly because Baumgartner had sent them e-mails that criticized their decisions and accused them of corruption.

Baumgartner began sending e-mails to Judge Markus (as well as his business associates, such as executives at companies where Markus served on the board of trustees) alleging that Markus was incompetent and corrupt; she also filed law suits in various jurisdictions accusing Markus of corruption.

By the middle of 2004, Baumgartner met Bryan DuBois, a 29-year-old webmaster, and the two of them began “reporting” on her cases and investigations on a blog, ErieVoices.com. In

June 2005, Markus testified before a secret grand jury and complained about these e-mails, lawsuits, and blog posts. The grand jury indicted Baumgartner on fourteen counts, charging her with intimidation, retaliation, and possession of criminal tools: her computer.

She was taken into custody and jailed almost immediately; bond was set at \$360,000. She was indicted twice more for similar charges, all stemming from her e-mails or blog postings while out on bail. Her residence was searched in February 2006; the search warrant stated that she was in unlawful possession of “documents relating to ErieVoices.com stories and comments,” as well as writings or other forms of written communication.” The search warrant and resulting inventory sheet shows that one box of “Erie Voices Paperwork” was seized, as were four computers. The search warrant is available online at: <http://www.ottawacountysheriff.org/documents/Baumgartner%20Search%20Warrant,%20February%201,%202006.pdf>

Baumgartner has been in and out of jail and psychiatric facilities since her first indictment. After a number of continuances her trial began in November 2006, and she pled guilty to eleven counts of intimidation and four counts of retaliation shortly thereafter.

On December 18, Baumgartner was sentenced to 8 years in jail and a \$500 fine.

An unofficial transcript of the first grand jury hearing was recently made available at <http://www.northcountrygazette.org/articles/110806GrandJury.html> (published November 8, 2006). Disturbingly, at the hearing the assistant prosecuting attorney told the grand jury that jailing people for their criticisms of local officials is a fairly common practice in Ohio, stating that together Judge Markus and he have dealt with “roughly 40 of these people” and noted that “once they go to prison ... they’re not writing anymore.”

#### *Mitchell v. Trummel*

In another case, Paul Trummel published a newsletter and website that criticized the administrators of a low-income senior citizens’ residence in Seattle. As a result of these publications, Judge James Doerty issued an anti-harassment order in

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## The Perils of Blogging

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April 2001 ordering Trummel to removal all personal identifying information regarding Council House staff and residents from his web site.

Although Trummel initially complied, he began posting such information again, and in October 2001 Judge Doerty held that the posting of names and addresses, “coupled with repeated inflammatory rhetoric connecting them with concepts like Islamic terrorism and racism [is] a violation of the antiharassment order ... in that it causes the victims to reasonably feel under surveillance by Mr. Trummel.”

When Trummel refused to remove the information, Judge Doerty ordered him jailed for contempt. After serving 111 days in jail (including 25 in solitary confinement), Judge Doerty conditionally released Trummel so as to give him an opportunity to purge his contempt by removing the private information, which he eventually did. Trummel challenged his convictions for contempt.

The intermediate appeals court upheld the trial judge’s orders, noting that the court “appropriately concluded that the public posting of personal information violated the no-surveillance provision of the order,” and applauded Judge Doerty for focusing on Trummel’s conduct rather than his speech.

Sitting en banc, the Washington Supreme Court reversed, holding that the contempt conviction was an abuse of discretion by “adding content restrictions” to the original antiharassment order. *See Trummel v. Mitchell*, 156 Wash. 2d 653, 131 P.3d 305 (2006) (en banc), *rev’g* 121 Wash. App. 1078 (Wash. Ct. App. 2004) (unpublished).

### ***Haberman v. Rhoad***

In a third variation on this theme, a Family Court judge in Florida ordered Kristen Rhoad to remove all web postings about her ex-husband, Phil Haberman, who accused Rhoad of cyberstalking. While filling out a typical form for a restraining order, the judge handwrote an injunction ordering Rhoad to “remove, or cause to remove, all blogs, e-mails or other web-based communications to [Haberman] or third parties that refer to [Haberman], and which are posted, or caused to be posted, by [Rhoad].”

The September 2006 order was issued despite the fact, apparently, that there are no official cyberstalking charges

pending against Rhoad under Fla. Stat. § 784.048. Rhoad’s blog postings revolved around her belief that Haberman is a sociopath and con-artist who misrepresented himself as a member of the Special Forces and recipient of the Purple Heart award in order to marry her and thus receive more military benefits.

Numerous others have accused Haberman of impersonating higher-ranking officers and lying about receiving a Purple Heart, and articles leveling such accusations have run in the Dallas Observer and on other websites. The family court judge apparently made no attempt to determine the truth or falsity of Rhoad’s accusations before enjoining her. Rhoad has refused to take down her blog and is attempting to appeal the order.

### ***Hargrave Military Academy v. Guyles***

In a similar case, harassment was not a claim, but a judge still enjoined website owners before determining whether the claims therein were defamatory. In *Hargrave Military Academy v. Guyles*, a West Virginia school sued for libel and tortious interference with contract after two parents launched an incendiary web site, HargraveHasProblems.com, to register their discontent after their son was expelled from the school.

In May 2006, the school requested a preliminary injunction to shut down the site; the federal judge granted it over objections from the ACLU and the parents that the order constituted a prior restraint. As alleged in the complaint, the parents had threatened to build in metatags to enable the parents’ website and the school’s website to be “conjoined twins.” The school was also threatened that Mr. Guyles could pay to have an advertisement for his website pop up whenever someone searched for the actual Hargrave website. The dispute was resolved confidentially in August 2006 and the case was dismissed under Rule 41.

### ***New Federal Law***

In addition to these disturbing cases, a new federal law criminalizes anonymous bloggers and Internet commenters who “intend to annoy.” In January 2006, President Bush signed H.R. 3402, the “Violence Against Women and Department of Justice Reauthorization Act of 2005.” In Section 113, “Preventing Cyberstalking,” the bill amends the Communications Decency Act of 1934 (47 U.S.C. § 223(h)(1)).

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## The Perils of Blogging

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The CDA now provides that “whoever ... utilizes any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet ... without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person ... who receives the communications ... shall be fined under title 18 or imprisoned not more than two years, or both.”

Previously the law specifically exempted “interactive computer services;” a federal court also recently held that the older version of the law did not create a private right of action and, even if it did, would not create liability for a non-anonymous blogger allowing others to anonymously post comments intending to annoy. See *Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006).

In February, proprietors of a website that allows people send anonymous e-mail for a fee, TheAnonymousEmail.com, challenged the new law on First Amendment grounds. See “Lawsuit challenges new ‘e-annoyance’ law,” [http://news.com.com/2100-1028\\_3-6037439.html](http://news.com.com/2100-1028_3-6037439.html) (published Feb. 9, 2006).

## Conclusion

Because the majority of these cases are not published and involve fringe defendants, it is questionable how much legal precedent the actions of these judges will have. The fact remains, however, that the legal landscape is perilous for the nonprofessional blogger or amateur journalist. Exercising what they believe to be their right to unrestricted critical speech can result in serious consequences.

Ten years ago, courts seemed awestruck by the free speech potential of the Internet; one court called it “the most participatory form of mass speech yet developed” and concluded “the Internet deserves the highest protection from governmental intrusion.” *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (Dalzell, J., concurring).

It is clear that, as the bloom has come off the rose, some courts seem to be losing their sense of reverence and viewing the Internet more as a means of harassment.

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## CYBER LAW ROUNDUP

# 2006 Decisions on Discovering the Identity of Anonymous Speakers in Internet Defamation Claims

During 2006, courts have continued to consider what standard to apply when libel plaintiffs seek to discover the identity of anonymous internet speakers. It was just over a year ago that the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451, 460-61 (Del. 2005), ruled that a plaintiff in such a case “must support his defamation claim with facts sufficient to defeat a summary judgment motion.”

In reaching this decision, the Delaware Supreme Court reviewed several approaches, including the ones used by the Virginia Circuit Court in *In re subpoena duces tecum to America Online, Inc.*, and the New Jersey Appellate Division in *Dendrite Int'l, Inc. v. Doe, No. 3*.

The Virginia court had adopted a “good faith” standard, requiring the plaintiff to show that it had “a legitimate, good faith basis” for its claim and that the defendants’ identities were “centrally needed to advance that claim.” *In re subpoena duces tecum to Am. Online, Inc.*, No 40570, 2000 WL 1210372, at \*8 (Va. Cir. Ct. 2000).

By contrast, the New Jersey standard was more protective of the anonymous defendant, requiring that the plaintiff (1) notify the anonymous defendant of the complaint, (2) identify and reproduce verbatim the allegedly defamatory statements, (3) set forth a case that can withstand a motion to dismiss and offers “sufficient evidence supporting each element of its cause of action, on a prima facie basis.” *Dendrite Int'l, Inc. v. Doe, No. 3*, 342 N.J. Super. 134, 141 (N.J. Super. Ct. App. Div. 2001). The court would then balance the plaintiff’s prima facie case with the defendants’ First Amendment protections.

The Delaware Supreme Court essentially adopted a simplified *Dendrite* standard. The libel plaintiff must make efforts to notify the anonymous defendant. In the Internet context, the plaintiff must “post a message notifying the anonymous defendant of the plaintiff’s discovery request on the same message board where the allegedly defamatory statement was originally posted.” And the plaintiff must satisfy the summary judgment standard. The court reasoned that the other *Dendrite* prongs were fully subsumed in these two requirements.

As a practical matter, to obtain discovery of an anonymous libel defendant’s identity under the *Cahill v. Doe* standard the plaintiff must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the*

*plaintiff’s control* – including defamatory meaning, falsity and actual malice. As to actual malice, the court recognized without discovery of the defendant’s identity, satisfying the actual malice element might be difficult. It therefore explained that “we do NOT hold that the public figure defamation plaintiff is required to produce evidence on this element of the claim.” Instead, the plaintiff can submit a verified complaint or affidavit to substantiate the actual malice element.

### 2006 Developments

During 2006, both federal and state courts continued to examine this issue. Here, in chronological order, is a summary of the year’s decisions:

#### Pennsylvania

Shortly after Delaware delivered the *Cahill* decision, Pennsylvania’s Court of Common Pleas adopted a comparatively weak standard in *Klehr, Harrison, Harvey, Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425, 2006 WL 37020, at \*8-9 (Pa. Ct. Pleas Jan. 4. 2006).

In *Klehr*, the court relied upon existing state rules of evidence to decide that anonymous internet posters earned no special protection in libel discovery. *Klehr* involved a defamation claim brought by a law firm, which was the subject of extensive commentary by anonymous sources on two websites. The postings, which included accusations of law breaking and ethical violations by members of the plaintiff firm, were determined to be defamatory *per se*.

When defendants sought a protective order on First Amendment grounds, the court chose to rely heavily upon a theory set forth by Professor Michael S. Vogel, who was plaintiffs’ counsel in *Dendrite*. *Klehr*, 2006 WL 37020, at \*8 (citing Vogel, *supra* note 4, 83 Or. L. Rev. at 801).

Professor Vogel argued, and the *Klehr* court agreed, that “though well intentioned, the rush to apply new standards should be slowed ... the new standards offer little real protection for anonymous speech beyond what the courts can provide under existing rules.”

The court applied the ordinary discovery rules under Pennsylvania Rule of Evidence 4011, which looks for bad faith of

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## 2006 Decisions on Discovering the Identity of Anonymous Speakers in Internet Defamation Claims

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the plaintiff and balances it against the burden caused to defendant. Klehr was not acting in bad faith, and any possible burden posed to defendants' First Amendment rights was outweighed by the fact that the statements at issue were defamatory *per se*.

Incidentally, the Pennsylvania Supreme Court had addressed the discovery of an anonymous internet poster in 2003 in *Melvin v. Doe*, 836 A.2d 42, 43-44 (2003), when it vacated a lower court denial of a request for a protective order. That request had been made by a number of John Does who had posted a statement about a Pennsylvania state judge on a site sponsored by AOL. The Pennsylvania Supreme Court's decision stemmed from principles of the collateral review doctrine, but it ordered the lower court to address the defendants' First Amendment rights on remand.

The Pennsylvania Supreme Court's discussion of First Amendment principles in *Melvin* led some to believe that the court would adopt a strict standard, like the ones articulated in *Dendrite* and *Cahill*, when the discovery issue ultimately came before it. See *Klehr*, 2006 WL 37020 at \*8 ("Defendants. . . suggest[] that [*Melvin*] 'foreshadows an adoption of the *Dendrite* standard.'"); See also Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 Or. L. Rev. 795, 812 (2004) ("[T]he *Melvin* majority gave a further hint of its views when it stated that resolution of the discovery issue did not require 'consideration of the merits of the underlying defamation action.' Rather, the court held that the relevant question was 'strictly a legal one' of 'what threshold requirements must be imposed as a prerequisite to discovery in an anonymous defamation case' an 'inquiry ... plainly separable from the defamation action.'")

Whether or not Pennsylvania will adopt the more protective standard suggested in *Melvin* remains to be seen.

### Arizona

In July, the Federal District Court in Arizona cited *Cahill*, and applied a summary judgment standard of review to this issue. *Best Western Int'l v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D.C. Ariz. July 25, 2006)

Plaintiff Best Western had sought to compel discovery of the identities of John Doe defendants who had posted com-

ments on a website that Best Western had set up for its members and board of governors. The district court noted that were it to apply a "good faith" standard, such as the one articulated by the Virginia Circuit Court and described above, Best Western would easily win the discovery motion since its claim was made in good faith and met the standards of modern notice pleading.

Adopting the reasoning of *Doe v. Cahill*, the Arizona court agreed that anonymous speech is protected by the First Amendment and therefore a libel plaintiff must do more than state a claim to be entitled to discovery. Here plaintiff's bare bones complaint, the court said, "provides an example of why the standard is appropriate" since nothing in the complaint provided a factual basis to limit defendants' First Amendment rights.

The court allowed Best Western the option of renewing its motion to meet the announced summary judgment standard. It required that the plaintiffs provide notice to the anonymous defendants and asked the parties to address "the John Doe Defendants' expectation of privacy" in the further briefing.

### District of Columbia

A District of Columbia trial court considered the issue in *Solers, Inc. v. Doe*, No. 05-3779 (D.C. Super. Ct. Aug 16, 2006) (Blackburne-Rigsby, J.).

Plaintiff Solers, Inc. sought the identity of a John Doe who posted an allegedly defamatory statement on a website maintained by the anti-piracy division of a watch-dog, trade association. The D.C. Superior Court refused to compel discovery, noting that "under any of the tests articulated, a motion to dismiss or any heightened motion to dismiss standard, Solers has not made a claim of relief for its defamation allegation." Solers had not shown actual harm stemming from the allegedly defamatory posting, nor could it show that there was a risk of harm. Furthermore, Solers "failed to demonstrate that it exhausted alternative methods of obtaining Doe's identity." Thus, the court granted the trade association's motion to quash.

### Massachusetts

Finally, the Federal District Court in Massachusetts considered the issue in *McMann v. Doe*, No. 06-11825-JLT, 2006 WL 3102986 (D. Mass. Oct. 31, 2006)

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## 2006 Decisions on Discovering the Identity of Anonymous Speakers in Internet Defamation Claims

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Plaintiff McMann, a real estate developer, brought libel, privacy and related claims against a John Doe defendant for creating a website using his name. The website, [www.paulmcmann.com](http://www.paulmcmann.com) contained a photograph of plaintiff, with the statement that he “turned lives upside down,” and a suggestion to “be afraid, be very afraid.” The website announced it will soon be updated with specific evidence of plaintiff’s misdeeds.

Plaintiff sought permission to subpoena the website’s hosting company to learn the identity of its creator. The court first concluded that the complaint failed to plead sufficient facts to warrant diversity jurisdiction. But it then went on to examine in detail the issue of protecting anonymous speech in the context of Internet libel suits. The district court agreed that anonymous speech is entitled to First Amendment

protection but it questioned whether the standard employed in *Cahill* and *Best Western* struck the right balance.

Under *Cahill*, a public figure could unmask an anonymous critic without a showing of actual malice. *Cahill* only required plaintiff to produce evidence in its control to “substantiate the actual malice element.” On the other hand, “requiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet.”

Regardless, the court held that “it is reasonable to apply some sort of a screen to the plaintiff’s claim before authorizing the subpoena.” Here the court concluded that plaintiff met neither the summary judgment nor the motion to dismiss standards. The statements alleged to be defamatory were opinion, and “plaintiff’s affidavit merely contains an assertion that the statement is not true.” As the court noted: “bare assertions in an affidavit are not adequate to defeat summary judgment.”

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# Perils of Publishing in the Global Age

Geoffrey Robertson QC

NAA/NAB/MLRC Media Law Conference  
Alexandria, Virginia  
September 27, 2006

GEOFFREY ROBERTSON: It is indeed a privilege to offer some thoughts on the ways of protecting the First Amendment here in Virginia where the First Amendment first originated in Madison's report to the Virginia Assembly calling for some constitutional protection against the resurgence of British libel laws, in particular the law of criminal libel.

Thanks to Madison's genius the media in the United States has enjoyed a freedom that has been the envy of your counterparts elsewhere, albeit a freedom perhaps threatened today by subpoenaing journalists to divulge their sources, a freedom certainly threatened around the world by the imposition of more repressive legal regimes claiming jurisdiction to punish and mulct the US media for civil and criminal libel, for contempt, for copyright, for breach of confidence.

These perils are certainly to media insurers, although let's put them in perspective. They are not the kind of perils that are faced by many of the journalists we serve. Last year, 63 journalists were killed, 1,300 media workers were attacked, were injured around the world and over 100 ended up in jail. The struggle to erect Madison's vision of press freedom is a fight to tell inconvenient truths.

It's not merely a battle to protect the profits of the US media, it's a fight for the right of citizens throughout the world to read and see information and opinion that their

governments and increasingly multi-national corporations and international public figures don't want them to read or see.

Ironically, it's sometimes always also a freedom to tell them what they don't want to know. As George Orwell said in his introduction to *Animal Farm*, "If liberty means anything at all, it means the right to tell people what they do not want to hear." An introduction, of course, that went unpublished because his left wing publisher, Gollancz, didn't want to insult Stalin.

Well, as globalization proceeds apace there are very few newscasters and broadcasters that are not disseminated across national borders. They're uploaded on the Net. They become actionable in 191 countries; 190 of those countries lacking a First Amendment.

Modern media lawyers must not only be experts on the domestic law of libel and contempt and privacy, they must be familiar with the rules in other countries, with international treaties and doctrines for resolving conflicts between laws.

We are all familiar enough with examples. The *New York Times* most recently forced, or advised at least, to cut its coverage of evidence about the plot to blow planes up mid-Atlantic for fear that they might prejudice some far off trial at the Old Bailey. *Forbes Magazine*, the top court in Britain dividing 3-2, on whether a plaintiff could sue for a minor nugatory circulation in Britain. The plaintiff being a Russian oligarch, Boris Berezovsky, and the story set entirely in Russia.

*Baron's*, a magazine that doesn't circulate at all in the small Australian state of Victoria dragged there to defend an article about a Victorian businessman's shenanigans on the New York Stock Exchange because it was downloaded by a few of his friends from a Melbourne synagogue.

Yahoo, condemned by Amnesty for divulging details of subscriber dissidents as the quid pro quo for operating in China. Journalist for the Straits Times arrested recently for spying in China. Far East Economic Review, based in Hong Kong, has just received the double whammy, sued not only by Li Kwan Yu but also by his son the Prime Minister. And so it goes on, often irrationally, very often comically but sometimes with malice and cruelty.

Jan Johannes and I had the experience, not so long ago, of going to Zimbabwe to observe the trial of the Guardian regular correspondent for twenty years from that country the American, Andy Meldrum. He was charged with an imprisonable offence, one of Mugabe's new laws of publishing false news about him.

Of course the Guardian isn't circulated at all in Zimbabwe, partly for that reason but Andy's story went up on the London Web site of the newspaper and there is a secret police detachment that spends its time around the clock Googling the world for critical stories about Mr. Mugabe.

The trial was somewhat comical, as the prosecutor tried to show the judge how this was published in Zimbabwe. We all had to adjourn to the business center of the local Sheraton Hotel where he desperately tried to Google it on the Guardian web site and couldn't find it. That was because we had advised that it be taken off.

So Andy was acquitted. Censorship perhaps, but in the interest of saving a journalist from prison, perhaps justified. Andy was acquitted by a judge whose car was then firebombed by Mugabe's thugs. His local lawyer, Beatrice Mtetwa was beaten up and Andy himself was deported and he now reports Zimbabwe from the comparative safety of Johannesburg.

So these global perils, how are they to be confronted in a world without a First Amendment? One way perhaps is by building upon the qualified free speech guarantee in human rights treaties, most notably Article 10 of the European Convention on Human Rights which now applies with a court to enforce it to 40 European countries. Paralleling Article 19 of the International Convention on Civil and Political Rights, which at last count 154 countries have ratified, even China, although not, of course, Singapore.

These guarantees although they are subject to qualifications, they are not like the First Amendment in the sense they don't have the block on laws restricting media freedom, they are always balanced with the right to reputation or national security and so forth. But it is nonetheless possible to introduce in the courts and commissions that are charged with considering breaches of the Article 19 or Article 10 right, some of the First Amendment jurisprudence.

Academics have become interested recently in what they call "diffusion of law," how one legal system will adopt attractive principles from other legal systems, sometimes for political or geo-political reasons, sometimes because of a migration of principles caused by a shared history, sometimes because of a landmark judgment or even the power of a judicial aphorism.

"Sunlight is the best disinfectant," gets quoted a lot in Europe these days at a time when it's not much bandied about in Washington I've noticed. *New York Times v. Sullivan* is a rather good example. I gave a talk here in 1984 on the twentieth anniversary and I did a check of all the free speech cases in Britain since 1964 and there was not one mention, not one, of *New York Times v. Sullivan*.



Well today, and in the subsequent 20 years, particularly since the adoption of Article 10, there is no press freedom case that gets argued in appellate courts without a reference to that great case. It has been instrumental, I think, in having the Reynolds defense, a public interest defense incorporated into British common law and in abolishing the right of political parties and public corporations to sue for libel.

So diffusion of law, diffusion of First Amendment principles is going on and can only be encouraged. But in order to understand and in order to encourage other countries to import them, it is important to look at briefly the history of the First Amendment. I know some Americans think that history begins in 1776, but in fact that's to detract from the struggle against the English libel laws in which the American colonists played a very proud and central part, as Madison knew, as Tom Paine certainly knew.

What lodged in their minds was the struggle against the sedition laws that was conducted in the 1630's and 1640's when John Winthrop took some 30,000 Puritans across the pond to settle New England. They were refugees from persecution and that persecution by Charles the First was very much a persecution, as a result of their claimed right to free speech.

They wanted the freedom to speak from the pulpit even though they weren't ordained by bishops. They wanted the freedom to have their preachers safe from the Star Chamber; the Star Chamber, the kangaroo court of Charles the First that imposed torture on those that spoke freely. They were taken out, they had their ears cut off, they had their noses slit and on their heads were branded the words "SL", SL standing for "seditious libeler." And of course they came back. They came back to fight the Civil War, the entire first graduating class of Harvard College joined Cromwell in that fight.

Civil liberties in Britain is dated back to Magna Carta. Well, of course, in 1215 there was no printing press to license, so Magna Carta says nothing about free speech. In fact, then there was a law of scandalatum magnatum, discomforting the powerful by gossip. The greater the truth, the greater the libel. And licensing begins in 1559.

But the fight against the sedition laws, produced of course when the Presbyterians tried to bring back licensing – the Puritans get a bad press largely because they are confused with the really dour Presbyterians – but their attempt to bring back licensing in the 1640's led Milton to make his famous cry for press freedom in the Areopagitica. “The attempt to subdue doctrine by licensing is like the exploit of the gallant man who thought to keep the crows out of his garden by shutting his gate.” That was Milton’s argument for a free marketplace of ideas.

It was Milton who first lodged in the Puritan consciousness the argument that was later adopted in *New York Times v. Sullivan*, the argument that in a free marketplace of ideas, truth will ultimately triumph over falsity but that false statements are necessary for that triumph to happen, they need protection if made non-recklessly.

So that period, I think, is crucial to understanding the basis upon which Madison, in his report to the Virginia Assembly, put forward the case for protection of the press. Of course it was put in place at a time when the American Revolution had been partly inspired by men like John Wilkes, the mayor of London who was led the criticism of George the Third and was a great supporter of the American Revolution.

It was Wilkes, it is often forgotten, who began and inspired the chant, that became the chant of the mob outside the Old Bailey, “Freedom of the press.” It was John Wilkes and freedom of the press, the first popular cries for press freedom after Wilkes’ printers and his publishers were arrested and subject to general warrants and unlawful searches.

And it's most important, at a time when the Europeans have gone somewhat Euro crazy with the idea of privacy and trying to trump Article 10 with Article 8 privacy rights, to remember that privacy, the right to be left alone originated in Wilkes' stand over the raids on him, on his publication, "The North Briton," for attacks on George the Third.

He was the great figure who not only established freedom of printers, but of course went to prison, went to prison and got elected again and again and again, three times, while he was in prison because he was the first in Britain to introduce the importance of the freedom of the press. He went to prison for his essay on women which was read solemnly by his enemy Lord Sandwich to the House of Lords, "Life can little more supply than just a few good fucks and then we die." First time a four letter word was heard in the House of Lords. The peers cried "Go on. Go on," as he read this blasphemous poem. And Wilkes of course charged with blasphemous libel and criminal libel that saw John Wilkes go to prison.

And he, too, was in Madison's mind in his report to the Virginia Assembly that led to the adoption of the First Amendment. It was there in Tom Payne's mind as well, when he wrote "Common Sense." So the freedom of the press, the chant of the mob incorporated into American law. And of course it was Voltaire's similar arguments for press freedom that enthused the French Revolution and, as Simon Schama writes, it was the "incontinent freedom" that the press had in France that was such a factor in the French Revolution.

And it's interesting that subsequently, while free speech found its home in the First Amendment, that in Europe both in England and in Europe, for quite different reasons, free speech was denied. Pitt, the Prime Minister thought that their Jacobinism

feared the French Revolution and so he insisted on wide-ranging prosecutions for the work of Tom Payne for so much political polemic under the four classes of libel. Seditious libel, blasphemous libel, criminal libel and obscene libel, were all developed as part of Pitt's drive to imprison printers.

Napoleon, who conquered Europe, became again determined to stamp out criticism of officials but he did so by passing insult laws. He abolished juries and passed the insult laws that now unfortunately, deface press freedom in so much of Latin America where they were imported by the Spanish and throughout Europe.

They're called Desacato laws in Latin America, they find their way into the 1881 version of the old Code Napoleon and they have left in Europe a very unhappy inheritance where the idea that those who criticize officials, be they policemen or politicians, must be punished by criminal law. And to its discredit the European Court of Human Rights has not outlawed them under Article 10. That's a battle that we are still fighting. They have stopped imprisonment. No journalist now is imprisoned for insult law crimes but they are widely fined and the idea of criminal conviction has not yet been rooted out as a result of Napoleon's inheritance.

But in Britain at least, we had trial by jury and a very complacent gentleman called Albert Dicey said at the beginning of the twentieth century "Well, we don't have freedom of speech but we do have the right to jury trial which ensures freedom of speech." Of course it doesn't, and as you look at the fact that every blasphemy case resulted in a conviction, every sedition case resulted in a conviction so that was the idea of resting it upon juries was undoubtedly extremely complacent.

But it did, of course, and it's the 100th anniversary of John Betjeman so I think it's fair to report what he said of freedom of expression in England. He said, "Think of



what our nation stands for; books from Boots and country lanes, free speech, free passes, class distinction, democracy and proper drains.”

That was free speech in England and what sadly happened was that the civil libel laws which had been introduced originally to discourage the upper classes from ending their quarrels with a duel in which a lot of heirs of estates were prematurely cut off, they encouraged them to sue each other in civil libel and so the old libel precedents were very much of the nineteenth century. They unblotted their escutcheons by suing for libel. The language is very much of the gentlemen’s club.

A libel is something that lowers you in the estimation of right-thinking chaps. Most of the early cases were to do with allegations of cheating at cards or shooting foxes. It’s a terrible thing for a gentleman to be accused of shooting a fox. A gentleman hunts them down with dogs. But in this period, as libel law was developing from the old forms of pleading, two unfortunate and really devastating for free speech presumptions came into play and are still in play. First of all, the presumption that anything that lowers a chap in others estimation is presumed to be false, the presumption of falsity.

That, it seems to me, is still the greatest clamp on free speech because it means that the media defendant has to prove, and if it’s a serious allegation, prove not quite beyond reasonable doubt but certainly to a very high standard, the case and of course where sources go to water and where – the classic example I suppose is Jeffrey Archer. They had photographs of him paying 2,000 pounds – \$5,000 – to a prostitute, but they couldn’t justify, they couldn’t prove that he’d slept with her and so over a million dollars was awarded to him some fifteen years before he was jailed for perjury. But that is the kind of miscarriage and there are so many in British libel history.

Miscarriage – Liberace got a fortune when he sued for the suggestion that he was effeminate. American publishers pull things, statements that they can quite easily make here. There was a famous case with Time magazine when I first started at the libel bar. Time magazine wouldn't publish in Britain, Daniel Moynihan's aphorism about Henry Kissinger. "Henry doesn't lie because it's in his interest. He lies because it's in his nature." Solemnly edited out – and so much else. William Shawcross' book on Cambodia had to have 22 cuts, and there were many other examples. I think U.S. Penthouse was sued by someone who was in prison for fifteen years for referring to him as a murderer and he won damages because he could show that he was only in prison for manslaughter. He was a manslaughterer, not a murderer.

The other presumption that has been very unhelpful to the press is the presumption of damage. Every criticism, which is what a libel boils down to in English courts, is presumed to have done terrible damage even when it hasn't – when it hasn't made the slightest difference to someone's reputation. There is that presumption of damage.

And until recently there was no public interest defense. It was thanks to Article 10 and to the influence of Sullivan that we finally got what is termed "Reynolds privilege," which is a kind of privilege to say important things so long as the media conform to ten checklists for responsible journalism laid down by House of Lords judges who have got no idea what it is like to work in a newsroom.

So Reynolds privilege, while it's a start, has not been as helpful as it might be for media defenses. So there you have the problem and it is a severe problem. Its severity was highlighted a few years ago when Idi Amin was in power. There is a new film about him —just opened. He was installed in Uganda by the British and was thought to be a pretty safe bet and the first sign of him going utterly crazy was when he sacked his

foreign minister, Princess Elizabeth of Toro, and gave a press conference in which he announced that she had been caught having oral sex at a toilet in Orly airport.

And this of course was the first sign of his craziness. It was widely reported in every British newspaper. Princess Elizabeth having been sacked and not having been in a toilet in Orly airport, then came to Britain and won enormous damages from British newspaper for publishing that obviously public interest story.

And so that was the position in Britain without Sullivan and without a public interest defense. Newsworthy stories of utmost importance could not be published and now can in certain cases, thanks to Reynolds, thanks to the effect and the impact and the diffusion of *New York Times v. Sullivan*.

Contempt of court has become, and you've got a session on it shortly, is another aspect of the British colonial history because it was the rule against scandalizing the court, that I think caught up with Murray Hiebert when he wrote an utterly true story about a Malaysian judge. It was actually invented by the Privy Council, which was the court for all the British colonies at the end of the nineteenth century, because they became worried about the natives getting restless and criticizing the judges. And they said, "Well, it's all right in countries that are sort of civilized and white for the judges to be criticized, but in other far flung colonies with colored populations, they couldn't be trusted." And so scandalizing the court was necessary.

Very sadly in some of those ex-colonies which for racist reasons this law was invented have adopted and run with it. The editor of the Wall Street Journal published a statement by Peter Cowan to the effect that a recent libel judgment against them in favor of Li Kwan Yu was deeply regrettable, he was charged with scandalizing the court and convicted.

There have been some amelioration of contempt of court thanks to Article 10, the right to criticize the courts – particularly in the case over Thalidomide. But contempt still does provide a real problem for American newspapers in particular reporting terrorism plots that arise from and are fomented in Britain. It's terribly important to know whether the plot to blow up planes over the Atlantic really has evidence or whether it's like other plots that the same people have thought or promoted and said to exist and which turn out to be nugatory or turn out to have no evidence.

Yet, not only is there this rule against prejudicing a trial, but there is also the fact that when the trial does take place, to avoid prejudice much of these trials take place in secret. The media are not allowed to report them until the end. And oddly enough, not only the press is complaining about these trials at the Old Bailey, incredibly important in producing evidence of terrorism which don't get reported except at the end, which means they are not really properly reported at all.

And not only is the press deprived of important copy, but the police are very angry about this – the police commissioner made a recent statement saying that it's intolerable that these trial are held in secret because the police cannot persuade the Muslim community in Britain that they are actually acting on evidence unless that evidence, when it's unveiled, can be reported. So there is a prospect that the press and the media will actually make some common cause in that respect.

I think it's an important matter that has to be faced. Obviously, one solution is sequestering juries. Another is to have trial before three judges rather than trial by jury. These arguments are important at the moment. The British press are in two minds. They rather like jury trial. It's a shibboleth. They have a stubborn attraction for it.



But it may be that the answer with those charged with terrorism is that they would get a fairer trial and the media would be free to report if anti-terrorist courts were composed of three judges rather than juries. That's a matter that we have to consider.

Well, what does human rights and the human rights treaties have to offer? We have now signed up 154 nations to the International Covenant on Civil and Political Rights, which is a kind of a universal declaration of human rights writ large.

It's important to understand where human rights came from. They don't come actually from the Declaration of Independence and the French Declaration of the Rights of Man. They were based on the concept of natural rights and if you read Jefferson these are our inalienable rights somehow coming from God. Well, in Europe we don't believe in God, and Jeremy Bentham was the first to say that this idea of natural rights is really nonsense – “nonsense on stilts.” Karl Marx then weighed in by attacking natural rights as bourgeois rights, particularly freedom of the press, which he described as freedom of the press proprietors. The idea of human rights didn't emerge until just before the Second World War. It was quite interesting how it did because in until 1939, when Hitler was extinguishing human rights throughout Europe, no European intellectual no League of Nations Court or debate canvassed the idea of human rights.

The first idea of universal human rights came from the little group of writers led by H.G. Wells. There was H.G. Wells, there was J.B. Priestly, there was A.A. Milne, who would motor up from Pooh Corner to add his twopence to the draft of this first universal declaration of human rights. And it was produced in 1939 as a Penguin special, H.G. Wells “The Rights of Man.”

The idea that freedom of speech was one of the fundamental rights that should be guaranteed was translated into 30 languages. The Foreign Office was so excited by

it that it actually translated it into German and dropped it on the advancing German army as it swept across France, but they didn't stop to read it.

The person who did stop to read it was Franklin Roosevelt, who was a great friend of H.G. Wells and he conspired a great speech in January 1st, 1942. What are we fighting for? Human Rights. What are human rights? The four freedoms: freedom of speech was the first, freedom of speech in worship, freedom from want and from fear.

And Wells' work was then sent to Eleanor Roosevelt who ran the committee that produced the universal declaration and that universal declaration was the basis of Article 19 of the universal declaration, was the model for Article 10 of the European Convention and the model for Article 19 of the International Convention on Civil and Political Rights.

We have, in Europe, I think, backslid in some respects. Largely from history, the result of the Holocaust is that you will never get a European court of human rights thinking it an invasion of free speech to jail people for hate speech. It's been very backward in relation to allowing nations to punish obscenity or blasphemy, but it has been, as I say, significant in first of all in contempt of court.

The case of Goodwin against the United Kingdom in 1996 specifically rejected the American position in *Branzburg v. Hayes* and showed that from a free speech guarantee you can spell out the freedom of the journalist to protect his or her source, because if the source can't be protected, stories and news will dry up and the public will be less well-informed.

Goodwin has now been adopted at an international level in the case of Jonathan Randall and the *Washington Post* that was heard in the international appeals court in The Hague. The right of war correspondents to protect their sources and not to be compelled to give evidence was upheld.

So in some respects it would be nice to think that the journalists in America might benefit from the far more rigorous protection that is given by the human rights treaties in Europe to the right to protect sources. I see that the Senate has recently frozen debate on the idea of a bill to protect journalistic sources in this respect if in few others. The European human rights position is perhaps more advanced than the protection to freedom of expression that is given by the First Amendment.

So in protecting the First Amendment, there are claims to actually widen it with some assistance. There is of course remaining, the problem certainly with British libel law of the burden of proof and the inept public interest defense. British libel law is the only law that is not enforced, or judgments under it are not enforced in American courts. *Bachchan v. India Abroad*, and other cases, have held that British libel law is antipathetic to the First Amendment.

Hopefully, if the Reynolds defense is developed, the first objection to British libel law, namely that it lacks a public interest defense, will be overcome. It however, remains the case that the burden of proof on the defendant is the other reason and will remain the other reason why European law is antipathetic to the First Amendment and that, it seems to me, is the most important problem and this is the area in which Sullivan and indeed Gertz can be of most help in persuading European courts that, in fact, the burden of proof must shift.

The other problem, of course, that we're having is privacy. As the European Court holds that it is a breach of Article 8 to photograph Princess Caroline in the street. Naomi Campbell won a judgment when having claimed that she was entirely drug free, a newspaper published a photograph of her emerging from a drug clinic. The medical confidentiality was said to trump the media's right to see her announce in a public street

that she was a hypocrite. She goes to trial in New York today for throwing a telephone at her maid, so I will adopt the British principle of not making any critical comments about her while she is facing trial, but certainly the result of that case does give us concern that at least some newsworthy and public interest may be gagged by privacy orders under the guise of breach of confidence.

Well, and of course we are seeing in the European court an unhappy development. The idea that Article 8 privacy can be balanced with Article 10 and that where stories of public interest relate to public figures they may have a privacy right to have them enjoined. Well, that I think, is to forget that Article 8 is limited to the right to protect home and family – it originated in John Wilkes' great case, *Entick and Carrington*, which protected him against a general search by governments in search for evidence. It is to take Article 8 entirely out of its historical origin to use it to trump the claim of newsworthy publication.

As we move forward, how can finally Article 10 be protected and promoted in the rest of the world? Journalists cannot be given a physical shield when they delve into areas which are likely to cause reprisals. One remembers and pays tribute to men like Daniel Pearl and Paul Klebnikov, both of them assassinated by those about whom they were investigating. But there is an important development in international law which largely because, I have to say, of the Bush administration's reluctance to regard international law as a great thing for every other country but America. And they've been reluctant to, in fact they've attempted to undermine until recently, the work towards an international criminal court.

But there are defects in the Geneva Convention protection of journalists. There is an urgent need to make amongst the war crimes that are listed definitively in the



Rome statute. It is not a war crime to assassinate a journalist and I think that the first thing that should be done is to make the attempts on journalists, which as I've said are now so common, make them a war crime punishable by the international criminal court.

Hopefully, as America's attitude to the ICC is changing thanks to Darfur, we may get a greater involvement and then a proper protection of journalists. There is another serious gap which a number of British journalists almost came a cropper in the early days in Afghanistan when they dressed up in burkhas. They were arrested for spying, and through a historical anomaly, the people who are not protected by the Geneva Conventions are spies and mercenaries. And in China, the Straits Times journalist was alleged to be both.

So you can torture and execute summarily journalists who are caught without a press card pretending to be citizens and that is a serious gap in the protection of journalists which should be plugged.

The Geneva Convention, of course, was a product of its time. I had to look at it and read it to apply it recently to the prison in Sierra Leone where Charles Taylor came in and I was quite interested to see that the greatest right that a prisoner could have in 1949 in the Geneva Conventions is, would you believe, the right to smoke. That was seen as vital in those days. And much of the Convention does hinge upon concepts of 1949.

I was amused to see a White House spokesman not long ago, referring to the fact that of course the prisons in Guantanamo couldn't be treated in accordance with the Geneva Conventions because that required them to be given a musical instrument and sure as hell the American taxpayer wasn't going to pay for a musical instrument.

That overlooked the fact that, of course, that comes from the importance of orchestras in the concentration camps and the Jewish ghettos and that's why it's there. It also overlooked the fact that the Taliban tended to execute those who played musical instruments.

So the Geneva conventions are products of their time and even though they were reformed in 1977, they still do not provide the protection for journalists that they should. Article 47, which allows journalists to be maltreated if they are caught in plain clothing must be repealed. Of course, it doesn't help in this sense when journalists, as it were, Geraldo-like, grab guns and fight for their side.

The British Ministry of Defense struck a campaign medal recently for soldiers in Iraq and invited journalists to apply, and shamefully I think 64 correspondents in search for a campaign medal applied. Journalists in return for the proper protection in international law should be prepared to be independent.

The second thing to be done is, of course, to apply – attempt to apply the principles in Goodwin's case and the valuable jurisprudence in European and international law to First Amendment battles brought by journalists here who are trying to protect their sources against subpoenas to testify before a Grand Jury.

It would be valuable if Branzburg is ever to be re-litigated to persuade the Supreme Court to take cognizance of the jurisprudence that has developed in Europe under Article 10 and internationally, that explains why it is part of freedom of expression for journalists to protect their source.

The next thing that I'd like to see the international media do, is to keep the pressure on at the European Court so as to encourage them to abolish insult laws and criminal libel laws. Madison's vision is still not complete in that respect, and most

notably throughout South America and throughout Europe, having journalists condemned as criminals is something that you can help to end.

Finally, and I think perhaps most difficult conceptually but most important, is to develop a conflict of law theory that will protect, sensibly, those American publications that are being hauled into court in up to 190 countries of the world. It seems to me that the correct answer to the conundrum of conflict of laws; what do you do when a plaintiff with a reputation in Victoria is libeled by a magazine that is circulated only in New York – that’s the Gutnick case – but there are all sorts of other cases that are coming through now where a newspaper or broadcasting organization which largely serves the area in which it is established and which it is domiciled, by whose laws it is developed and by where it is insured – those media being dragged into courts with a completely different system of law.

The answer seems to me to say if they are to be sued, they should be sued in their place of domicile unless they have acted so as to promote or promulgate themselves in the place of the forum. Whenever you suggest this, there’s always some plaintiff’s lawyer who will erect the specter of a libel-free zone. A sort of “press goes wild island” in which there’s no defamation law and you can get away with anything. But I think that can be taken care of in a proper conflict rule.

I don’t think that we will get this rule for many more years. It is too much to ask national courts to yield jurisdiction where there is a plaintiff who has been traduced in some article that’s been downloaded from another country by the members of his synagogue or whatever. They will insist upon trying it but then, I think for the time being, I’d be happy for a treaty on the subject to require, where this occurs, where a publisher domiciled in another country is dragged into court by a plaintiff domiciled in a

different country, to at least require that the courts of the plaintiff's country, if they are to take jurisdiction, apply the law of the defendant's domicile.

That would require countries in which American newspapers and broadcasters are sued to apply the First Amendment. I don't think there would be any better way of introducing foreign courts to the freedom of speech guarantee of the First Amendment than to make them apply the First Amendment in their own courts. Thank you very much.