

MILRC Media Law Resource Center

MEDIA LAW LETTER

Associate Member Edition

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MLRC's Annual Dinner November 7, 2007
William J. Brennan, Jr. Defense of Freedom Award
Presented to David Fanning
Panel Discussion With Documentary Filmmakers

At the annual dinner on November 7 at the Grand Hyatt in New York, MLRC presented the William J. Brennan, Jr. Defense of Freedom Award to David Fanning. Fanning was honored for his role in creating and sustaining the FRONTLINE television documentary series.

MLRC Chair Ralph Huber presented the award and made the following remarks:

“Tonight, we will be presenting the William J. Brennan, Jr. Defense of Freedom Award, which is not something we do every year. This award was established to honor those whose actions have advanced the cause of freedom of expression. And it is given in the name of the first recipient, the honorable William J. Brennan, Jr. He was an impassioned voice for the principles of free speech and the Brennan Award serves as a symbol and celebration of the principles of the First Amendment.”



MLRC Chair Ralph Huber



William J. Brennan, Jr. Defense of Freedom Award

“Our recipient tonight is David Fanning, the creator and executive producer of the PBS documentary program, *Frontline*. *Frontline* began in 1983 and since then has aired over 500 documentaries – investigative pieces – on subjects as wide-ranging as the war in Iraq to the authenticity of Shakespeare's dramas. *Frontline* is the only regularly scheduled investigative documentary series on broadcast television today. It has won all the major journalism awards out there, and not just once but many times over. It has been a consistent platform for the best independent producers in the business. It runs, week after week, documentaries that are engaging, informative and entertaining all while remaining true to the highest ideals of journalism. David Fanning was there at

the beginning. As creator of *Frontline*, he has been its guiding light since day one, marshalling not only the best in reporting but the resources and station support needed in the eclectic, even eccentric, world of public broadcasting.”

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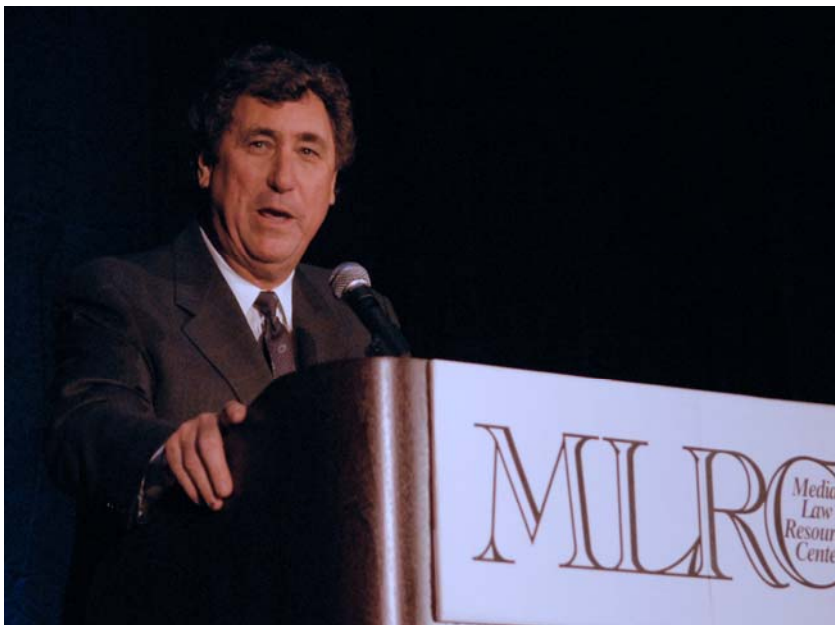
PHOTOS BY JULIENNE SCHAER

MLRC's Annual Dinner November 7, 2007

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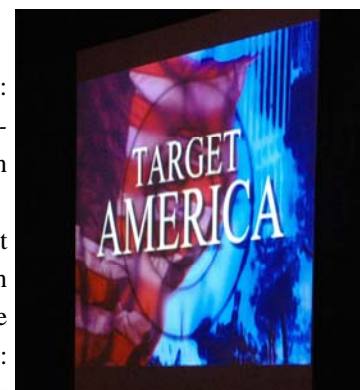
David Fanning:

“This award, in the name of a man who did more than anyone to strengthen the First Amendment, to protect the individual from the hand of government and to protect the full-throated conversation of democracy. It is humbling to share it. This honor is, of course, for Frontline and that's not any single person. It is a collective work and conscience of an enormously talented group of journalists, producers and reporters that have over 25 years done the hard work of making the documentaries.”



David Fanning

The MLRC annual dinner also featured a panel discussion entitled “Witnesses to Our Time: Independent Voices of the Documentary.” It was moderated by Judy Woodruff of *The NewsHour with Jim Lehrer* and featured David Fanning, FRONTLINE producer Lowell Bergman and documentary filmmakers Heidi Ewing and Alex Gibney.



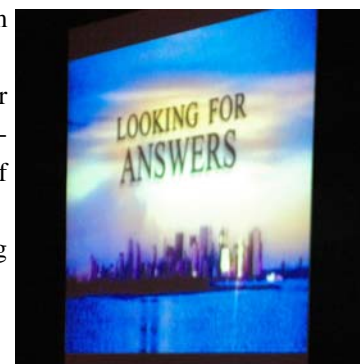
Judy Woodruff is a senior correspondent with *The NewsHour with Jim Lehrer* on PBS. She recently completed part two of the PBS documentary series, “Generation Next: Speak Up. Be Heard,” a project to interview young people in America and report on their views.

Lowell Bergman is a producer and correspondent for FRONTLINE and an investigative reporter with *The New York Times*. He is also the Reva and David Logan Professor at the Graduate School of Journalism at the University of California at Berkeley.

Heidi Ewing is a documentary filmmaker whose film credits include the 2007 Oscar-nominated film, “Jesus Camp,” and “Boys of Baraka.”



Alex Gibney is a documentary filmmaker with more than 40 films to his credit, including the 2006 Oscar-nominated film, “Enron: The Smartest Guys in the Room.”



(Continued on page 5)

(Continued from page 4)



From left: Heidi Ewing, Judy Woodruff, David Fanning, and Alex Gibney

Judy Woodruff: *“What is it that attracts you to that idea, that story? You’ve all done such accomplished work. What is it that turns you on about a story? That makes you think this is something I want to spend time with?”*

David Fanning: *“What you have to do is say, this is territory that’s interesting for us. How do we turn this over in a way that we can find and angle of vision into it? Where can we put the chisel on the rock and hit it hard and open it up in some way? That will require somebody out and doing old fashioned leg work.”*



Lowell Bergman

Lowell Bergman: *“...the expansion--technological expansion of the media in the internet and otherwise has made it impossible, in this country and other countries, to keep information from people. That’s one of the most important things that’s happened technologically. The expansion of the documentary form.”*

Alex Gibney: *“What’s really important for documentarians is to find a voice, not in a self-conscious way but in a way that finds a way of telling a story that makes the most sense for them.... When I started making the film Enron, I thought I’d lost my mind. I had broken rule number one of the filmmakers handbook, which is never make a film about accounting. But I was confident in that film because it really wasn’t about numbers. It was about people.”*



Heidi Ewing

Heidi Ewing: *“We try to go at subject matter through individual characters. Sort of, non-luminaries. Regular run of the mill people that if we hadn’t come along would never have gotten their moment.”*

Ontario Court of Appeal Recognizes Defense of “Public Interest Responsible Journalism”

Adopts Reynolds / Jameel Principles to Strengthen Press Protections

By Brian MacLeod Rogers

The Ontario Court of Appeal has ruled in favor of a *Reynolds/ Jameel* defense for “public interest responsible journalism.” *Cusson v. Ottawa Citizen*, 2007 ONCA 771 (Nov. 13, 2007). This is the first time this defense has been recognized by an appellate court in Canada.

The unanimous decision by three justices was written by Justice Robert Sharpe, a respected scholar with a strong interest in libel law even before his appointment. It is carefully reasoned and closely based on the *Reynolds/Jameel* judgments by the UK House of Lords. While not binding outside Ontario, it is certainly persuasive and is likely to prove authoritative in other provincial jurisdictions across Canada. In strong terms, the decision makes it clear that it is time for a change in the common law of libel to better protect free expression.

The adoption of the approach to public interest journalism developed by the English House of Lords in their 1999 and 2006 decisions in *Reynolds v. Times* and *Jameel v. Wall Street Journal Europe* comes a dozen years after the Supreme Court of Canada firmly rejected the *New York Times v. Sullivan* constitutional privilege defense in *Hill v. Scientology*.

This reflects an evident Canadian preference for English authority in the common law of libel and maintains the traditional approach of strict liability that keeps the onus on the defendant to establish a successful defense. Fault and falsity are presumed for any defamatory publication and need not be proven by the plaintiff. The new “public interest responsible journalism” defense, like truth and fair comment, must be proven by the defendants, with a focus on their own conduct and the public interest in publishing the story. As stated by Justice Sharpe:

As I see it, this defence represents a natural extension of the law as it has been developing in recent years, an incremental change “necessary to keep the common law in step with the dynamic and evolving fabric of our society”. It amounts to a sensible half-way house between the two extremes of the traditional common law no-fault liability on the one hand, and the traditional qualified privilege requirement for proof of malice on the other. The public interest responsible journalism defence recognizes that in relation to matters of public interest, the

traditional common law unduly chills freedom of expression but, at the same time, rejects the notion that media defendants should be afforded a license to defame unless the innocent plaintiffs can prove deliberate or reckless falsehood. It rights the common law imbalance in favour of protection of reputation and creates a proper balance between that value and freedom of expression.

Background

The case involved a series of articles published following the September 11, 2001 attacks. The plaintiff was an Ontario Provincial Police (“OPP”) officer who went to New York City with his pet dog and took part in canine search operations at Ground Zero. When he refused to return to duty, claiming he was providing essential help, OPP officials termed him a “renegade,” and a media battle ensued, with a great deal of public sympathy shown toward the officer, Danno Cusson.

Intrigued that there might be more to the story, the *Citizen* investigated it. New York police officers at the scene were interviewed and said they had been led to believe that Cusson was a trained canine officer with the Royal Canadian Mounted Police. In fact, neither he nor his dog had had formal training.

During a six-week jury trial in March and April 2006, five New York police officers testified in support of statements in the stories. Unusually, the trial was bilingual, and judge and jury spoke both French and English; the plaintiff spoke French as his first language although the *Citizen* is an English-language newspaper. Faced with some 151 questions on over 30 passages from the articles, the jury found the newspaper had proved most, but not all, of the libel stings were true and denied a defence of fair comment.

Damages of \$100,000 were awarded against the newspaper and another \$25,000 against an OPP superintendent quoted in the story – even though no malice was found.

The newspaper had argued a “traditional” qualified privilege defense, i.e., that the articles were in the public interest and there was a reciprocal duty and interest for their publication. The judge rejected the defense, finding there was no “compelling moral or social duty” for the articles.

(Continued on page 7)

Ontario Court of Appeal Recognizes Defense of “Public Interest Responsible Journalism”*(Continued from page 6)***Court of Appeal Analysis**

The Court of Appeal also rejected this defense and, because it had not been argued at trial, ruled against allowing the defendants the new *Reynolds/Jameel* defense. While admitting that *Jameel* had not yet been decided at the time of trial, the court held *Reynolds* had really changed the law in England by enunciating the responsible journalism standard. The court held the newspaper was bound by its choice to rely on the traditional qualified privilege defense and would not been given another “bite at the cherry”. This result echoed the one in *Reynolds* itself, where the *Times* was denied the new defense on the facts of that case. Certainly, the result seems most unfair, and consideration of an appeal to the Supreme Court of Canada is currently underway.

The court set out the “non-exhaustive list of 10 factors” that Lord Nicholls described in *Reynolds*. However, consistent with *Jameel*, the court held that the defense should not be adopted in a “slavish or literal fashion” but rather in a “manner that best reflects Canada’s legal values and culture”.

The defence rests on the broad principle that where a media defendant can show that it acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear, it has a defence even if it got some of its facts wrong. That standard of responsible journalism is objective and legal, to be determined by the court with reference to the broader public interest. The non-exhaustive list of 10 factors from *Reynolds*, applied in the manner directed in *Jameel*, provides a useful guide. The defence is plainly intended to shift the law of defamation away from its rigidly reputation-protection stance to a freer and more open discussion on matters of public interest and should be interpreted accordingly...In assessing whether the media has met this standard, the court will consider the 10 factors outlined by the House of Lords in *Reynolds*, or such of them – or any other factors – as may be relevant in the circumstances. As *Reynolds* and subsequent authorities have noted, these factors are not a list of hurdles that the media defendants must negotiate; rather, they are indicia of whether the media were truly acting in the public interest in the circumstances.

The new defense finally brings Canada (or certainly the Province of Ontario) into the mainstream of developments in libel law more protective of press freedom. While the victory proved pyrrhic for the *Ottawa Citizen*, media interveners (*The Globe and Mail*, Canadian Newspaper Association and Ad IDEM/Canadian Media Lawyers Association) helped pave the way for future cases. The defence may soon be properly christened, with a number of trials and appeals pending that will raise the issue.

Brian MacLeod Rogers, Barrister and Solicitor, in Toronto was co-counsel for the media interveners (The Globe and Mail, Canadian Newspaper Association and Ad IDEM/Canadian Media Lawyers Association) with Peter Jacobsen and Adrienne Lee of Bersenas Jacobsen Chouest Thomson Blackburn LLP. Rick Dearden and Andrew Kidd of Gowling Lafleur Henderson LLP acted for the Ottawa Citizen defendants at trial and on appeal. Ron Caza and Marie-France Chertrand of Heenan Blaikie LLP acted for the plaintiff, Danno Cusson.

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Supreme Court of Canada to Hear Case on Fair Comment Defense to Libel

Media Coalition Argues for Broadening Defense

By Brian MacLeod Rogers

For the first time in nearly 30 years, the Supreme Court of Canada will consider the libel defense of “fair comment” in a case from British Columbia – *WIC Radio Ltd. and Mair v. Simpson*. The appeal will be heard on December 4, 2007.

In *WIC Radio*, a well-known, outspoken radio commentator, Rafe Mair, delivered his editorial of the day strongly criticizing the position taken by the plaintiff as a family-rights/family-values activist in opposing the teaching of tolerance towards homosexuality in the school system, with comments such as:

The trouble is people who don't want violence often unwittingly provoke it, and Kari Simpson is, thank God, permitted in our society to say exactly what she wishes, but the other side of the free speech coin is a public decent enough to know a mean-spirited, power mad, rebel rousing and, yes, dangerous bigot when they see one.

The case was tried by a judge alone. The judge dismissed the claim. She ruled that a key implied meaning for the broadcast was that the plaintiff, Kari Simpson, “would condone violence” but found that the defense of fair comment applied and that the plaintiff had failed to prove malice as the dominant motive.

However, the BC Court of Appeal reversed, using particularly opaque reasoning. *Simpson v. Mair and WIC Radio Ltd.*, 2004 BCSC 754 (June 4, 2004). After pointing out that fair comment could not protect “imputations of fact”, the court held:

The learned judge's conclusion...as to the defamatory meaning of these words excludes any further consideration of fair comment because there is no evidentiary foundation for a finding that the appellant would condone violence.

This might mean that the imputation was either an unproven statement of fact or a comment unsupported by facts. Whatever the interpretation, this point had not been raised on the appeal nor addressed by either the court or counsel during oral argument. One of the grounds on which the Supreme Court of Canada granted leave for the appeal was whether an appellate court should reverse a decision on grounds that were neither raised nor argued on the appeal.

This will be the first common law libel appeal heard by the

Court since it rejected *New York Times v. Sullivan* in *Hill v. Scientology* in 1995. The last case involving fair comment was decided in 1979 in *Cherneskey v. Armadale Publishers*. A majority of the Court then imposed a subjective test of “honest belief” in published comment, which required provinces to pass legislation in order to permit letters to the editor and the like to be safely published in the media.

Since the case offers a rare opportunity to re-examine the traditional defense of fair comment, eight media organizations successfully sought leave to intervene jointly in the case as a “Media Coalition,” and both the Canadian Civil Liberties Association and the B.C. Civil Liberties Association have also intervened to raise constitutional arguments about freedom of expression.

The Media Coalition sees this case as an opportunity to clarify and strengthen law protecting free expression and, in particular, opinions and “value judgments” about matters of public interest. Such expression is at the core of the *Canadian Charter of Rights and Freedoms* protection for free speech, and yet too many judges and juries are taking a narrow approach to what constitutes an opinion and applying a “fairness” standard that has no place in a democratic society's need for vigorous public debate.

The defense should be as broad as possible and be termed “comment,” dropping the adjective “fair” to avoid misunderstanding. The Supreme Court of Canada's previous rejection of a public interest qualified privilege defense for the media means that the defense of “comment” is particularly critical to protecting discussion about political matters and other topics of public interest in Canada. The question is whether the court will see this case as a chance to set the law straight.

Brian MacLeod Rogers (Toronto) is counsel for intervener, Media Coalition (Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, British Columbia Association of Broadcasters, RTNDA Canada/The Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists and Canadian Journalists for Free Expression). Dan Burnett of Owen Bird (Vancouver) is counsel for the Appellants, WIC Radio Ltd. and Rafe Mair. Lianne Potters acts for the plaintiff Kari Simpson. Robert Holmes of Holmes & King (Vancouver) represents intervener, British Columbia Civil Liberties Association, and Professor Jamie Cameron (Osgoode Hall Law School of York University) with John McCamus and Matthew Milne-Smith of David Ward Phillips & Vineberg LLP (Toronto) acts for the Canadian Civil Liberties Association.

Sullivan v New York Times in England a Historical Perspective

By David Hooper

Witnessing the award of the William J Brennan Jr. Defense of Freedom Award to David Fanning a few weeks ago reminded me of the letter that I have received from Justice Brennan on 17 March 1993, a copy of which is reproduced below.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.
RETIRED

March 17, 1993



David Hooper, Esq.
Biddle & Co.
1 Gresham Street
London EC2V 7BU
England

Dear Mr. Hooper,

Thank you very much for your note of March 8 and the enclosed copy of the *Derbyshire* decision. I have found the opinion most interesting and gratifying.

Sincerely,

I had sent the judge a copy of the decision of the House of Lords in *Derbyshire County Council -v- Times Newspapers Limited* [1993] 1 All ER 1011 in which I had been involved. It was the first case in which serious consideration had been given in Great Britain to *New York Times Co. v. Sullivan*, 376 US 254 (1964).

The Derbyshire case marked the recognition of the importance of the free discussion of public affairs unfettered by over-harsh and oppressive libel laws. It was the case that laid the foundation for the subsequent case of *Reynolds -v- Times Newspapers Ltd* [2001] 2AC 12 and *Jameel -v- Wall Street Journal* [2007] EMLR 14. It is a case that rewards examination to see the dichotomy but also such similarities as exist between the First Amendment and the British Common Law approaches.

The Sunday Times had written a series of articles questioning the propriety of links between the Council's pension fund and companies run by a local businessman. The headlines indicate the nature of the articles.

“REVEALED: SOCIALIST TYCOON’S DEALS WITH A LABOUR CHIEF”

and

“BIZARRE DEALS OF A COUNCIL LEADER AND THE MEDIA TYCOON”

The tycoon himself received libel damages from the paper but it was not all plain sailing and he was later, like a number of distinguished UK libel litigants, to end up in jail convicted of a number of serious sexual offences. The interest of the case, however, was that the Council, following a dubious ruling in *Bognor Regis UDC -v- Campion* [1972] 2 All ER 61 was suing for libel. In *Bogner* a local Council received damages of £2,000 over a leaflet savagely attacking it. (This case had made Bognor Regis well-known to law students of the time. The town was otherwise better known for featuring in the reputed last words of King George V who was advised by his doctor to recuperate at the seaside town. “Bugger Bognor” observed the King before going to meet his maker.)

The *Bognor* decision conflicted with the only other attempt in the previous 100 years on the part of a Council to sue for libel, *Manchester Corporation -v- Williams* [1891] 1QB 94 where in similar circumstances, namely, a local citizen writing to a newspaper accusing his Council of bribery and corruption, the claim of the Council had been struck out.

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Sullivan v New York Times in England a Historical Perspective

(Continued from page 11)

House of Lords Decision in *Derbyshire*

In argument before the House of Lords in *Derbyshire* there was considerable discussion of the *Sullivan* case and it had some impact on the decision of the House of Lords. In fact, the House of Lords adopted the approach of the Supreme Court of Illinois in *The City of Chicago v. Tribune Co.*, 307 Ill 595 (1923) where Chief Justice Thompson observed in ruling that the City could not maintain an action of damages for libel

“Every citizen has a right to criticise an insufficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements and where the public service or due administration of justice is involved he shall have the right to speak his mind freely”.

While it was noted by the House of Lords that the decision in the *Chicago* and *Sullivan* cases related most directly to the provisions of the American Constitution concerned with securing freedom of speech, there was a striking endorsement of the principles of *Sullivan* when it was observed that

“The public interest considerations which underlay (those decisions) are no less valid in this country. What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important.”

This was an important recognition of the chilling effect of libel actions and it was elsewhere noted in the judgment

“In a free, democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism”.

The case was also significant for the cop-out approach which was followed in a number of other cases over the next decade that there really was no very much difference between Article 10 of the European Convention of Human Rights and the English Common Law regarding freedom of speech. This came as news to a number of lawyers but it got around the thorny problem of the fact that at the time the United Kingdom had adhered to the Convention but had not enacted it into domestic law and, of course, this predated the Human Rights Act 1998. It was therefore noted that

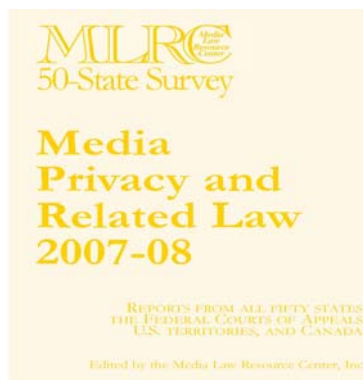
“In the field of freedom of speech there was no difference in principle between the English law on the subject and Article 10 of the Convention”.

Because of the recognition of the importance of the *Sullivan* case and the reference to the chilling effect of libel actions, I sent the Judgment to Justice Brennan. Only in the United States would one receive such a gracious response signed by a man of such distinction under the signature Wm J Brennan Jr. We would have given him at least a peerage and a seat in the House of Lords.

David Hooper is a partner at Reynolds Porter Chamberlain.



50-STATE SURVEYS



MEDIA PRIVACY AND RELATED LAW

(published annually in July)

The 2007-08 edition is currently available.

TOPICS INCLUDE: False Light • Private Facts • Intrusion • Eavesdropping • Hidden Cameras • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Relevant Statutes

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Book on Police Corruption Protected by Qualified Privilege Defense

By Amali de Silva

There has been speculation following the *Jameel v Wall Street Journal* case last year that the UK courts would still seek to interpret the *Reynolds* defense of qualified privilege very restrictively. However, in a momentous victory for media defendants, the Court of Appeal has held that allegations made in a book are protected by the *Reynolds* defense. *Charman -v- Orion Books* [2007] EWCA Civ 972 (Ward, Sedley, Hooper, JJ.).

Background

In June 2003, The Orion Publishing Group (Orion) published a book by Graeme McLagan, an experienced and respected journalist with a long-standing interest in the issue of police corruption. The book was entitled "Bent Coppers - The inside story of Scotland Yard's battle against Police Corruption" and related the story of Scotland Yard's attempts to eradicate corruption in the force.

Michael Charman, a police officer, sued Orion and McLagan for libel in respect of a number of statements made in the book. The defences put forward by the defendants included *Reynolds* qualified privilege and statutory qualified privilege (the latter in respect of reports in the book of a House of Commons adjournment debate and a criminal trial).

At interlocutory hearings, the trial judge ruled that the case should be heard by judge alone, and that the qualified privilege defences should be tried first. He also ruled that the book did not mean that Charman was guilty of corruption, but that there were "cogent grounds to suspect that Mr Charman abused his position as a police officer by colluding with Brennan in the commission of substantial fraud by Geoffrey Brennan from whom he and Mr Redgrave received corrupt payments totalling £50,000."

Trial of Qualified Privilege

The trial took place in June 2006. The trial judge, Mr. Justice Gray, accepted that the problem of police corruption was a matter of grave public concern and therefore of legitimate public interest but he found in favour of Charman, holding that the qualified privilege defenses failed for the following reasons:

The report was not neutral; McLagan had partially adopted a serious charge against Charman and failed to report the facts fully, fairly and disinterestedly.

The defendants had failed to show that they were acting responsibly in communicating the information contained in the book about Charman to the public.

The reporting of the adjournment debate in the House of Commons was protected by statutory privilege. However, the report of the criminal trial as a whole was skewed so as to give the readers a false and unfair impression of the allegations against Charman and was therefore not protected.

The defendants were granted permission to appeal on the basis that the case raised "important issues about the steps required of an author and publisher in order to qualify for a defence of the "Reynolds" type of qualified privilege, when the publication question is a book and not a newspaper article, where the topic is one of public interest but is also complex, and where the author has made attempts to obtain the claimant's side of the story."

Court of Appeal Decision

The appeal was heard in March 2007 and judgment handed down in October. Lord Justices Ward, Sedley and Hooper were unanimous in allowing the defendants' appeal, ruling that the passages in the book complained of by Charman were responsibly reported and protected by *Reynolds* qualified privilege. The court also removed once and for all any doubts about whether *Reynolds* qualified privilege could apply to a book.

The court placed great emphasis on the House of Lords decision in *Jameel v Wall Street Journal Europe SPRL* (No. 3), stating that "Jameel has made an important contribution... for it reiterates the Reynolds principles but also clarifies their application."

The court reiterated that if the public interest was engaged, the report would be privileged if, considered as a whole, it satisfied the test of responsible journalism. However, the test of responsible journalism is "not intended to present an onerous obstacle to the media in the discharge of their function."

(Continued on page 12)

Book on Police Corruption Protected by Qualified Privilege Defense

(Continued from page 11)

Importantly in this case, the court stated that in assessing the responsibility of the report weight had to be given to the professional judgment of the journalist in evaluating material: “it is his [the journalist’s] assessment of that evaluation which is important, not the judge’s own evaluation of the material conducted with the benefit of hindsight and with the sharp eye of a trained lawyer.” The court considered that the trial judge erred in not making “sufficient allowance... for McLagan’s honesty, his expertise in the subject, his careful research, and his painstaking evaluation of a mass of material.”

In addition, the court clarified what was meant by “balance” in the context of Reynolds qualified privilege:

Balance, it should be appreciated, does not mean giving equal weight or credence to intrinsically unequal things – for example a telling accusation and an evasive reply... A more selective or evaluative account is quite capable of staying within the bounds of responsible journalism.

Neutral Reportage

The Court also provided helpful clarification of the “neutral reportage” defense. It stated the test to be as follows:

the defence [of neutral reportage] will be established where, judging the thrust of the report as a whole, the effect of the report is to not to adopt the truth of what is being said, but to record the fact that the statements which were defamatory were made... The protection is lost if the journalist adopts what has been said and makes it his own or if he fails to report the story in a fair, disinterested, neutral way.

Lord Justice Ward described it as the difference between a piece of investigative journalism where the journalist was “acting as the bloodhound sniffing out bits of the story from here and there not as the watchdog barking to wake us up to the story already out there.”

In this case, the appeal court agreed with the trial judge that neutral reportage did not apply.

Conclusion

When the House of Lords judgment in *Reynolds* was handed down in 1998, the new defense of public interest qualified privilege which it formulated was hailed as an important tool with which media defendants could defend freedom of expression on matters of genuine public interest which were responsibly reported.

In reality, however, the lower courts interpreted the defense so narrowly that it has rarely succeeded. The more liberal approach taken in *Jameel* and this case is therefore most welcome, showing “how far the courts have gone in releasing the shackles on the freedom of expression afforded to the media in matters of public interest.”

This means that the media can again give serious consideration to the publication of investigative journalism into matters of public interest, without fearing that over-zealous judges acting with the benefit of hindsight will second guess their editorial decisions several years later. Hard-hitting journalism is a viable proposition once more.

Caroline Kean and Amali de Silva of Wiggin LLP and Adrienne Page QC, Matthew Nicklin and Adam Speker of 5RB represented the defendants in this matter. Louis Charalambous of Simons Muirhead & Burton and Hugh Tomlinson QC, Matrix Chambers, and Lucy Moorman, Doughty Street Chambers, represented the claimant.



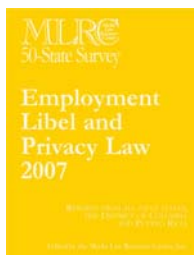
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The Other Side Of The Pond: UK Media Law Update

By David Hooper

Charman -v- Orion Books [2007] EWCA Civ 972

As discussed in more detail in this issue of the *MediaLawLetter*, *Charman* is a decision of considerable importance to publishers for whom, until the House of Lords decision in *Jameel*, the *Reynolds* defence had been a costly mirage. Messrs Justices Eady and Gray would inevitably find that there was some further step that the publisher could have taken to investigate the facts including delaying the publication date, when unlike newspaper editors they did not have the news deadline of the following day to justify publication.

In *Charman* the Court of Appeal felt that Mr Justice Gray had failed to look at the big picture and had given insufficient deference to the professional judgment of the author and had applied judicial hindsight to his evaluation of the editorial process. The Court of Appeal were satisfied that Graeme McLagan's book "*Bent Coppers: The Inside Story of Scotland Yard's Battle Against Police Corruption*" was a work of careful research and painstaking evaluation carried out honestly by a writer with considerable expertise on the subject of police corruption. The tone of the book was one of objective investigative journalism and the court emphasised that any lingering doubts should be resolved in favour of publication.

This should be a significant turning point for publishers. From a defence perspective the *Reynolds* defense is a particularly helpful weapon, as it significantly increases the risk for a claimant, who now has to factor in the unknowns of exactly what research an author such as Graeme McLagan would have undertaken. Previously the claimant faced a much lesser risk namely evaluating whether or not the author could prove that the defamatory material was true or fair comment.

There are two interesting footnotes to the case. The Appellate Courts have now found fault with the approach of two leading libel judges of first instance in their approach to such cases which distinctly favoured claimants. The pendulum should now swing back in favour of defendants. The case also threw up another controversial instance of the Police Federation looking after its own and throwing honest coppers' money at unmeritorious libel claims. With some understandable bitterness Mr McLagan whose life had been dogged by this case for four years expressed surprise that the Federation should support someone like *Charman* who had resigned following internal disciplinary proceedings.

not taken until the paperback edition had been published. A little *schadenfreude* is in order at the news that the Police Federation face a liability of £2 million in legal costs.

Prince Radu of Hohenzollern -v- Houston [2007] EWHC 2328

There is a preliminary issue of *Reynolds* privilege to be decided in this claim where the Prince has sued a magazine which suggested that he might be an impostor who had falsely passed himself off as a royal prince. Very sensibly Mr Justice Eady has decided that this issue is really a matter of evaluation for a judge and that in accordance with principles of case management it is best decided by a judge rather than calling in a jury to make various findings of fact.

The *Loutchansky* case highlighted the complexities and uncertainties of having to get juries to decide stray issues of fact about the quality of the journalism. This decision will result in the saving of costs and will help build up case law as to what constitutes responsible journalism.

An interesting footnote about this case is that both sides are acting under a Conditional Fee Agreement, the result of which may make the case virtually unseizable as the lawyers have to establish that they were successful in the litigation to be paid!

Sheffield Wednesday Football Club -v- BBC [2007] EWHC 2375

This case highlights an area of law which may become increasingly important in internet libel litigation. Claimants can, prior to commencing litigation, obtain what is known as a Norwich Pharmacal Order [1974] AC 133 prior to launching litigation to obtain disclosure of the identity of persons responsible for posting anonymously defamatory material on a website, see *Totalise plc -v- The Motley Fool Limited* [2001] EWCA Civ 1897.

The website operator or ISP will normally have their legal costs paid by the claimant. The court will normally make an order for disclosure provided that it is satisfied that the allegations are serious and that the claimant has a strong claim. Here these conditions were satisfied where there were allegations of greed and untrustworthiness against the chairman of a football club on a BBC sports website. These were not, of

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The Other Side Of The Pond: UK Media Law Update

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course, the views of the BBC, but the Corporation was required to provide information which would enable the person who had posted the material under the pseudonym Enchanted_Fox.

Jones -v- Associated Newspapers Limited [2007] EWHC 1489

In English libel litigation there is a considerable premium on making settlement offers which turn out to have been more favourable than what the claimant in fact receives at trial. The claimant can likewise under Part 36 of the Civil Procedure Rules achieve the same result by setting out the terms upon which he or she would be willing to resolve the case.

In this interesting decision a Member of Parliament was awarded £5,000 damages having eleven months earlier turned down a settlement offer of £4,999 plus an unqualified apology. Did that extra pound mean that the MP had done better than what he had been previously offered? No, said Mr Justice Eady. He would have been better off taking the £4,999 and receiving an unqualified apology.

In a contested libel action a successful claimant has to rely simply on the vindication of the jury's financial award rather than an apology. He does not receive an apology as of right. That is one of the key advantages of a negotiated settlement, namely that the claimant can be vindicated by an apology in a Statement in Open Court. In this particular case the MP had been subjected to some fairly bruising cross-examination about an incident which had not really enhanced his reputation.

An interesting undercurrent was that additionally Mr Justice Eady was not attracted to the idea of ordering indemnity costs plus interest on those costs which could amount to 10% over base rate where there was a conditional fee agreement. Not only would that produce an order for costs which might be disproportionate but there was no real need to award interest as the Claimant had not had to pay legal costs as the action proceeded and therefore was not being kept out of his money.

Murray -v- Express Newspapers Limited [2007] EWHC 1908

There is an apparent discrepancy between the comments of Baroness Hale in the *Campbell -v- MGN* case and the decision in *Von Hannover* in the European Court of Human Rights as to whether it is lawful to publish photographs of individuals going about routine everyday activities in public places when there is no evidence that the taking of the photographs constituted harassment or caused distress.

Baroness Hale had indicated that taking a photograph of an individual popping out to collect a pint of milk would be unlikely to infringe the laws of privacy. The European Court had taken the contrary view that such photographs of a person going about their normal daily life could fall within the scope of their private life.

In *Murray*, Mr Justice Patten supported the Anglo-Saxon view notwithstanding the fact that although the photograph had been taken in a public place, namely an Edinburgh street, it had been taken covertly and with a long lens. Furthermore, the photograph was of the 18 month old son of J. K. Rowling who had studiously protected her son's privacy. There was, however, no evidence of harassment or distress and the judge was of the view that an individual engaged in innocuous routine activity in a public place has no expectation of privacy. A similar conclusion has been reached in New Zealand, *Hosking -v- Runting* 2005 INZLR 1.

Leave to appeal has been given and UK lawyers await the result with interest. The case is of particular interest for its analysis of the claims which can be brought in respect of such matters under the Data Protection Act 1998.

Racial and Religious Hatred Act 2006

This legislation came into force on 1 October 2007 and amends Section 29 Public Order Act 1986. It punishes using threatening words or behaviour intending to stir up racial or religious hatred. The legislation has the worthy aim of extending protection to all religious groups, but it was fortunately toned down on freedom of speech grounds when it had been intended to extend the legislation to behaviour or words which merely abused or insulted religious groups.

The Act is a salutary reminder of the minefield that can be entered once writers produce works such as *Satanic Verses*. There is an interesting freedom of speech defence built into the Act which one hopes to see replicated elsewhere in similar legislation.

Terrorism Legislation

As from 1 October 2007 there is a further addition to the armoury of counter-terrorism legislation which could impact on news gatherers. Section 49 under Part 3 of the Regulation of Investigative Powers Act 2000 is implemented with effect from 1 October 2007 which can require the disclosure of

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The Other Side Of The Pond: UK Media Law Update

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decryption keys with a refusal carrying five years imprisonment if the matter concerns terrorism or national security or two years in other cases.

Data Protection

This is an area of increasing relevance to the law of privacy. The Information Commissioner has produced various guidance which indicates that he is taking a wider view of the interpretation of personal data than did the Court of Appeal in *Durrant v- Financial Services Authority* [2004] FSR 28. This can be seen in the Working Party's Opinion 4/2007 on the concept of personal data which was adopted on 20 June 2007. A further indication of his thinking is to be found in the

consultation on a new framework Code of Practice for Sharing Personal Information which was published on 13 October 2007. Details can be found on the Commissioner's website www.lco.gov.uk.

Worldwide Press Freedom Index

At the top of the lists are Iceland, Norway and Estonia. The United Kingdom is in 24th place (out of 169 which is the position occupied by Eritrea). The land of the First Amendment sits in 48th place. Perhaps it will do better when there is a Federal Shield law and fewer journalists are sent to prison by the US courts.

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



First Amendment Speakers Bureau

Publishing Online

The MLRC Institute will soon roll out a second topic for presentation through its First Amendment Speakers Bureau: Publishing Online.

We are looking for volunteers to give talks and help organize presentations.

This topic will address:

- the media's use of the Internet
- news organizations' interaction with their audience online
- the use of content submitted by readers and viewers
- blogs, whether kept by media staff, readers or others
- liability for defamation for statements made online
- copyright and privacy law

Speakers will have access to a turn-key set of presentation materials prepared by the MLRC Institute. As with talks on the reporter's privilege, the first topic taken up by the Speakers Bureau, presentations on publishing online will be done at colleges, high schools, bookstores, and libraries, and before rotary clubs, chambers of commerce and other civic organizations.

The MLRC Institute has received a grant from the McCormick Tribune Foundation to develop and administer the First Amendment Speakers Bureau.

If you are interested in joining the Speakers Bureau or in helping to organize a presentation in your area, please contact

John Haley
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Supreme Court of Indonesia Awards Former President Suharto \$108 Million Against TIME Magazine

By Robin Bierstedt

The Supreme Court of Indonesia ruled against TIME magazine in a libel suit brought by former President Suharto. It threw out two lower court decisions in TIME's favor and awarded Suharto damages in the amount of one trillion rupiah, or approximately \$108 million.

Background

The lawsuit arises from a May 24, 1999 cover story in TIME Asia entitled "The Family Firm" (the cover line is "Suharto Inc.") that detailed how Suharto and his six children amassed a \$15 billion fortune in "cash, property, art, jewelry and jets" amid a climate of corruption, collusion and nepotism during Suharto's 32-year rule. Suharto sued for libel in July 1999, naming TIME and six journalists, and demanded \$27 billion in damages.

The article is 14 pages long but Suharto challenged just four parts: (1) the "Suharto Inc." cover line; (2) artwork accompanying the article that shows Suharto embracing a house (belonging to one of his children); (3) a quote to the effect that Suharto doesn't pay his fair share of taxes; and (4) an allegation that Suharto transferred \$9 billion from a Swiss bank to one in Austria.

When he brought his lawsuit, many observers assumed that a foreign publication would not be able to get a fair trial in Indonesia when it was up against a former President who had appointed the judges hearing the case. Yet, for the first two rounds at least, that was not the case.

The trial began in March 2000 with a series of one-day hearings that took place every few weeks. TIME put on several witnesses, including journalism and linguistic experts who testified that the magazine had been responsible in reporting the story. Suharto put on no witnesses.

In June 2000 the three judge trial panel found for TIME. The court said that the article was published in the public interest and that Suharto had presented insufficient evidence to support his claims. They also said that TIME had followed accepted journalistic practices and had "covered both sides."

An intermediate appellate court affirmed TIME's trial victory in March 2001, and the case has been pending in the Supreme Court for the last six years.

The Supreme Court's Judgment

When TIME won at trial, the decision was hailed as a victory for the rights of a free press in Indonesia. The Supreme Court's decision, on the other hand, has aroused considerable outrage in Indonesian circles, where it is viewed as a significant setback to democratic freedoms.

The ruling against TIME was made by a panel of three Supreme Court judges. The presiding judge, German Hudiarto, is a two star retired general of the army who once said he is indebted to Suharto because if it weren't for Suharto, he would never have been appointed a two star general.

While the Court's opinion is lengthy, it gives little rationale for either the ruling itself or the amount of the damages. The crux of the opinion is the following:

since the picture and writing...has been widely circulated, and turns out to have gone beyond the limits of decency, diligence and prudence, so that the act of tort that slander the reputation and honor of the Plaintiff as the Great General of the Indonesian Army (Retired) and as former President of the Republic of Indonesia, thus the civil accountability...can be granted according to sentiments of appropriateness and fairness...

The one trillion rupiah award is for "non-material" damages, to restore good name, reputation and good will. So-called "material" damages were rejected because they were not itemized in detail. In addition to monetary damages, the Court ordered TIME to publish an apology to Suharto three consecutive times in each of its editions and 10 other publications.

Fortunately in Indonesia there is an opportunity to challenge a Supreme Court ruling, which can be done once only and is limited to certain designated grounds. TIME will file a petition for review on the grounds of "manifest error" and new evidence. The petition will be considered by a different panel of judges. There is no oral argument before the Court.

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Supreme Court of Indonesia Awards Former President Suharto \$108 Million Against TIME Magazine

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Suharto's Standing in Indonesia

The Indonesian government has pursued its own cases against Suharto. In 2000, two years after Suharto fell, the government then headed by Abdurrahman Wahid decided to prosecute Suharto for corruption. Wahid publicly said he thought Suharto and his family had appropriated between \$45 and \$75 billion. But Suharto's doctors claimed he was too ill to stand trial and in 2006 the corruption charges were dropped. In July 2007 the government filed a civil suit against one of Suharto's charity foundations for cheating the treasury, asking for

damages of \$1.5 billion.

On the international front, the World Bank and United Nations recently issued a joint Stolen Asset Recovery (StAR) Initiative, designed to fight global corruption. Its report, released last month, called Suharto the world's biggest embezzler of state funds, having stolen between \$15 and \$35 billion.

Robin Bierstedt of Time Inc., along with her colleagues Andy Lachow, Nick Jollymore and Angus Emmerson, represent TIME in this case. TIME's Indonesian counsel is Mulya Lubis of Lubis, Santosa & Maulana in Jakarta.

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A COMPARATIVE EXPLANATION AND CRITIQUE OF ECHR'S DEVELOPING CASE LAW ON PRIVACY AND LIBEL

By David S. Korzenik and Mona Houck

The Bulletin is available online at www.medialaw.org

Police Raid of Journalist's Home Violated Article 10, ECHR Rules

Major Victory for Press Freedom in Europe

At press time, the European Court of Human Rights released a decision in favor of journalist Hans-Martin Tillack on his complaint over a police raid of his home and office. *Tillack v. Belgium* No. 20477/05 (ECHR Nov. 27, 2007).

Background

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

Tillack had published a number of articles criticising OLAF. The articles were based on leaked information, and OLAF claimed, despite the lack of any evidence, that Tillack had obtained the information by bribing an EU official. Its real goal, however was to identify the leak in its administration by obtaining access to Tillack's files. Tillack was never charged with bribery or any other criminal offence.

After his files were seized, Tillack challenged the Belgian authorities' action before the national courts to protect his sources and to have his files returned. He also filed a petition with the European Court of First Instance (CFI) for interim measures to prevent OLAF from obtaining any information or documents from the Belgian police. These motions were denied.

Tillack then filed a petition with the European Court of Human Rights in Strasbourg alleging a violation of Article 10, the right to free expression.

ECHR Judgment

In its judgment, released in French, the Court first affirmed the principle that the protection of journalists' sources is fundamental to press freedom. It ruled that under the facts the search and seizure of Tillack's files was an unjustified interference with his Article 10 right of free expression. The court awarded Tillack damages of €10,000 and €30,000 in costs.

Next month's MediaLawLetter will have a more detailed report on the decision from Tillack's counsel at White & Case.

Ian Forrester, QC, Thierry Bosly, Werner Derijcke, Christoph Arhold, Nathalie Flandin, Juliette Siaens and Muriel Alhadeff of White & Case in Brussels represented Hans Martin Tillack.

French Court Dismisses Case Against Wikipedia Over Encyclopedia Entry

In an interesting ruling, a French court dismissed a privacy claim against user-generated online encyclopedia Wikipedia over an anonymously posted entry that described plaintiffs as gay activists. The court found that under the circumstances, Wikipedia was not responsible for content created by third parties.

According to news reports, civil court Judge Emmanuel Binoche ruled that Wikipedia is a webhost within the meaning of France's e-commerce law (Loi No. 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique). Under this law, providers of online "communi-

cation services" are not responsible for third party content unless they have actual knowledge of illegal content – or fail to remove such content promptly upon learning of it. "Web site hosts," the judge ruled, "cannot be liable under civil law because of information stored on them if they do not in fact know of their illicit nature."

The plaintiffs had claimed that they complained to Wikipedia by e-mail and that it failed to promptly remove the posting. The judge ruled that Wikipedia removed the posting in a timely manner once it had actual knowledge of the complaint.

New Zealand Supreme Court Rules Public Interest Trumps Privacy in Video Confession Case

In an important decision, the Supreme Court of New Zealand ruled that public interest in the administration of justice trumped privacy rights in a case involving the broadcast of a suppressed murder confession. *Rogers v. Television New Zealand Limited* (SC 68/2006) [2007] NZSC 91.

In a 3-2 decision, the Court affirmed a decision allowing Television New Zealand (TVNZ) to broadcast a police videotape of a confession that had been suppressed at trial. The underlying facts were compelling. In 1994, a woman was brutally murdered. In 1995, Lawrence Lloyd was found guilty of manslaughter and spent seven years in prison. That conviction was later set aside based on evidence that Lloyd's nephew, Noel Rogers, committed the crime.

Rogers was charged with the murder and appeared to confess to the crime in a videotaped statement where he described in detail how he cut the victims throat "like a sheep." That confession was later ruled inadmissible and Rogers was found not guilty by a jury. The police gave a copy of the videotape to TVNZ. Rogers filed suit against TVNZ to enjoin it from broadcasting the tape arguing that it would violate his right to privacy.

Although the majority decision expressed some criticism of the police for releasing the video, it found that

had no relevance to whether the tape could be broadcast. Instead, the public interest in the open administration of justice outweighed any claimed privacy interest. "Any public perception that the courts are adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system," the court stated. Moreover, the majority rejected the argument that the media could "misuse" the tape.

"Concerns were also expressed that TVNZ might wish to present the video or selected aspects of it in a sensationalist rather than a dispassionate and balanced way. That argument invites the Court both to speculate and to enter into the murky waters of presentational censorship and editorial control. I would decline the invitation. ... Matters of presentational and editorial judgment should be left where they belong. If it transpires that there are concerns about how the videotape has been used, they can be addressed by recognised causes of action or by reference to the Broadcasting Standards Authority."

TVNZ was represented by William Akel, of Simpson Grieson in Auckland.

Entertainment Law: California Jury Rejects Writer's Breach of Implied-in-fact Contract Claim Against Jim Jarmusch Movie

By Vincent Cox

On September 28, a Los Angeles federal court jury returned a defense verdict rejecting a writer's breach of implied-in-fact contract claim against the producers of the 2005 feature film "Broken Flowers." *Martin v. Focus Features, LLC*, No. CV 06-1684 (C.D. Cal.) (Lew, J.).

The case illustrates the many reasons why producers, writers, and production companies go to such great lengths to avoid entering into implied-in-fact agreements to pay for the disclosure of ideas.

A party who willingly accepts the disclosure of ideas from someone who has clearly conditioned the disclosure upon the consent by the recipient of the disclosure to pay the disclosing party the reasonable value of those ideas has entered into an implied-in-fact contract. This is the most important exception to the general principle that ideas are "free as the air."

Prior to 1978, ideas in unpublished works potentially could be protected by a variety of state law theories such as *quantum meruit*, implied-in-law contract, plagiarism, unjust enrichment, conversion, common law unfair competition, and interference with prospective advantage. Once the dividing line for federal and state authority was moved from publication (pre-1978) to fixation in a tangible medium of expression (post-1978), federal copyright law restricted state law authority for the protection of works within the subject matter of copyright to those theories of recovery which were qualitatively different from copyright, a test which has often been described as the "extra element" test.

Since a contract to pay someone for the service of providing the disclosure of an idea con-

tains the "extra element" of actual (not constructive) consent, the implied-in-fact contract theory survives preemption. *Grosso v. Miramax*, 383 F.3d 965 (9th Cir. 2004). Under current liberal federal and state pleading rules, it is comparatively simple for a plaintiff to plead a claim for breach of an implied-in-fact contract.

The plaintiff merely needs to plead that the defendant accepted the submission of plaintiff's idea, knowing that it had been tendered based upon defendant's implied promise to compensate plaintiff for the reasonable value of the idea in the event that the defendant made use of the idea.

However easy it may be to plead a claim for breach of implied contract, in order to prove the claim, plaintiff must be able to prove that a defendant willingly chose to enter into a financial obligation of uncertain magnitude, which was to be triggered by an event that was undefined, and indeed indefinable at the time that the idea was tendered. Sensible people generally avoid open-ended financial obligations triggered by uncertain events. That is why production companies routinely refuse to accept unsolicited submissions and require parties who submit literary materials either to rely solely upon copyright law, disclaiming contractual remedies, or provide for highly specific contractual remedies including arbitration clauses and liability limits.

Background

Plaintiff Reed Martin is a part-time professional journalist, part-time business school teacher, and part-time screenwriter. In connection with his work as a journalist, he would occasionally interview film company executives who would thereafter receive from Mr. Martin letters enclosing a copy of the forthcoming interview article, as well as a copy of Mr. Martin's screenplay, "Two Weeks Off," about a workaholic investigative journalist who decides to in-

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Entertainment Law: California Jury Rejects Writer's Breach of Implied-in-fact Contract Claim Against Jim Jarmusch Movie

(Continued from page 20)

investigate his failed love life by going back to visit his old girlfriends. Martin also gave copies of his work to a talent manager named Glenn Rigberg.

In September 2003, Martin interviewed the president of Focus Features, David Linde. Thereafter in October 2003, he sent a letter to Linde enclosing his forthcoming interview article, as well as a copy of his screenplay, "Two Weeks Off." Although a package was received at the Focus Features offices, Focus had no record of actually receiving the plaintiff's screenplay, and Focus never responded to Martin's letter. As for the submission to talent manager Rigberg, there was no evidence of contact between Rigberg and defendants prior to completion of the defendants' screenplay.

Jim Jarmusch is an independent filmmaker, who has written and directed nine feature films. In 1998, a friend, Bill Raden, came up with the idea of a film to be triggered by the protagonist's receipt of an anonymous letter telling him that, unbeknownst to him, he was the father of a 20-year-old son who was coming to look for him. The idea was that receiving the letter would cause the protagonist to go back to visit his girlfriends from two decades ago. Jarmusch gave the idea some thought, and in 2001 he registered a four-page treatment with the Writers Guild, further developing the concept.

In 2002, Jarmusch was able to persuade Bill Murray to commit to star in a screenplay to be written based upon the concept, and in early 2004, Jarmusch wrote the screenplay for the film. In the spring of 2004, the screenplay was presented to a number of potential financing sources, and ultimately Focus Features won the auction for the right to distribute the film to be made based upon the screenplay. That film, "Broken Flowers," was a critical and commercial success.

Mr. Martin filed suit in the Central District of California, alleging that "Broken Flowers" both infringed his copyright in 12 versions of his screenplay, and that it was also a breach of an implied-in-fact contract that he alleged was a result of his submission of his screenplay to David Linde of Focus Features in October 2003.

Trial Issues

Prior to trial, plaintiff withdrew his claims for copyright infringement, and the case was tried to a jury solely on a theory of breach of implied-in-fact contract.

Martin's claims suffered from the vulnerabilities commonly found in implied-in-fact contract claims. First, Martin's letter to Linde enclosing his screenplay was not the kind of letter that "clearly conditioned" disclosure upon a promise to pay.

In fact, it gave the recipient of the letter no opportunity to refuse to accept disclosure, and under *Desny v. Wilder*, 46 Cal.2d 715, 739-41 (1956), such a "blurt-out" of the idea forecloses a claim for breach of an implied-in-fact contract.

Second, nothing about the disclosure carried the earmarks of a sale of ideas. Rather, it appeared that, at most, plaintiff was offering to sell the copyright in his screenplay, or was offering it as a sample of his writing in order to induce the recipient to consider hiring him as a writer on other projects. Under *Faris v. Enberg*, 97 Cal. App. 3d 309 (1979), the disclosure of ideas for purposes other than the sale of ideas cannot give rise to a claim for breach of an implied-in-fact contract.

A third vulnerability of the claim was that plaintiff attempted to argue that defendants had, by accepting receipt of his screenplay, agreed not to use the work without paying him, rather than entered into an agreement to pay him for the use of the work, should they choose to do so. The difference is consequential because there is at least district court authority for the proposition that an implied agreement not to use a copyrighted work is for all intents and purposes equivalent to copyright, and lacks the extra element required to avoid preemption.

Selby v. New Line Cinema Corp., 96 F. Supp. 2d 1053 (C.D. Cal. 2000); *Endemol Entm't B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q.2d 1524 (C.D. Cal. 1998). But see *Architectronics, Inc. v. Control Systems, Inc.*, 935 F.Supp. 425, 438 (S.D.N.Y. 1996); see also *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984) (enforcing contract to refrain from using idea in connection with pre-1978 submission, governed by 1909 Copyright Act).

Another vulnerability of the claim was that, since at the time of the submission to Focus Features, plaintiff was a New York resident submitting his work in New York to another New York resident, the place of making the contract, if it were made, was New York. Plaintiff was therefore subject to the requirement of New York law that, in order to state a claim for breach of an implied-in-fact contract, plaintiff must show that the ideas that he was submitting were novel as to the recipient of the screenplay. See *Apfel v. Prudential-Bache Securities, Inc.*, 81 NY.2d 470 (1993).

(Continued on page 22)

Entertainment Law: California Jury Rejects Writer's Breach of Implied-in-fact Contract Claim Against Jim Jarmusch Movie

(Continued from page 21)

Trial Testimony

Since none of these defense arguments had succeeded in the summary judgment motion filed prior to the trial, the trial commenced with the plaintiff relying heavily upon testimony from executives at Focus Features that they do not believe they have the right to use other person's screenplays without paying for them. They testified that, notwithstanding evidence that plaintiff had sent a package to Focus, they had no recollection of ever seeing or hearing about plaintiff's screenplay prior to the filing of the lawsuit. Plaintiff argued a grand conspiracy in which all the defendants' witnesses must have been fabricating their testimony that plaintiff and his works had nothing whatsoever to do with the film "Broken Flowers."

At trial, the defendant director/screenwriter testified extensively about the creative process that led him to create "Broken Flowers." The jury found that testimony quite persuasive, and returned a defense verdict in less than three hours. Particularly helpful to the jury was the 2001 Writers Guild registration which demonstrated that Jarmusch had his idea in place more than two years before plaintiff claimed he had submitted his screenplay to Focus Features.

The case offers many lessons. It illustrates how important it is for writers to document their creative process. It also demonstrates the need to be vigilant to avoid the receipt of unsolicited literary material. Since implied-in-fact contracts expose idea recipients to uncertain liability based upon an unknowable contingency, the targets of such disclosures must institute and maintain practices that preclude such claims, through the blanket refusal to receive unsolicited works, and by instituting a requirement that a submission may only be made after an appropriate written agreement has been signed by the submitting party.

Vincent Cox and Louis Petrich of Leopold, Petrich & Smith, P.C., represented the defendants. Plaintiff was represented by John Marder, Michele Levinson and Daniel Clark of Manning & Marder, Kass, Ellrod, Ramirez, LLC.

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Penguin Putnam Wins Copyright Infringement Trial Over Dorothy Parker Poems

Previously Published Compilation Lacked Sufficient Creativity to Be Protected

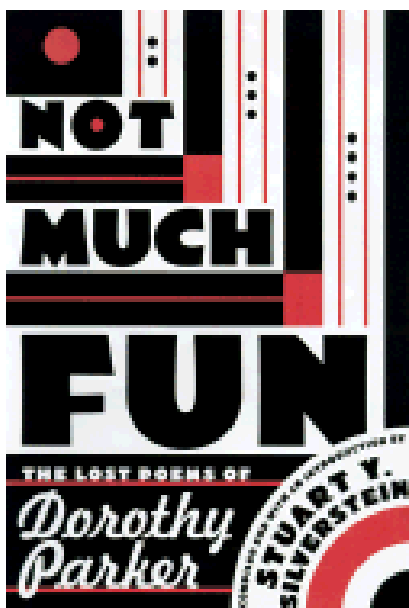
In a bench verdict, a New York federal court rejected a copyright infringement claim against Penguin Putnam over its publication of certain Dorothy Parker poems. *Silverstein v. Penguin Putnam, Inc.*, No. 01 Civ. 309 (JFK) (S.D.N.Y., Nov. 6, 2007) (Kennan, J.).

Plaintiff had compiled and published a set of Dorothy Parker poems. Penguin Putnam later republished nearly all of them in its own compilation of Dorothy Parker poems. The interesting issue in the case was whether plaintiff's compilation was entitled to copyright protection.

Following a bench trial this summer, featuring evidence from academics on the nature of poetry, Judge John Keenan ruled this month that plaintiff's compilation lacked sufficient creativity to gain copyright protection. The judge also rejected plaintiff's related trademark and unfair competition claims.

Background

In 1996, plaintiff Stuart Silverstein published a compilation of poems by Dorothy Parker entitled "Not Much Fun: The Lost Poems of Dorothy Parker." The poems had not previously appeared together in any Dorothy Parker compilations, but had been published in various periodicals in the 1920's to 1940's. Silverstein put together the compilation by reviewing original or microfilm copies of the newspapers and magazines in which Parker had published her work. Silverstein offered his manuscript to Penguin, but rejected its offer to publish the poems as part of a larger collection. Instead, Silverstein's book was published by Scribner, an imprint of Simon & Schuster.



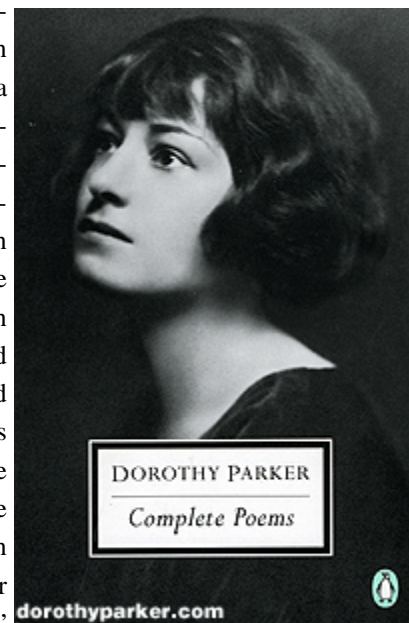
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A few years later Penguin published most of the poems from Silverstein's compilation as part of a larger compilation of almost all of Dorothy Parker's poems in the aptly titled "Dorothy Parker: Complete Poems." Penguin photocopied the poems from Silverstein's work but placed them in a different order and omitted one of the poems. Silverstein was not given credit for his compilation by Penguin.

Previous Decisions

Silverstein sued Penguin for copyright infringement, violation of the Lanham Act and unfair competition over the unauthorized use of his compilation. In 2003, Judge Keenan granted summary judgment to plaintiff. See *Silverstein v. Penguin Putnam, Inc.*, 2003 WL 1797848 (S.D.N.Y. 2003). On the copyright claim, the court held that Silverstein had a valid copyright in the compilation because his selection, arrangement and coordination of the poems reflected "a substantial amount of creativity and judgment meeting the minimum requirement for originality." On the trademark claim, the court held that publication without credit constituted "reverse passing off." And plaintiff's state law claims were not preempted by the Copyright Act. Finally, the court enjoined Penguin from further distribution or sale of "Complete Poems" and ordered that all existing copies be recalled.



On appeal, the Second Circuit vacated the injunction and remanded the case for trial to determine whether plaintiff's compilation was sufficiently creative to enjoy copyright protection. *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77 (2d Cir. 2004). The court found that although a compilation could be protected by copyright, material issues of fact existed as to whether Silverstein had exercised the necessary creativity in selecting and compiling the poems for his book.

(Continued on page 24)

Penguin Putnam Wins Copyright Infringement Trial Over Dorothy Parker Poems

(Continued from page 23)

Bench Trial

The case was tried without a jury from July 17, 2007 through July 25, 2007, with testimony from Silverstein and editors from Penguin and Scribner, as well as video depositions of academic experts.

In a 79 page bench opinion, Judge Keenan held that Silverstein's work in selecting and compiling the poems was insufficiently creative to merit copyright protection.

The Court finds that Silverstein simply selected for inclusion in *Not Much Fun* all of the uncollected Parker poems that he could find and that this selection process involved no creativity. His decision that certain works were poems was based objectively on whether the work contained the conventional structural features of a poem. This finding is evidenced by the fact that every poem in *Not Much Fun* is objectively recognizable as a poem and that Silverstein did not exclude any uncollected Parker poems from the book. It is further supported by the fact that Silverstein represented *Not Much Fun* as, and the book itself purports to be, a compilation of all of Parker's uncollected poems. Furthermore, Silverstein's decision that certain works were or were not authored by Parker was based on historical evidence and not creative judgment.

Judge Keenan examined several of the poems at length to show that in structure and format they were easily recognizable as poems. For example:

A litter of newspapers
Piled in smothering profusion.
Supplements sprawling shamelessly open,
Flaunting their lurid contents –

“Divorced Seven Times, Will Re-Wed First Wife,”
Unopened sheets of help advertisements;
Editorials, crumpled in a frenzy of ennui;
Society pages, black with lying photographs.

This is “objectively recognizable” as a poem and “no creative or subjective judgment inhered in their classification as such.” Although the court acknowledged plaintiff's “sweat of the brow” in putting together the compilation, “efforts of this kind are not the object of the copyright laws.” *Citing Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

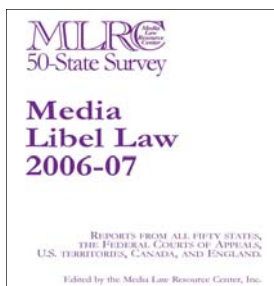
Finally, the court held that Silverstein's reverse passing off claim under the Lanham Act failed. *Citing Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), the court found that the claim must fail because Penguin, as producer of the book, is the “origin of the goods” under the Lanham Act, not Silverstein. The state law claims were dismissed because the court found that they were preempted by the Copyright Act.

Penguin Putnam was represented by Richard Dannay and Thomas Kjellberg of Cowan, Liebowitz & Latman, PC in New York. Plaintiff was represented by Mark A. Rabinowitz and Christopher Mickus of Neal, Gerber & Eisenberg, LLP in Chicago.



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Federal Shield Law Bill Passes the House

On October 16, the House of Representatives overwhelmingly passed a bill that would create a federal shield law. The bill, called the “Free Flow of Information Act of 2007” (H.R. 2102), would provide a qualified privilege against disclosure of sources and information. The House vote comes after a nearly three-year effort to pass a federal shield law bill.

H.R. 2102 was introduced in early May by Reps. Rick Boucher (D-VA) and Mike Pence (R-IN), among others, and won wide support from Democrats and Republicans in the House, passing with a vote of 398 to 21 (with 12 abstentions). During the debate on the floor, strong support came from House Judiciary Committee Chairman John Conyers (D-MI).

On the day of the vote, the administration issued a statement in which senior advisors pledged they would recommend that the President veto the bill on grounds that it “could severely frustrate – and in some cases completely eviscerate – the Federal government’s ability to investigate acts of terrorism and other threats to national security.”

Supporters of the legislation were able to defeat an amendment put forward by Rep. Lamar Smith (R-TX) that would have effectively gutted the bill. One of the revisions sought by Rep. Smith would have provided for the compelled disclosure of a confidential source when it “will help to prevent or identify criminal misconduct specified by the Attorney General.”

As for the scope of the Bill, those engaged in “journalism” “for a substantial portion of [their] livelihood or for substantial financial gain” may claim protection under the bill. “Journalism” is defined as “the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”

The Senate Judiciary Committee passed a version of the Free Flow of Information Act (S. 2035) out of committee on October 4, but it has not yet been scheduled for a vote on the Senate floor.

Free Flow of Information Act of 2007 (Engrossed as Agreed to or Passed by House)

HR 2102 EH
110th CONGRESS
1st Session
H. R. 2102
AN ACT

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Free Flow of Information Act of 2007’.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) Conditions for Compelled Disclosure- In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person--

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than the covered person) of the testimony or document;

(2) that--

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person--

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is critical to the successful

(Continued on page 26)

(Continued from page 26)

completion of the matter;

security with the objective to prevent such harm;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that--

(A) disclosure of the identity of such a source is necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively;

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed--

(i) a trade secret, actionable under section 1831 or 1832 of title 18, United States Code;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), actionable under Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer actionable under Federal law; or

(D)(i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and

(ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security; and

(4) that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.

(b) Authority to Consider National Security Interest- For purposes of making a determination under subsection (a)(4), a court may consider the extent of any harm to national security.

(c) Limitations on Content of Information - The content of any testimony or document that is compelled under subsection (a) shall--

(1) not be overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

(d) Rule of Construction- Nothing in this Act shall be construed as applying to civil defamation, slander, or libel claims or defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court.

(e) Exception Relating to Criminal or Tortious Conduct- The provisions of this section shall not prohibit or otherwise limit a Federal entity in any matter arising under Federal law from compelling a covered person to disclose any information, record, document, or item obtained as the result of the eyewitness observation by the covered person of alleged criminal conduct or as the result of the commission of alleged criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the conduct, if a Federal court determines that the party seeking to compel such disclosure has exhausted all other reasonable efforts to obtain the information, record, document, or item, respectively, from alternative sources. The previous sentence shall not apply, and subsections (a) and (b) shall apply, in the case that the alleged criminal conduct observed by the covered person or the alleged criminal or tortious conduct committed by the covered person is the act of transmitting or communicating the information, record, document, or item sought for disclosure.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) Conditions for Compelled Disclosure- With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered

(Continued on page 28)

(Continued from page 27)

person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) Notice and Opportunity Provided to Covered Persons- A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)--

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER- The term `communications service provider'--

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON- The term `covered person' means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include--

(A) any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);

(C) any person included on the Annex to Executive Order No. 13224, of September 23, 2001, and any other person identified under section 1 of that Executive order whose property and interests in property are blocked by that section;

(D) any person who is a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or

(E) any terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).

(3) DOCUMENT- The term `document' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) FEDERAL ENTITY- The term `Federal entity' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM- The term `journalism' means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Passed the House of Representatives October 16, 2007.

Attest:

Clerk.

“Let the Sun Shine” in Our Federal Courts Progress of the “Sunshine in the Courtroom Act of 2007”

By Maureen Sheridan Kenny

In a continuing effort to drag our reluctant federal courts into the 21st century, Representatives Chabot and Delahunt proposed H.R. 2128, the “Sunshine in the Courtroom Act of 2007,” earlier this year.

This bill, along with its companion Senate Bill 352, seeks to dismantle the long-standing and oft-criticized rule prohibiting cameras in federal courtrooms. The proposed Act affords presiding judges in federal district and appellate courts the discretion to “permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.”

Late last month, proponents and opponents of the bill lined up to testify before the Committee on the Judiciary in its “Hearing on Cameras in the Courtroom.”

Television In Modern Society

In his statement before the Committee on the Judiciary, key opponent and District Court Judge John R. Tunheim referred to the following “eloquent” language from *Estes v. Texas*, 381 U.S. 352 (1965) regarding televised proceedings: “The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable.”

In reversing a criminal conviction based in part on the televising of the pre-trial and trial proceedings, *Estes* continues to serve as the linchpin for the opponents’ claim that television impedes a fair trial.

The bills’ opponents, however, seemingly fail to acknowledge that *Estes* was decided over four decades ago when television was more of a novel medium than the pervasive, omnipresent reality that it is today. Indeed, in *Estes*, Justice Harlan foretold the necessity of the Court’s revisiting this issue if prompted by future technological developments.

“[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination”

According to the proponents of H.R. 2128, that day has come.

Judge Nancy Gertner from the United States District Court for the District of Massachusetts best summarized the current state of affairs in testifying: “Public proceedings in the 21st century necessarily mean televised proceedings.” Implicitly criticizing the continued resistance to televised judicial proceedings, Judge Gertner noted: “Public access’ means something different today than it meant years ago, and all of the institutions of the government have to adjust to it.”

Indeed, Judge Gertner testified, federal courts have consistently deferred to the realities of modern times by allowing electronic access to court papers, reconfiguring courtrooms to allow media access (including overflow courtrooms with monitors), and incorporating technology in the courts that allow the participants to present all information on screens. Allowing cameras in the courtroom merely represents the latest in a long line of thoughtful developments rationally tied to the demands of our ever-changing society.

Aside from technology’s role in placing television at the epicenter of public discourse, proponents of the bill also pointed to its role in making cameras much less intrusive. Barbara Cochran, President of the RTNDA, testified:

“Technological advances in recent decades have been extraordinary, and the potential for disruption to judicial proceedings has been minimized. The cameras available today are small, unobtrusive, and designed to operate without additional light. Moreover, the electronic media can be required to ‘pool’ their coverage in order to limit the equipment and personnel present in the courtroom, further minimizing disruption.”

This current technology stands in stark contrast to that referred to in *Estes*, where the courtroom was described as a “forest of equipment,” containing numerous huge cameras with “cables and wires snaked over the floor.” In supporting the bill, Congressman Ted Poe likened cameras in courtrooms to the cameras currently used in Congressional proceedings:

(Continued on page 30)

“Let the Sun Shine” in Our Federal Courts Progress of the “Sunshine in the Courtroom Act of 2007”*(Continued from page 29)*

“The camera that I had in my courtroom was just like the one inside this room. No one here notices the camera—the cameras today are small and unobtrusive. It does not interfere with this Committee’s proceedings. It does not make the Members pander to the camera. But the camera allows the public to witness the proceedings when they are not able to sit inside the room.”

Indeed, even *Estes* anticipated that future improvements could warrant a different result: “When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.”

Discretion to Deny or Limit Cameras

The bills’ opponents presented a parade of horrors that *could* occur if cameras are allowed in federal courtrooms, including a chilling effect on witnesses and judges, “grandstanding” by attorneys, and jurors’ misperception of their role. The opponents did not, however, adequately address the plain text of the proposed Act that requires judges to deny or limit cameras if they determine that the cameras could have these adverse effects.

First, as to the chilling effect on witnesses, the Act requires judges to inform each non-party witness of the right to have his or her image and voice obscured during testimony. If the witness so requests, the judge “shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable to the broadcast audience”

Judge Tunheim argued this safeguard was inadequate because providing witnesses “the choice of whether to testify in open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community.” Judge Gertner disagreed, noting that notorious cases automatically generate a highly charged courtroom atmosphere, regardless of the presence or absence of cameras. “In high profile cases, with the sketch artist present, the courtroom filled to the rafters with people, the question is whether the presence of cameras materially changes the atmosphere, and in my experience, it does not.”

Second, the proposed Act allows the Judicial Conference of the United States to promulgate advisory guidelines to which a judge “may refer in making decisions with respect to the management and administration of photographing, recording, broadcasting, or televising”

Despite this explicit grant of authority within the Act, the Judicial Conference remains staunchly opposed to the bill. In criticizing the Judicial Conference’s position, Fred Graham of Court T.V. stated that, “by opposing this bill, the members of the Judicial Conference seem to be questioning their judicial brethren’s ability to exercise their discretion wisely and to follow the advisory guidelines that the Conference itself would issue.”

Finally, the Act provides that the presiding judge “shall not permit” cameras in the courtroom if the “judge determines the action would constitute a violation of the due process rights of any party.” Thus, while the Act generally affords district and appellate judges a great deal of discretion, they have *no* discretion to elevate the media’s First Amendment rights above the parties’ Fourteenth Amendment due process rights. Indeed Judge Gertner noted that the limited breadth of the proposed Act is likely its best virtue. “[T]he strength of the bill is that it does not require cameras, insist on them, encourage them. Rather, it allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations. I, for one, would like to try.”

The narrow scope and non-mandatory nature of the proposed Act leads one to wonder why its opponents are so vehemently opposed to it. Opponents may claim that, while individual judges retain the discretion to allow or disallow cameras, the court of public opinion will force unwilling judges to allow them.

Indeed, *Estes* warned of this societal pressure, stating that, “where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory.” This concern loses its luster when one examines the distinction between “almost mandatory” and “mandatory.” Moreover, if a judge truly has the strength of conviction in determining that cameras should be excluded or limited in a particular case, that judge should have little problem defending his or her decision.

After all, that is what judges are paid to do—make decisions and stand behind them. Congressman Poe best articulated this sentiment in his testimony before the Committee on the Judiciary: “Some members of the bar and judges may not want the public to see what is going on inside the courtroom because they don’t want the public to know what they do in the courtroom. Candidly, maybe these people shouldn’t be doing what they are doing if they don’t want the public to know.”

Maureen Sheridan Kenny is an Assistant Professor at Case Western Reserve University School of Law and a Senior Attorney at Squire, Sanders & Dempsey LLP in Cleveland, Ohio.

Fire Sparks Free Speech Fight In Boston

By Thomas W. Kirchofer

On October 3, attorneys for the Boston Firefighters' Union obtained an ex parte temporary restraining order against WHDH-TV, blocking the television station from broadcasting the alarming results of autopsy reports for two firefighters who perished in the line of duty. *Boston Firefighters Union, IAFF Local 718 v. WHDH-TV, Channel 7*, SUCV2007-04341 (Sup.Ct. Oct. 3, 2007); *rev'd*, 2007-J-455 (Mass.App.Ct. Oct. 4, 2007).

Although the Massachusetts Appeals Court overturned the prior restraint the next day, the injunction prevented the TV station that obtained the story first from broadcasting it – even as its competitors made it the day's top story.

The Prior Restraint

The events leading up to the case began more than a month earlier. On the evening of August 29, 2007, two firefighters responding to a restaurant fire died when the building's roof collapsed. The men were lauded as heroes for their sacrifice, and thousands of people attended their funerals.

However, WHDH uncovered a bombshell: according to confidential sources, autopsy results indicated that one of the firefighters was legally drunk at the time of his death, while the other had cocaine in his system.

The union – citing privacy principles - obtained the TRO in Suffolk Superior Court immediately after learning of WHDH's scoop on October 3. WHDH's lawyers learned of the TRO at about 1 p.m. They quickly gathered cases on prior restraints and raced to the courthouse for a preliminary injunction hearing that afternoon.

At the preliminary injunction hearing, the Union relied on, M.G.L.A. c. 38, § 2, which declares that autopsy reports “shall not be deemed to be public records” and grants the Chief Medical Examiner the power to make rules regarding the disclosure of autopsy results.

The rules laid out a few basic steps regarding the dissemination of autopsy results – and they pretty clearly did not envision disclosure of the results to the press without the consent of the next of kin. 505 C.M.R. 1.00. The union also cited *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132 (1989), in which the Massachusetts Supreme Judicial Court refused to grant a newspaper access to autopsy records, stating

that “[t]here is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person's body.” *Id.* at 135.

However, WHDH had decades of Supreme Court precedent on its side. In perhaps the best-known prior restraint case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court rejected the Nixon Administration's efforts to enjoin newspapers from publishing the “Pentagon Papers” – confidential documents relating to the American war effort in Vietnam that someone stole and leaked to the press.

At the hearing, WHDH's lawyer tried to shift the court's attention away from the red herring privacy issues raised by the Union, arguing that this was a classic example of a prior restraint and presumptively unconstitutional.

Nevertheless, the court entertained an argument that an injunction should issue because WHDH had not obtained its information in compliance with the statute and regulations. From a constitutional perspective, the issue didn't matter because if WHDH damaged the union, the union would have a full spectrum of remedies available after the broadcast.

Ruling from the bench, the court issued the injunction. Based on the state's privacy laws, the court held that, “If one was to say it was a prior restraint on free speech, it is a justified prior restraint on free speech.”

WHDH Loses the Scoop

The hearing ended just shy of 5 p.m. and WHDH's counsel rushed next door to the Appeals Court, but a security guard told her the clerk's office had closed for the night. The station's lawyers made numerous phone calls that evening in an effort to make an emergency appeal, but the courts had all closed. Any relief would have to wait until the following morning.

Meanwhile, the hearing had attracted the attention of Boston's other media outlets. Because the Union had only sought an injunction against WHDH, the firefighters' secret quickly became the night's top story as its competitors raced to report the news.

While WHDH lawyers worked on a brief for the Appeals Court, the rest of the Boston media reported the news that WHDH had been prepared to report first. The story led all the evening newscasts and made the front pages of the morning papers. WHDH, however, led its newscast with a precisely wo-

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Fire Sparks Free Speech Fight In Boston

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ded story about how the Court had blocked its plan to report that at least one of the firefighters was “impaired” at the time of the fatal fire. WHDH then ran a story about the Court proceedings, and told its viewers it planned an immediate appeal.

WHDH had uncovered the hottest story in town, but as a result of the injunction, WHDH lost the chance to report the news first. WHDH had lost the scoop.

Appeals Court Dissolves Prior Restraint

WHDH’s appeal was argued the next day. Appeals Court Justice Andrew R. Grainger found in favor of WHDH, and he issued a written opinion that reinforced the First Amendment’s protections against prior restraints.

“[A]ny prior restraint on expression comes [to the Court] with a heavy presumption against its constitutional validity,” Grainger wrote. *Boston Firefighters Union, IAFF, Local 718 v. WHDH-TV, Channel 7*, No. 2007-J-455

(Mass.App.Ct. filed Oct. 4, 2007) at 4 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). Judge Grainger dissolved the Superior Court’s injunction and fully restored WHDH’s First Amendment right to report the news. He also put to rest the Union’s argument that because WHDH obtained the information from a confidential source and not in accordance with the statutes and rules, that an injunction was appropriate. “[T]he inability of the press to require the government to disclose information that is not part of the public record does not support a restraint on speech with respect to information already known to the press,” Justice Grainger wrote.

After a day of damage, WHDH regained its rights.

Thomas W. Kirchofer is an associate with Edwards Angell Palmer & Dodge LLP in Boston. Partners Michael T. Gass and Jordana B. Glasgow of the firm represented WHDH in this matter. The Boston Firefighters Union was represented by Paul Hynes.

The screenshot shows the WHDH-TV website interface. At the top, there is a navigation bar with links for Auto, Education, Theatre Performances, Decision 2008, Health, Program Schedule, and Contact Us. Below this is a main menu with links for HOME, LOCAL, NATIONAL, WORLD, WEATHER, TRAFFIC, BUSINESS, SPORTS, and ENTER. A secondary navigation bar includes Features, News Team, eUpdate, Events, Where's My Movie, and Closing Bell on Your Cell. The main content area displays the article title "Alcohol level challenged in firefighter autopsy results" with a sub-headline "BOSTON -- Questions have been raised about the autopsy results of a firefighter killed in the line of duty." The article text discusses Paul Cahill's blood alcohol level and the theory of post-mortem alcohol generation. To the right of the text is a photograph of two firefighters in uniform. Below the photo is a "Related Links" section. The date "Saturday, October 6, 2007" is shown in the top right corner of the article area, along with an XML icon.

Florida Court Reverses Injunction Prohibiting Television Station From Broadcasting Documents

By **Judith M. Mercier and Charles D. Tobin**

A Florida appeals court has overturned an injunction that prohibited an Orlando television station from broadcasting the contents of documents about a political consultant that the station lawfully obtained from a source. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 2007 WL 2890115 (Fla. 5th Dist. Ct. App. Oct. 4, 2007).

The court found that – even though the documents purportedly included medical records and attorney-client communications – the plaintiff, Douglas M. Guetzloe, had failed to meet his "heavy burden" to justify entry of the prior restraint.

Background

Guetzloe is a well-known Central Florida political operative. A source, who bought the 80 boxes of records at auction from a storage facility after the facility said Guetzloe had failed to pay his storage bill, brought the records to Post-Newsweek station WKMG after recognizing Guetzloe's name on the documents.

After WKMG advised Guetzloe that it intended to publish portions of the contents of the records in its broadcast, Guetzloe filed suit in the state court in Orlando seeking declaratory and injunctive relief and replevin. Guetzloe asserted privacy interests in the records, claiming that they contained medical records and attorney-client communications.

Without notice to WKMG, Guetzloe sought a temporary injunction. Circuit Court Senior Judge Rom W. Powell granted Guetzloe's *ex parte* motion and enjoined WKMG from publicly airing the contents of the records. When it received notice, WKMG moved to dissolve on the basis that the injunction was "an unconstitutional prior restraint on its right to broadcast news based on lawfully obtained information." A few days after the hearing on WKMG's dissolution motion, the trial court refused to set it aside, but modified the injunction to solely prohibit the publication of medical records of Guetzloe and his family and communications between Guetzloe and his attorneys.

Reversal of Unconstitutional Prior Restraint

The Florida Fifth District Court of Appeal, in an opinion by Judge Vincent G. Torpy, Jr., on October 5, 2007, reversed the tempo-

rary injunction. In doing so, the court followed traditional prior restraint law in recognizing that "the censorship of publication has been considered acceptable only in 'exceptional cases'" and holding that Guetzloe failed to meet his "heavy burden" for the imposition of such censorship.

The court acknowledged that "in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here." The court held that Guetzloe did not establish that the records in the boxes are "sufficiently sensitive," giving rise to a privacy interest that would outweigh WKMG's First Amendment right to broadcast them. The court rejected the lower court's reliance on HIPAA, finding it inapplicable under these facts, and also rejected Guetzloe's constitutional right of privacy arguments, holding that those privacy rights only apply in actions involving the government.

The court also noted that regardless of Guetzloe's claim that the storage company did not have legal authority to auction his documents, he offered no proof that WKMG engaged in unlawful conduct to gain possession of the documents. Finally, the court held that Guetzloe's claim that some of the documents contain attorney-client communications also would not justify a prior restraint.

According to the court, attorney-client privilege may only justify a prior restraint, if ever, when a defendant's fair trial rights are at stake, according to the court (citing *United States v. Noreiga*, 752 F. Supp.

1045 (S.D. Fla. 1990)).

Judith M. Mercier and Charles D. Tobin are partners in the Orlando and Washington, D.C. offices, respectively, of Holland & Knight LLP. Along with Sanford L. Bohrer (in Miami) and David C. Borucke (in Tampa), they represented amici curiae Florida Association of Broadcasters, Tribune Company, Inc., Fox Television Stations, Inc., The Hearst Corporation, E.W. Scripps, Company, News-Journal Corporation, The New York Times Company, Gannett Company, Inc., The Associated Press, The Washington Post, Cable News Network, Inc., The Florida Press Association, The First Amendment Foundation, Monterey Campbell, Jack A. Kirschenbaum and Maureen A. Vitucci, of Gray Robinson, P.A., Melbourne, Florida, represented WKMG. Frederic B. O'Neal, Windermere, Florida, represented Douglas Guetzloe.

The court acknowledged that "in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here."

MLRC's Projects and Finances Reviewed at 2007 Annual Meeting

MLRC's annual meeting was held on November 7, 2007 at the Hyatt Hotel in New York. The meeting was called to order by Ralph Huber, Chairman of the MLRC Board of Directors. Ralph welcomed everyone to the meeting.

Elections

Ralph explained that the Board now consists of eleven members. Formerly it consisted of nine members, but last year, the bylaws were amended to increase the number of directors in total to eleven, and to provide that one of the eleven voting directors was to be the president of the Defense Counsel Section.

Due to the staggered terms of the directors, five current directors were up for reelection: Henry S. Hoberman of ABC, Inc.; Marc Lawrence-Apfelbaum of Time Warner Cable Inc.; Stephen Fuzesi, Jr. of Newsweek, Inc.; Kenneth A. Richieri of The New York Times Company; and Kurt Wimmer of Gannett Company, Inc.

Ralph made a motion to approve the reelection of the directors. Dale Cohen seconded the motion. All present voted in favor and Sandy Baron, Executive Director of MLRC, voted the 34 proxies (which had been retained and were brought to the meeting) in favor.

After their reelection, Ralph congratulated the Board of Directors. Ralph then announced the other directors of the Board: Dale Cohen of Cox Enterprises, Inc.; Ralph P. Huber, Chairman, of Advance Publications, Inc.; Karole Morgan-Prager of The McClatchy Company; Elisa Rivlin of Simon & Schuster; and Susan E. Weiner of NBC Universal, Inc. Ralph then praised the Board for its work.

Financial Report

Ralph introduced Kenneth Richieri to provide the financial report. Ken began by explaining that MLRC operates on a calendar fiscal year and that as a result, the financial report for the twelve months ended August 31, 2007, was not particularly meaningful in terms of evaluating the fiscal year's performance of MLRC. New York law, however, requires that the company provide a financial report to its membership that covers a twelve month period ending within six months of the Annual Meeting, hence the August 31st date.

He next reported that as of August 31, 2007, MLRC has net assets of almost \$1.4 million, which is more than \$150,000 ahead of the net assets on August 31, 2006, when it

was \$1.26 million. Ken reported that the organization is very stable financially, as evidenced by its ability to grow net assets during a twelve month period in which it had one time expenses related to moving offices. Those expenses that have increased over the prior year are primarily attributable to additional staff hired with the approval of the Board, and the Board has been urging Sandy to consider how best to use the resources available to the organization to expand MLRC's reach and projects.

Ralph then reported that additional members had been brought in in the past year. Sandy added that in order to bring in more new members, it is most effective when current members themselves spread the word about the organization. She also noted that the value of the organization is evident in that when lawyers move firms or companies, they encourage their new entities to join MLRC.

Executive Director's Report

Ralph next introduced Sandy's Executive Director's report. Sandy began her report by encouraging anyone with an idea for a project, whether for an article or a conference, to let MLRC know. She next thanked the directors for their work throughout the year. Sandy reported first about the London Conference on International Media Law. This conference included 200 delegates from all over the world. Sandy reported that the reception at the Tower of London was one of the most spectacular MLRC has ever had, and thanked Hiscox Media for hosting it. She also thanked the planning committee for their work on the conference and then asked MLRC Staff Attorney David Heller to provide a report of the conference.

David began his report by thanking everyone on the Board who contributed to the conference and commented that it was great to have people from all over the world attending. David highlighted a new session at the conference on Asian Media Law and reported that MLRC will be keeping in contact with the lawyers to learn more about their issues. He then reported on the series of articles that were written in connection with the conference and included topics such as privacy law developments and publishing in Ireland. David reported on various sessions held at the conference, such as a session on privacy law, one on digital media issues and an in-house counsel breakfast. The London 2009 conference will be held on October 1 and 2, 2009 and will be on a Thursday and Friday instead of a Monday and Tuesday due to Yom Kippur.

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MLRC's Projects and Finances Reviewed at 2007 Annual Meeting

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Sandy next reported on the upcoming Conference held at and with Southwestern Law School in Los Angeles, which is now an annual event in the last week in January. Last year's conference focused on the legal challenges of integrating traditional media and entertainment in a digital environment. This year's conference theme will be "Avoiding Digital Fault Lines" and is to be held on January 31, 2008 in Los Angeles. Everyone is encouraged to attend.

Sandy then reported on the California Chapter, which brings together MLRC members, both in-house and outside counsel, who represent the various media in California. The Chapter would like to start video conferencing with non-Los Angeles members. Sandy reported that the MLRC members in Northern California have proposed that MLRC consider a set of sessions in the Bay Area that would bring together MLRC's traditional members with those who are engaged primarily, if not exclusively, in digital publishing. She is working with a small task force in analyzing whether, and if so, how, to create such a set of sessions in 2008.

Sandy next discussed upcoming meetings on 'Managing the Materials.' These meetings – two of which have been held in New York largely with in-house counsel and two in Washington – have focus on all the documents that companies produce and store electronically, such as emails, correspondences, telephone records, etc. and those that reflect the business operations of media companies, but are held by third parties. Sandy reported that the meetings address how to locate and manage these documents, document retention policies and related issues. She reported that a third round of these sessions should be held in December and that there will be a mini-version of it at the California Chapter in December.

Sandy reported on the Task Force on Credentialing. This is going to move forward and will focus on the legal issues that are relevant to credentials ranging from high school sports to professional sports and other event coverage.

She also discussed the Model Shield Law Project, which was organized before the federal shield law was introduced. The Model Shield Law, and the legal research that was done in connection with that project, has been used by those working on adoption of shield laws in nine states. A Task Force, which started with the Model Shield Law, has also been reviewing the proposed federal bills and their various modifications.

Sandy thanked MLRC Staff Attorney Maherin Gangat for her help on all of the shield law matters. Sandy reported

that the coalition building used in the shield law project was also useful in fighting right of publicity bills, for example in Connecticut, where the coalition had to battle Paul Newman and New York, where it is being spearheaded by the Marilyn Monroe estate. Although the Motion Picture Association of America keeps tabs on right of publicity bills, members should let MLRC know of any bills percolating in their area.

Sandy thanked the Newsgathering Committee for their great work on producing comments to the Department of Justice's proposal that plea agreements be removed from the PACER system. She thanked Steve Zansberg, his colleague Michael Berry, Bruce Rosen and his colleague, former MLRC Fellow Katie Hirce, for producing comments to the DOJ proposal so quickly.

Sandy then urged everyone to consider joining the ALI, and then the MLRC ALI Task Force. The ALI will be working on a Restatement (Third) of Torts on Privacy soon.

Sandy concluded her report by thanking everyone and expressing that she looks forward to working with everyone next year. Ralph thanked Sandy for being able to mobilize coalitions so quickly to respond to issues and also thanked her for the different programs that MLRC hosts.

Defense Counsel Section Report

DCS President Peter Canfield began his report by inviting everyone to the DCS Breakfast on Friday, November 9, 2007. He reported that membership in DCS is strong, both in terms of numbers and their contributions to MLRC projects and materials, which have been strong in the past year. Peter reported that new committee chairs will be coming on this year and that the Executive Committee will be Dean Ringel as President, Kelli L. Sager as Vice President and Robert D. Nelon as Secretary.

MLRC Institute

Ralph next called for a report on the MLRC Institute. Sandy explained that the MLRC Institute, a 501(c)(3) sister organization to the MLRC, and is engaged in developing First Amendment educational projects for the public. This year, with a grant from the McCormick Tribune Foundation, the Institute was able to hire a Fellow. The Institute has been working on the Speaker's Bureau, which sends a lawyer and a news person into venues across the country to speak on the reporter's privilege. The next topic will cover issues related to publishing online. Sandy explained that the Speaker's Bureau is meant to be grassroots and held in small venues.

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MLRC's Projects and Finances Reviewed at 2007 Annual Meeting

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New Business

Before calling for any new business, Ralph took a few minutes to speak about the roots of the MLRC as the Libel Defense Resource Center and how important the organization is. Ralph

explained that the MLRC is an important voice for most major issues that effect the media and that it is on a national, and increasingly international, level. He then thanked Sandy for her work. Sandy announced the planning board meeting for next September's NAA/NAB/MLRC Conference on Thursday, November 8, 2007. Ralph then called for new business and there being no new business, the meeting was adjourned.

Defense Counsel Section Reviews Projects and Goals at Annual Meeting

Dean Ringel Incoming DCS President; Nathan Siegel Joins as Treasurer

The Defense Counsel Section's annual meeting was held on November 9, 2007 at the offices of Proskauer Rose LLP in New York. DCS Executive Committee President Peter Canfield called the annual meeting to order, welcomed everyone to the breakfast and thanked them for attending.

Peter commented that the DCS is one of the most active bars that he has ever been in and that it is a hallmark of the MLRC organization. He expressed appreciation for the great participation by the committees and thanked everyone for their work throughout the years, while encouraging others to get involved.

Peter then mentioned the new business item to be voted on at the end of the meeting: when to hold the annual meeting of the DCS next year. He announced the choices, all of them in and around the MLRC dinner, as Thursday or Friday morning at 7 AM, Thursday at lunch, or Wednesday at lunch.

President's Report & Election of Treasurer

The first order of business was the succession of the DCS Executive Committee. The 2008 Executive Committee will be: Dean Ringel, President; Kelli L. Sager, Vice President; and Robert D. Nelson, Secretary. Next Peter reported that the executive committee had nominated for Treasurer Nathan Siegel of Levine Sullivan Koch & Schulz. No other nominees for the membership had been received and by a voice vote, Nathan was approved as Treasurer. Peter then thanked Sandra Baron, Executive Director of the MLRC, and the MLRC staff.

Executive Director's Report

Sandy began her report by thanking the current emeritus James Stewart, who is rotating off of the Executive Committee, for his work. She praised his six years of active participation and thanked him for his work on the **PANIC BOOK**. Sandy then turned to Dean to thank Peter for his work as President. The DCS thanked Peter for his service and Sandy announced that Peter will serve as Emeritus.

Conferences & Programs

Sandy began her report with the London Conference, held in September. She introduced David Heller of the MLRC to provide an overview of the conference. David reported that it was the largest international conference to date, with about 200 delegates from a diverse group of nations. He highlighted a new session at this year's conference on Asian media law and expressed hope that it grows in the future. He next discussed the series of articles that were published as a Bulletin for the conference, which included an article on privacy law developments in Europe. David reported that the conference was a success due to active participation and MLRC will be back in London in 2009.

Sandy reported that the next MLRC conference, "Avoiding the Digital Faultline," at Southwestern Law School in Los Angeles, will concern contracts, union and guild agreements, and user generated content on the internet. She mentioned the California Chapter, also held at Southwestern Law School, which brings together California lawyers in media practice. She urged anyone interested in participating to contact

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Defense Counsel Section Reviews Projects and Goals at Annual Meeting

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MLRC and she thanked David Kohler of the Donald E. Biederman Entertainment and Media Law Institute, and Tamara Moore, Administrator, for all that they do in connection with the conference at Southwestern and the California Chapter.

Sandy thanked the New Legal Developments Committee for their help with choosing this year's Pre-Dinner Forum topic. Anyone with a suggestion for a forum topic for next year was also encouraged to contact MLRC. She also mentioned other sessions held by MLRC, including an upcoming session on "Managing the Materials." This session addresses how to deal with the huge amounts of materials being created both inside an organization and by third parties. A session will be held at the next California Chapter meeting in December and Sandy is looking to hold the conference in other parts of the country where there is interest.

Sandy next addressed the current shield law efforts by the MLRC, headed by MLRC staff attorney Maherin Gangat. The Model Shield Law Task Force, a small team set up by the large membership group involved with the shield law, has not only developed a Model Shield Law, but has also provided advice and research on the current proposed federal shield law.

Sandy then addressed the proposed right of publicity statute in Connecticut. MLRC created a coalition that helped to defeat the bill, and is acting in similar way to defeat a proposed bill in New York state. She warned the members to keep an eye out for these types of bills and encouraged all to let MLRC know of any pending bills.

Sandy encouraged everyone to continue looking for cases (including non-media) and legislation in their states and to let MLRC know of any amicus efforts members are engaged in and to continue sending briefs and ideas for the *MediaLawLetter*. She then introduced the MLRC staff and thanked them and the entire DCS.

Committee Reports

Peter then asked for the reports from the committees.

Advertising & Commercial Speech Committee

Nancy Felsten reported that the committee is looking to discuss the intersection of advertising and the First Amendment. She reported that the committee is currently editing articles on the new prescription drug ad rules, regulation of what

children have access to, commercial speech: confusion in the court, and gorilla and buzz marketing. The committee believes these articles will be published in the next two months.

ALI Task Force Committee

Tom Leatherbury first explained that the committee gets involved in any ALI project that relates to the First Amendment. He reported that the focus of the Task Force was on language in two ALI projects – one on enforcement of foreign judgments and two, on international intellectual property. The Task Force members had been concerned that gains made in decisions in American courts with respect to enforcement of international judgments not be undone by ALI reporters. This project has been a success. The committee is currently waiting for the ALI to go public with its drafting of the Restatement of Torts (Third) on privacy. Finally, all were encouraged to join ALI.

Conference & Education Committee

Mary Ellen Roy reported that the planning board meeting on Thursday, November 8, went well and that the committee is open to ideas and volunteers. Mary Ellen noted that the Virginia Conference will be held in a new location next year, near Dulles International Airport in Chantilly, VA.

Employment Law Committee

John Henegan reported that the committee is working with MLRC staff attorney Eric Robinson on two papers on independent contractor issues and on the accommodation of religion in the workplace. John also noted that the committee had produced "A Basic Guide to Employment Defamation and Privacy Law," written from the business perspective, counseling employees on defamation and privacy issues. It was designed to be given to non-lawyers who deal with employment matters. The booklet is available on the MLRC website for download, or it can be purchased from MLRC for \$3.00 per copy.

Entertainment Law Committee

Kate Bolger reported that the committee holds teleconferences every 6-7 weeks with about 12-16 participants who handle entertainment, as well as media law matters. She also

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Defense Counsel Section Reviews Projects and Goals at Annual Meeting

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reported that many members are writing for the *MediaLawLetter* and that Laurie Michelson is putting together an article comparing copyright infringement tests by the circuits.

Ethics Committee

Bob Bernius reported that the committee has been publishing regular articles in the *MediaLawLetter* and working on future articles.

International Media Law Committee

David McCraw reported that many committee members were involved in the London Conference with great success. David reported that the committee is working with Eric Robinson to archive the international section of the *MediaLawDaily* on the webpage. Currently the committee is working on a list serv that will enable committee members to help each other and is considering the development of blogs by the subcommittees for each region of the world.

Internet Law Committee

Mark Sableman explained that in the past, the main activity of the committee had been to put together a compendium of substantial articles for the biennial NAA/NAB/MLRC Conference. This year, the committee is going to try to produce more articles throughout the year on practical issues, such as the impact of the *Roomates* case, user generated content, archiving, and the use of photographs.

Legislative Affairs Committee

Laurie Babinski spoke for the committee, noting that it will continue to do *MediaLawLetter* articles on state and federal issues and update the website with key legislative developments. She reported that the committee needs additional help in reporting on state issues. The committee is interested in doing a White Paper and is in the process of choosing a topic, possibly the right of publicity. Anyone who would like to contribute to the paper, or has an idea for a topic, should contact the committee chairs. The committee also has a conference call coming up.

MediaLawLetter Committee

David Tomlin reported that the Committee has been talking with MLRC about how to make the newsletter more effective in a digital environment. The various ideas discussed, however, will likely have to await an update of the software on the MLRC website. Two projects that have been discussed, however, are (1) making it possible to select individual articles from the *MediaLawLetter* to print; and (2) improving upon the searchability of the archives. David thanked David Heller for his work on the *MediaLawLetter*.

Membership Committee

Guylyn Cummins reported that the committee is focusing on California and will continue its focus there. Sandy added that James Chadwick organized a gathering of Northern California members and from that gathering came a proposal to bring together digital publishers with the traditional MLRC membership in a set of substantive sessions, possibly as early as next spring.

Model Shield Law Task Force

Nathan Siegel reported that the task force has been helping with the proposed federal shield law. He thanked Sandy and MLRC staff attorney Maherin Gangat and the MLRC for their assistance. The Task Force has been responding to amendments and changes with research on the substance and with suggestions for alternative language.

New Legal Developments

Laura Handman reported that the committee has membership from all regions of the country and has, as its goal, to spot trends and developments. These developments are intended to be the basis for MLRC Bulletins, articles, the Pre-Dinner Forum and conference topics. She noted that the committee has discussed such topics as waivers in the subpoena context, confidential sources in defamation cases, defenses to privacy acts, aiding and abetting and whether courts can review the classification of judicial records.

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Newsgathering Committee

Steve Zansberg began by explaining that the committee has a broad mandate, ranging from the reporter's privilege to access issues. The committee has published a compendium of state whistleblower statutes and discussion points on the use of confidential sources. With the help of Bruce Rosen and others, the committee prepared the public comments filed by MLRC on the proposal submitted by the Department of Justice and pending before The Administrative Office of the United States Courts to remove plea agreements from the PACER system. Steve also reported that a model brief on newsgathering claims is coming out soon and will include sections on how to defend against intrusion, misrepresentation and wiretap claims. The committee is also producing an updated insert for the **PANIC BOOK** on the closure of civil trials for trade secrets and other types of confidential information. In 2008, the **PANIC BOOK** will be updated. Finally, the committee is also looking into how to assert the reporter's privilege when there's no shield law.

At this point, Sandy thanked Steve Zansberg, his colleague Michael Berry, Bruce Rosen and his colleague, former MLRC Fellow, Katie Hirce for their efforts in producing the MLRC comments.

Pre-Publication/Pre-Broadcast Committee

Sam Fifer encouraged everyone to share any type of checklist they may have to handle pre-publication matters. He reported that the committee is working on an interactive educational model for the public and holds regular conference calls.

Pre-Trial Committee

John Borger reported that the committee is close to finishing a paper with a broad overview of the reporter's privilege and it should be published within the next few weeks. The committee is looking for suggestions for next year.

Trial Committee

Michael Sullivan highlighted upcoming projects, which include topics such as voir dire, jury questionnaires, expert witnesses and *Daubert* motions, opening statements (to

compliment a previous closing statement project), jury instructions, and special verdict forms. The committee is also updating the Model Jury Instruction Manual with new materials (it was last updated in 2000). Lastly, reach out if you are aware of a case tried in your neighborhood that may be of value to the committee.

Report of the California Chapter

Kelli Sager gave the report of the California Chapter. There are quarterly meetings at Southwestern Law School with conference calls to include northern California members. The last meeting had a program by Tom Burke of Davis Wright Tremaine on Section 230 and the *Roommates.com* case.

Report on the MLRC Institute

Maherin Gangat began her report on the Institute by first thanking everyone who has participated in Institute programs. The current Institute "speakers bureau" program is underwritten by a grant from the McCormick Tribune Foundation and its purpose is to educate the public on the First Amendment. The initial "speakers bureau" topic – for which the Institute prepares and provides background materials, handouts, and a powerpoint presentation – was on the reporter's privilege. The Institute is in the process of expanding to include presentational materials on publishing online. Entitled "Online News: Redefining Journalism", this topic will explore the changing concept of news and publishing online. Maherin thanked MLRC Institute Fellow John Haley for his assistance. If anyone would like to speak or knows of a venue for a speech, please contact Maherin.

New Business

Peter conducted an informal poll on changing the breakfast time. The results were evenly divided. Peter then thanked Ralph Huber, the President of the MLRC Board of Directors, for attending the meeting.

Ralph thanked the DCS for its enormous contributions to MLRC and noted that 2007 was the first year in which the DCS president served as a full voting member of the MLRC Board. Peter then concluded by thanking everyone for attending, and thanked Sandy, the MLRC staff, and Chuck Sims of Proskauer for hosting the meeting. There being no other new business, the meeting was adjourned.