

MILRC Media Law Resource Center

MEDIA LAW LETTER

Associate Member Edition

2007:4

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Dutch Journalist, Jailed for Refusing to Reveal Source, Wins Claim Before ECHR

The Netherlands Violated Journalist's Article 10 Rights

By Christien Wildeman

In a recent judgment the European Court of Human Rights reaffirmed the protection for journalists' sources under Article 10 of the European Convention on Human Rights. *Voskuil v. The Netherlands*, Application no. 64752/01.

In 2000 the Amsterdam Court of Appeal, in the notorious trial against Mink K., ordered the detention of Koen Voskuil, a journalist of the daily newspaper *Spits*, in order to compel him to reveal the identity of his source which he refused. After his release Voskuil lodged an application against the Netherlands with the European Court of Human Rights. The long-anticipated judgment was pronounced on November 22, 2007.

Background

In March 2000 the Court of Amsterdam convicted three people of arms trafficking, including the well known organized crime figure Robert Mink Kok, known as "Mink K." In the criminal investigation, the Amsterdam police had stated that an arsenal of weapons had been found by chance: the caretaker of a building in Amsterdam had contacted the police when water was leaking from one of the flats in the building, whose occupants were absent. With the aid of two locksmiths, the police had gained entry to the flat and in the subsequent search for the source of the leak, the weapons had been found. The accused lodged an appeal against the judgment of the Court.

On September 12 and 13, 2000 the daily newspaper *Spits* published two articles, written by journalist Koen Voskuil, in which doubts were expressed about coincidences allegedly involved in the finding of the weapons. The September 13th article quoted an unnamed policeman of the Amsterdam force as commenting in respect of the flooding: "That is what we made out of it. Sometimes you just need a breakthrough in an investigation."

Subsequently, Voskuil was summoned to appear as a witness for the defense in the appeal proceedings on September 22, 2000. When asked to reveal the identity of his source Voskuil invoked his right of non-disclosure. After having deliberated, the Court of Appeal considered that if the statement made by the police officer to Voskuil was correct, this might affect the conviction of the accused and it also affected the integrity of the

police and judicial authorities.

Subsequently, the Court ruled that the interests of the accused and of the integrity of the police and the judicial authorities outweighed Voskuil's interest in protecting the identity of his source. However, Voskuil remained silent, upon which the Court ordered his immediate detention for a maximum of 30 days.

At the next hearing on October 9, 2000, Voskuil once again refused to reveal the identity of his source. Upon this, the Court decided to lift the order for his detention. It considered that for a number of reasons Voskuil's article was implausible. This being the case, Voskuil's detention no longer served a purpose. On October 30th the criminal proceedings continued and the Court heard Voskuil, seven other journalists who had published similar articles, two plumbers and a caretaker.

After his release, Voskuil lodged an application against the Netherlands with the European Court of Human Rights.

ECHR Judgment

The Court found it clear that there had been an interference with Voskuil's rights under Article 10 of the Convention. The question was whether this interference could be considered "necessary in a democratic society," as Article 10 of the European Convention on Human Rights prescribes.

Before answering this question the European Court of Human Rights stressed the importance of press freedom.

Since 1985 the Court has frequently made mention of the task of the press as purveyor of information and "public watchdog". Protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of

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Dutch Journalist, Jailed for Refusing to Reveal Source, Wins Claim Before ECHR

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journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.
Voskuil (¶ 64)

The Dutch Government argued that it was necessary for Voskuil to identify his source to 1) secure a fair trial for the accused; and, 2) to guard the integrity of the Amsterdam police. However, the Court found the first reason invalid. The Amsterdam Court of Appeal was not prevented from considering the merits of the charges against the three accused; at the hearing of October 30, 2000 it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from Voskuil. As for the second reason, the Court took the view that in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed.

The Court was struck by the lengths to which the Netherlands authorities were prepared to go to learn the source's iden-

tity. Such far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing from coming forward and sharing their knowledge with the press in future cases.

Thus the government's interest in knowing the identity of the source was insufficient to override Voskuil's interest in protecting it. The Court concluded that there has been a violation of Article 10 of the Convention. Furthermore, the Court found that the Netherlands had violated Article 5 of the Convention (the right to liberty and security), since the detention procedure prescribed by law had not been followed.

Statutory Protection of Sources

For some years, the Dutch Association of Journalists has advocated for statutory protection for journalists' sources. At the start of 2007 Minister of Justice Hirsch Ballin opposed the idea because he was of the view that a statutory provision would not add anything to current legal practice. In the meantime, however, he changed his mind and has announced that he wants to lay down the journalistic right of non-disclosure in law.

Christien Wildeman is a lawyer with Kennedy Van der Laan in Amsterdam.



50-STATE SURVEYS

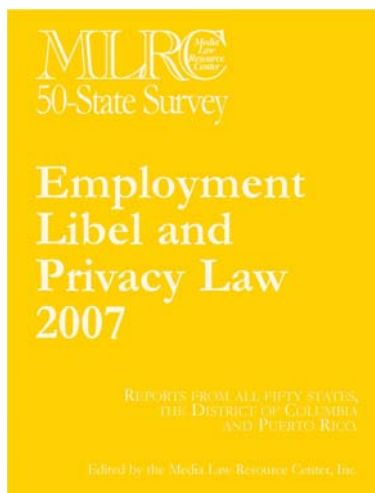
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ECHR Strengthens Protection For Journalists And Their Sources In Landmark Case Involving EU Whistleblowers

Police Raid of Reporter's Home Violated Article 10

By Christoph Arhold

In a major ruling by the European Court of Human Rights ("ECHR") upholding the freedom of the press, journalist Hans-Martin Tillack has won his long legal battle to protect his sources in the European Commission's Anti-Fraud Office ("OLAF"), after a Belgian police raid on his home and office and the seizure of his working materials. *Tillack v Belgium*, Case 20477/05 Nov. 27, 2007. (The authentic language of the judgment is French. An English version is not yet available and quotations from the judgment are our own translation.)

This was the crucial last act in an important series of cases on protection of journalists and the liability of the EU Institutions.

Background

In 2002 Mr. Tillack, who was then the German magazine *Stern's* Brussels-based EU correspondent, wrote a series of articles on fraud and mismanagement in the Community Institutions which criticized OLAF's investigation of these problems, relying on leaked internal OLAF documents.

OLAF tried unsuccessfully to identify the source of the leak, and also issued press releases which implied that Mr. Tillack might have used bribery to obtain the documents. Mr. Tillack complained to the European Ombudsman, who in November 2003 condemned OLAF for accusing him of bribery on the basis of nothing but rumor and hearsay - a claim by the then spokesman for the European Commissioner responsible for OLAF to have heard a vague suggestion to that effect from a former colleague who refused to confirm this.

In November 2003 Mr. Tillack published an article on OLAF's Director-General, which apparently spurred OLAF into taking more decisive action. As it could not silence Mr. Tillack itself, its officials consulted with Belgian officials in January 2004 on possible coordinated action, and in February 2004 OLAF forwarded the Belgian judicial authorities reports which accused Mr. Tillack of bribing Commission officials to obtain confidential EU documents and helped them to breach their duty of confidentiality.

The grounds for the accusations were the same rumor and hearsay which the European Ombudsman had already condemned OLAF for using. OLAF asked the authorities to launch investigations immediately in order to safeguard the evidence in Mr. Tillack's possession (hinting - falsely - that he was about to leave Europe for a US assignment). Obviously OLAF's real goals were to put an end to the articles and identify its whistle-blower - it would be able to do this once Mr. Tillack's materials became part of the Belgian authorities' file on the "bribery case", as OLAF or the Commission could then obtain access to the file as a *partie civile* (the victim of an offense).

On March 19, 2004 at 7.00 am, the police raided Mr. Tillack's home in Brussels, took him into custody (holding him incommunicado for some 12 hours) and sealed or seized virtually all his archives, working documents, computers and mobile phones at his home and office, and - as a matter of course - his bank statements.

Belgian Court Actions

On his release from custody (without charges - indeed, he has never been charged with any offense), Mr. Tillack petitioned the Belgian examining magistrate for the lifting of the seizure measures, arguing that the investigation violated a journalist's right under Article 10 of the European Convention on Human Rights to protect his sources. The examining magistrate, however, refused to acknowledge a breach of Article 10.

At that time Belgium had no legislation which protected press freedom, though it has since hastily adopted such legislation. Mr. Tillack challenged the order by a petition to the *Chambre des mises en accusation*, which confirmed the order and its reasoning in September 2004. He then appealed to the *Cour de Cassation*, Belgium's Supreme Court, which rejected the appeal in December 2004 despite an opinion by the *Avocat Général* (court prosecutor) which stressed the authorities' failure to evaluate the evidence provided by OLAF before ordering the searches and seizures. As all national remedies had been exhausted, Mr.

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ECHR Strengthens Protection For Journalists And Their Sources In Landmark Case Involving EU Whistleblowers

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Tillack's final recourse against the Belgian authorities was an application to the ECHR.

European Community Court Actions

In a further effort to protect his sources effectively, Mr. Tillack asked the European Court of First Instance ("CFI") for interim measures to prevent OLAF from obtaining the information and documents held by the Belgian police. (The CFI has jurisdiction for direct actions against Community acts. Its decisions can be appealed to the European Court of Justice ("ECJ"). Acts by EC institutions can only be directly challenged before these Courts.)

As interim measures are contingent on a pending main action, Tillack also sought the annulment of OLAF's decision to complain to the Belgian authorities under Article 230(4) EC, which allows challenges to decisions that directly alter the legal situation of an individual. As it was uncertain whether OLAF's decision qualified as such an act, he also filed under Article 288(2) EC Treaty for damages for injury resulting from OLAF's false accusations. All these actions were dismissed by the CFI in October 2004, Case T-193/04 R, *Tillack v. Commission*, [2004] ECR II-3575, and, following an appeal, by the European Court of Justice ("ECJ") in April 2005, Order in Case C-521/04 P (R), *Tillack v Commission*, [2005] ECR I-3103.

Both Courts considered the action for annulment inadmissible and the action for damages unfounded, for the same reason: the Belgian authorities had conducted the raids at their own discretion. They reasoned that as OLAF's reports were not legally binding on the Belgian authorities, they did not constitute challengeable acts, and as the Belgian authorities had discretion in reacting to them, there was no direct causal link between OLAF's false accusations and the injury resulting from the raid.

This reasoning seems to open up a dangerous gap in effective legal protection, as it meant that OLAF escaped liability for its false accusations, although the Belgian courts had ruled that the national authorities' actions were justified because they had a duty to cooperate with an EU Institution such as OLAF.

ECHR Action Against Belgium

Before the ECHR the Belgian authorities continued to argue that the information they had received was "*precise and serious*," in particular because it "*was provided by OLAF, an office with an excellent reputation engaged in the fight against corruption. As OLAF had carried out an internal investigation before sending the reports, the examining magistrate had no reason to believe that the matters reported were nothing but unsubstantiated facts and allegations.*" However, the seven judges of the ECHR (including the Belgian Judge Françoise Tulkens) did not accept these arguments. They unanimously found that Belgium had violated Article 10 of the Convention, and awarded Mr. Tillack €10,000 for non-pecuniary injury and €30,000 for costs and expenses.

The ECHR first recalled the essential role of the free press in a democratic society and the fact that the protection of journalists' sources is a basic condition for press freedom. Interference with this fundamental right can only be justified if it is "*necessary in a democratic society*," and this is only the case when the interference aims to serve a higher social need and is proportional to the pursued legitimate objective, and when the motivation given by the national authorities to justify the measure is relevant and sufficient." ECHR judgment, ¶60.

These conditions were not fulfilled here. As the ECHR observed, it was evident when the searches took place that their purpose was to identify Mr. Tillack's sources in OLAF, for OLAF's benefit. *Id.*, ¶s 63-64. The Court emphasized that a "*journalist's right not to reveal her or his sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution, even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumors.*" *Id.*, ¶65.

It did not matter that these rumors were spread by OLAF. The ECHR therefore considered that although Belgium's arguments were "*relevant*," they could not be considered "*sufficient*" to justify the searches.

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ECHR Strengthens Protection For Journalists And Their Sources In Landmark Case Involving EU Whistleblowers

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Comment

The ECHR has a long tradition of upholding press freedom (including earlier judgments against Belgium for failing to do so). This judgment will make it more difficult for national authorities to circumvent protection of journalists and their sources on the basis of false accusations such as bribery of officials or conniving in the betrayal of confidential information. We understand the ruling is in line with a recent German Constitutional Court judgment in a similar case, *Judgment of the German Constitutional Court*, Feb. 27 2007, Case 1 BvR 538/06; 1 BvR 2045/06, both judgments being based on two key rules:

Not all forms of suspicion are sufficient to justify a search warrant against members of the press, or national authorities would be free to violate press freedom at their discretion. Instead there must be a thorough investigation which finds specific indications that the journalist has probably committed an offense.

Identifying a journalist's source must not be the main objective of searches and seizures: even when there are specific indications that he has committed an offense, they are still prohibited if their sole or main purpose is to identify his informant.

But although the ECHR ruled decisively on the issue of press freedom and protection of sources, the problem of OLAF's liability for its unlawful behavior remains unresolved. OLAF considered it necessary to publish a press release stating that the ECHR judgment was directed solely against Belgium, while the Community Courts had ruled in OLAF's favor. See OLAF press release 07/15, Brussels, 29 November 2007, at http://ec.europa.eu/anti_fraud/press_room/pr/2007/15_en.html.

This may be formally true, but it simply highlights the hole in the European judicial system - indeed, the ECHR actually observed that the Belgian authorities had acted on behalf of OLAF, so OLAF should normally also be liable for the violation of Article 10. However, the ECHR has no jurisdiction over the EU, which is not as such a member of the Human Rights Convention.

The Community Courts, which are competent for OLAF's actions, based their rulings on concepts developed in the context of classic European economic law to deal with commercial relationships between market operators, whose interests are normally limited to financial compensation. Today the EU is much more than just a trade and customs union; it has a broad mandate which includes concerted action against terrorism and organized crime.

Nor do the EU Institutions now act solely through directives which are implemented by national authorities; they have developed their own direct investigative powers and it should be possible to hold them liable as a matter of course if they abuse their powers. This deficit in the EU's judicial system must be ended.

Christoph Arhold, a lawyer with White & Case LLP in Brussels, represented Hans-Martin Tillack.

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Paris Court Rejects Attempt to Enjoin Release of Book About Cecilia Sarkozy

Divorce, or the Beginning of Private Life

By Jean-Frederic Gaultier

In a decision given on January 11, 2008, the Paris Court proved efficient and concerned about finding a balance between freedom of speech and the right to privacy.

Cecilia Sarkozy, recently divorced from French President Nicolas Sarkozy, claimed that the book "Cecilia" written by journalist Anna Bitton should be removed from the shelves on the grounds of an invasion of her privacy. The court rejected this claim finding that a prohibition, even a temporary one, would be "*obviously disproportionate*." The book quotes Cecilia making several unflattering comments about her former husband, including calling him a "womaniser," and "a man who loves no one, not even his children."

Efficiency

The privacy judge worked as swiftly as the divorce judge. "Cecilia S." had a request filed on 9 January 2008 to have this matter heard via fast-track interim proceedings ("*référé*"). The request was granted the same day, the trial (French style) took place on 10 January 2008, the decision was handed down on 11 January 2008, and reported in the press the same day.

Balance of Free Expression & Privacy

Pursuant to Article 9 of the *Code Civil*, "*Everyone has the right to the respect of his right to privacy. Without prejudice to compensation for harm suffered, the court may prescribe any measures, such as sequestration, impounding and others, appropriate to preventing or putting an end to an invasion of personal privacy; in the event of urgency, such measures may be provided for by interim order.*"

Privacy matters are deemed to be urgent, with the result that this test is often met. "Personal privacy" or "intimacy" is the core of private life. There is no definition, and case law remains quite unpredictable. Health is usually part of the intimacy, personal feelings as well. It remains unclear in respect of wealth or family roots, some contradictory decisions having been rendered in this respect. Case law developed a third test on the grounds of Articles 8 and 10 of the European Convention on Human Rights: sequestration or impounding may be ordered in

interim proceedings in order to prevent irreparable harm.

The decision given on January 11 rejected the claim mainly on the grounds that Cecilia S. failed to prove irreparable harm.

The court stated that most of the book is dedicated to subject matters that are part of privacy "by nature": family life, marital life, love affairs, and personal feelings. The court further considered that some of these may also be part of intimacy, in particular the personal feelings the author attributed to Cecilia S.

Invasion of privacy may, however, be legitimate when it is in the public interest. The court considered that the divorce of a President is of interest for the public as it could have some political impact. The court also reminded that the boundaries of one's private life are in one's own hands, and that Cecilia elected to make her private life public: Cecilia S. publicly claimed she was a "*political individual*", and that her duty as a spouse was to help her presidential husband;

- ◆ *she gave several interviews about topics similar to the ones reported in the book;*
- ◆ *several articles had been published about her private presidential life, without complaints from her about this;*
- ◆ *while still married to the President, she and her husband publicized their private life, and thus created public interest.*

Lastly, the court explains why impounding the book, even temporarily, would be disproportionate in view of this past attitude:

- ◆ *the book does not deal with post-presidential divorce information;*
- ◆ *the book is already on the shelves, and several articles Cecilia S. does not complain about already reproduce part of it;*

the journalist who wrote the book interviewed Cecilia S. many times, took down notes in front of her, informed her of her intention to publish a book, etc., again without Cecilia S. complaining: and the book does not undermine Cecilia S.' status.

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Paris Court Rejects Attempt to Enjoin Release of Book About Cecilia Sarkozy

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Cecilia S. announced she would appeal. In addition, as already indicated, the decision was given via interim proceedings ("reféré"). It therefore has no bearing on the merits, where Cecilia S. may well succeed if she decides to follow this route.

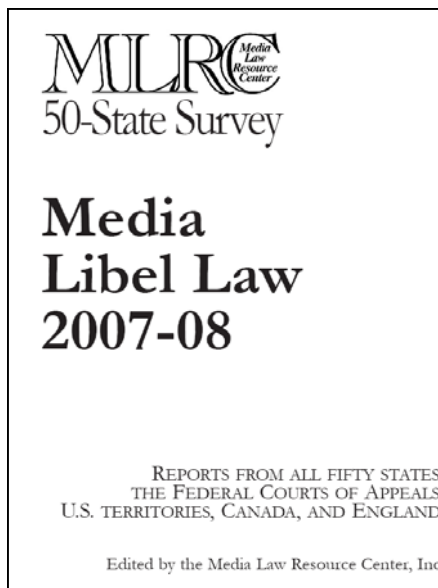
Prohibition of a book remains very exceptional in France, and the decision handed down by the Paris court confirms this.

The decision is however quite unusual in some respect. It is (or was?) admitted that love affairs of politicians are not in the interest of the public. As the court puts it, the situation is likely to be different when a politician decides to put his private life in the public domain and thus "creates public interest."

Jean-Frederic Gaultier is a partner with Clifford Chance in Paris.



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The Other Side of the Pond: UK & European Law Update

Media not bound to disclose draft articles before publications

By David Hooper

With the increasing number of aggressively pursued applications for privacy injunctions, the ruling of Mr Justice Eady in *Thomas Cook Tour Operations Limited -v- Telegraph Media Group Limited* (2007) EWHC 2560 is of some importance. The travel company, Thomas Cook, had secured an interim injunction at an earlier hearing before Mr Justice Beatson initially in defamation relating to an account of potential criminal proceedings in Greece. Subsequently, a claim was made in privacy to protect the identity of the employee under investigation following the deaths of children in a hotel accident. The newspaper had been criticised at the earlier hearing for not disclosing the draft of the article but Mr Justice Eady firmly rejected such criticism. He referred to the decision of the Court of Appeal in *Leary v BBC* on September 29, 1989 when the court pointed out that it was not appropriate to require a media defendant to reveal a draft article. They might wish to do so but that was entirely for them. They should not be pressed to do so against their wishes nor should they be penalised for not doing so. Mr Justice Eady pointed out it is not for the court to lay down the text which shall be published because that would be to fall foul of the principle that the court should not become a censor.

The case is a helpful reminder that media Defendants need not succumb to pressure to produce the article they are proposing to publish. In doing so they could well be providing the Claimant with ammunition to use against them. Usually the media Defendant is best advised not to produce the material but to require the Claimant to specify what their concerns are and then to consider - without showing the article to the Claimant - what changes, if any it would be prudent to make to the article prior to publication.

Is Jerry Springer a Blasphemer?

An evangelical outfit called Christian Voice has been trying to prosecute the BBC for its broadcast of *Jerry Springer- The Opera*. They were trying to emulate the success of Mary Whitehouse, an old battle-axe commit-

ted to protecting what she perceived to be the moral virtues of middle England in *Whitehouse -v- Lemon* (1978) 68 CR.APP.R.381, where Gay News has been successfully prosecuted for some metaphorically attributed homosexual acts to Jesus Christ. However, the District Judge's decision refusing to allow Christian Voice to bring such a prosecution was upheld by the Divisional Court, which ruled that there must be contemptuous, reviling, scurrilous or ludicrous material relating to the Christian religion and that there must be a risk serious breach of the peace.

As *Jerry Springer- The Opera* had been playing for some time in the theatre without noticeable civil unrest, the prosecution was bound to fail. Furthermore, in their enthusiasm to protect the Christian religion, Christian Voice had paid insufficient weight to the fact that under the Theatres Act 1968 and the Broadcasting Act 1990 such prosecutions were not possible. The court did, however, certify that a point of public interest sufficient for the attention of the House of Lords was involved, although they did not give permission for such an appeal to take place.

Christian Voice appear determined to secure eternal damnation of this production, so it is possible the matter may end up in the House of Lords. The interest would be whether the House of Lords will effectively abolish the crime of blasphemy, which has been criticised on many grounds, not least because it protects only the Church of England and not other religions.

Privacy and Long-Lens Photography

Settlement of a claim by former Prime Minister Tony Blair and his wife Cherie against Associated Newspapers Limited regarding the publication of long-lens photographs taken of them when they were on holiday at Sir Cliff Richards' villa in Barbados has recently been announced. Claims by persons including public figures in respect of photographs of their everyday life in private locations seem likely to increase, particularly when taken surreptitiously and/or with long lenses. The real issue is likely to be whether they can assert privacy in respect of

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The Other Side of the Pond: UK and European Law Update

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their everyday activities in public places - the issue in the JK Rowling case (please cross-refer to my article in the October issue of the *MLRC MediaLawLetter*).

Perjury and Libel Actions

Jeffrey Archer and Jonathan Aitken know to their cost (4 years and 18 months respectively) the dangers of giving false evidence in libel actions. A former member of the Scottish Parliament, Tommy Sheridan recently had his collar felt by the police following his successful libel action in Scotland when he obtained £200,000 damages against the *News of the World* in respect of allegations of sexual shenanigans. He has not, however, been charged. He was simply arrested and questioned following a rather dramatic arrest by police waiting outside the radio station where he broadcast his programme "Citizen Tommy." Exactly how the police can obtain evidence that the witnesses were engaged in sexual activity when they asserted on oath that they were not remains unclear. Before any prosecution could be brought the Procurator Fiscal (the independent prosecuting authority) would have to be satisfied there was sufficient evidence for a case to be brought. All that one can say therefore at present is that recent events are a salutary reminder that the media have shown themselves determined to pursue libel claimants when they consider them to have obtained libel awards by false evidence.

Jameel and Reynolds Defences- The Claimants are Winning Again

On 23 November 2007 Mr Justice Eady ruled in [*Prince Radu of Hohenzollern v Houston*](#) (2007) EWHC 2735, on which he had made earlier preliminary rulings commented by me in the *MLRC MediaLawLetter* Oct. 2007 at 39. This was a claim by the husband of Princess Margarita of Romania over an article published in *Royalty Monthly* entitled "Scandal in Romania as Princess Margarita's husband is branded an impostor." Prince Margarita had been previously known to British people as the companion of the youthful Gordon Brown, now our Prime Minister, before walking out on him after five years of understandably complaining about his obsession

with politics.

Here, however, attempts to establish that the article was simply reportage of a press conference where these fiercely disputed allegations were made along the lines of *Roberts v Gable* failed, principally because criticisms of Radu were included which had not been mentioned at the press conference. Furthermore, the judge took the view that the allegations against Radu had in some measure been adopted. Nor was the defendant assisted by the *Reynolds* defense as most recently considered in the *Sharman* case (see the *MLRC MediaLawLetter* of Oct. 2007 p.39).

The decision was of some interest as the approach of Mr Justice Eady to *Reynolds* cases had been the subject of some trenchant criticism in the House of Lords in *Jameel*. However, the case is a salutary reminder that although the *Jameel* decision is extremely helpful to media defendants, success is by no means guaranteed. Mr Justice Eady recognized that failure to meet all the *Reynolds* tests would not operate as a hurdle which should cause the defendant to trip over.

However, the allegations had to be looked at "in the round." The defendants had had plenty of time to put the allegations to Radu but they had not done so and this was principally where their claim of responsible journalism floundered. The defendant sought to justify the allegations and that was how the case would have to be defended. The Judge considered Radu's reputation was attacked on several fronts without giving him a chance to respond and the magazine had gone some way to adopting the allegations against him. The Judge felt that it was of particular significance that a number of false allegations against Radu had been put in circulation without giving him any opportunity to put his side of the story, namely that he had forged a document relating to his title, that he was a former member of the Romanian secret police and that he had falsely claimed to have been adopted by the Romanian royal family.

The Judge accepted the importance of editorial judgment but he was firmly of the view that the failure to give Radu any opportunity of rebutting the allegations deprived the Defendants of a defence of responsible journalism.

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The Other Side of the Pond: UK and European Law Update

(Continued from page 11)

Editors' Code

The Editors' Code Book approved by the Newspaper Publishers Association, the Newspaper Society and the Periodical Publishers Association and their Scottish equivalents, which sets out the Code of Practice under which journalists operate and in respect of which they are accountable to the Press Complaints Commission, is now being published online at <http://www.editorscode.org.uk>

Conditional Fees

The real theme which should be of concern to media defendants is that the costs in CFA proceedings are out of control. The British media organisations have recently submitted their proposals to the Department of Justice concerning Conditional Fee Agreements in publication proceedings. The likelihood is that whether one likes it or not, Conditional Fee Agreements are here to stay, as they are the basis for people with limited means being able to bring proceedings in, for example, personal injury cases, where previously they would have received state-funded Legal Aid. There is, therefore, an element of politics about the CFA regime. What is quite clear is that the present system is a scandal reminiscent of the 18th century cartoon of the litigation cow being happily milked by portly lawyers. A link is also included in this note to an excellent article by Joshua Rozenberg in the London Evening Standard of 18 December 2007. [Libel Law is Out of Control](#).

What is of particular concern is the level of costs that can be run up under a Conditional Fee Agreement - and remember that the only element of restraint is the self-imposed restraint of the plaintiff's lawyer who is not in any real sense accountable to his client for the level of fees - before the claim is even intimated to the defendant. At the very least one needs a system whereby claims can be resolved at an early stage without incurring a success fee. Furthermore the success fee itself when payable should accurately reflect the level of risk at that stage of the proceedings. One of the dangers inherent in the system which, no doubt, all plaintiff lawyers assiduously avoid is the temptation to talk up the risk of the claim, as the higher the risk, the higher the success fee. No rea-

sonably sane person would in normal circumstances bring a costly libel action, if the risk really was 50/50.

Unhappily, under the CFA regime they have nothing to lose except possibly the smile on their lawyer's face if the case turns out to be successfully defended. The lawyer, however tends to keep smiling, as he normally stands to recover a 100% success fee — \$1500 an hour for often not very taxing work.

Injunctions and Confidential Information

In an interesting decision of Mr Justice Tugendhat on 16, November (2007) EWHC 2677 [Northern Rock plc v The Financial Times Limited and Telegraph Media Group Limited](#), a number of newspapers had received a confidential memorandum prepared by Merrill Lynch providing financial information for potential acquirers of the troubled bank Northern Rock. The Judge took the view that it would be futile to injunct the further publication of the resume of that briefing memorandum which had appeared in the mass media. Different considerations applied to the *Financial Times* website where the entire contents of over ten pages of the memorandum were published. This was considered by the court to contain detailed financial information which was commercially sensitive and although it had been publicly accessible on the website, it had not received the same degree of publication. The Judge therefore ordered that confidential information to be removed.

Strange Goings On in Europe

On 11 December 2007 the Grand Chamber of the European Court of Human Rights, by a majority of 12 to 5, reversed the earlier majority decision of a Chamber Court in favour of the journalist Martin Stoll, in the case of [Stoll v Switzerland](#), application No. 69688/01. The Swiss journalist Martin Stoll had been investigating the lamentable conduct of Switzerland in relation to the assets of Holocaust victims. A report by the Swiss Ambassador to the United States had come his way, which clearly had not greatly impressed Stoll, judging by the headline: "Ambassador Jagmetti insults the Jews". Predictably, the secretive and sanctimonious Swiss had fined

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The Other Side of the Pond: UK and European Law Update

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Stoll for publishing “secret official deliberations”. The European Court, however, agreed that it was vital to the functioning of diplomatic relations that such information should be kept confidential and found fault with the tone and misleading nature of Stoll’s report and therefore concluded that there was no breach of Article 10 and upheld the fine.

A mirror image case of *Pfiefer v Austria*, 15 November Application No, 12556/03, provided a result which many would consider more just but troubling for different reasons. Carl Pfeifer was an Austrian freelance journalist who was the editor of the official magazine of the Vienna Jewish community. He had locked horns with a university professor who had written in neo-Nazi terms. Eventually proceedings were taken against the professor under the National Socialism Prohibition Act, which resulted in the professor committing suicide. This caused a right-wing publication, *Zur Zeit*, to accuse Pfeifer and others as being part of a hunting society which had pursued the professor to his death. Pfeifer, who, one might have thought as a journalist was able to look after himself, chose to sue the magazine. The Austrian courts, which have in the past been somewhat flakey in matters concerning neo-Nazis, took the not unsensible view that there was no basis for this claim as the offending statement was a value judgement relying on a sufficient factual basis.

Step in the European Court of Human Rights, with its fondness for the merits and ensuring that the meritorious prevail over the unmeritorious, and they awarded Pfeifer €5,000 plus €10,000 for his costs because his Article 8 privacy rights had been infringed and he should have been entitled, notwithstanding the provisions of Article 10, to bring a libel action. Out of the window it seems went the idea of the margin of appreciation permitted to a state like Austria in deciding whether there was defamation in this case where there does appear to have been an element of give and take. More alarming are the implications of the Court’s ruling. This goes far beyond actions of the state which might infringe Articles 8 or 10. It now extends, it seems, to requiring the state to protect an applicant like Pfeifer against excessive criticism. The

Court reiterated that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primary negative undertaking, there may, the court said, be positive obligations inherent in effective respect for private and family life. Applying the appropriate balancing exercise between articles 8 and 10, the European Court of Human Rights superimposed its own view of the merits of FIFA’s libel action and decided that the statements were not value judgments and that the allegations against Pfeifer were facts which should be susceptible of proof but in their view were not proved. There is therefore a route to Strasbourg for disappointed libel plaintiffs who may be able to persuade the 17 judges that they should in effect receive their libel damages.

Premium Phone Lines and Television Companies

On 20 December 2007, the regulatory body Ofcom fined Channel 4 £1.5 million for the way in which they had run premium phone lines where members of the public were encouraged at considerable expense to telephone the station in the hope of winning a quiz prize. On occasions there was not a fair or realistic prospect of success in the competitions. The television companies were generating considerable revenue from these programmes. Channel 4 was only one of a number of television companies disciplined in this way. GMTV had earlier been fined £2 million. The rules for such programmes are now changing. A new body, PhonepayPlus, will deal with the regulation of such programmes, which takes over from ICTSIS. It published a formal framework agreement between Ofcom and PhonepayPlus on 5 December 2007, which it is hoped will avoid such scandals. It has been a deeply embarrassing episode for the various television companies who have made abject apologies and substantial donations to charities.

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

The Reporting of Criminal Convictions Under UK Law

Libel, Contempt & Data Protection Issues

By Robin Shaw and Zoë Norden

For media lawyers and their publisher clients it will often be the case that an individual that comes to the public's attention has a past involving criminal behaviour which may be considered newsworthy. The extent to which publishers need to be mindful of any applicable legal framework that imposes any restrictions on such reporting will depend on the circumstances of publication and the offense itself.

Rehabilitation of Offenders Act

Legislation under English Law provides details of the conditions under which certain information in relation to previous criminal convictions should and should not be referred to with reference to rehabilitation and spent convictions (See Section 5 of the Rehabilitation of Offenders Act 1974, which sets out the rehabilitation period for a number of offences upon which the conviction will then become 'spent'). Broadly speaking it only applies to convictions leading to a sentence passed of no more than 30 months imprisonment.

The Rehabilitation of Offenders Act 1974 (the "1974 Act") (Section 4(1), Rehabilitation of Offenders Act 1974) provides that, subject to certain limitations (Section 4(7) and Section 4(8), Rehabilitation of Offenders Act 1974), a person who has become a rehabilitated person for the purposes of the 1974 Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.

The consequence of this is two-fold: that no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction to prove that such a person has been convicted or sentenced for an offence which is the subject of a spent conviction; and any person in any proceedings should not be asked, but in any event, is not required to answer questions related to their past which cannot be answered without reference to the spent convictions.

The Act also applies to convictions outside England (Section 1(4)(a), Rehabilitation of Offenders Act 1974) so that a person may become a rehabilitated person for the pur-

poses of the Act.

There are however special provisions (Section 4, Rehabilitation of Offenders Act 1974) in the 1974 Act relating to defamation without which there would have been no defense of justification available in relation to a publication involving an allegation of a conviction which was spent. The 1974 Act provides that nothing shall prevent a defendant in an action to which the section applies from relying on any defense of justification or fair comment or of absolute or qualified privilege which is available to him, or restrict the matters he may establish in support of any such defense, unless the publication is proved to have been made with malice. (*Herbage v Pressdram* [1984] 1 W.L.R 160, seems to make clear the burden of proving malice in a Rehabilitation of Offenders case rests on the claimant). Any publication that is complained of that took place before the conviction became spent is not affected by the 1974 Act (Section 8(2), Rehabilitation of Offenders Act 1974.)

By virtue of the special provisions in the 1974 Act, it would appear therefore that there would be a defense to a libel action which involved the publication of details of a spent conviction.

Contempt of Court

Publishers should also be aware of the provisions of the Contempt of Court Act 1981 (the "1981 Act") when looking to exploit their back catalogue online. In particular, back catalogues in the case, say, of newspapers, will inevitably contain details of criminal convictions which may or may not have subsequently become spent. In theory, at any rate, the availability of such details may have consequences if the criminal whose details are contained in the archive in question becomes the subject of further criminal proceedings.

This is because under English law details of any previous convictions of a criminal defendant are generally withheld from the jury on the grounds that if they were to hear about them the jury could be unfairly biased against the defendant.

Accordingly, newspapers and the media in general are prohibited from publishing such details in the lead up to and

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The Reporting of Criminal Convictions Under UK Law

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during the course of the criminal trial. If such details were readily available from an archive, the publisher would be at risk of liability under the strict liability rule in the 1981 Act, which applies where its conduct interferes with legal proceedings (regardless of the intent to do so).

It would appear unlikely that the mere existence of such an archive would be held to create a sufficiently serious risk to give rise to proceedings for contempt.

Data Protection

A further area of consideration worth noting is a recent development in the area of data protection, in relation to the retention of information held by the police regarding details of criminal convictions. On 1 November 2007, the Information Commissioner's Office announced that it had issued enforcement notices against four police forces for holding information about criminal convictions that was in breach

of the third and fifth data protection principles.

These principles require that personal data processed for any purpose should be adequate, relevant and not excessive, and should not be kept for longer than is necessary for that purpose. Records that were ordered to be deleted related to individuals who had been convicted or cautioned on one occasion in relation to non-custodial offences and had not been convicted of any other offences.

The Commissioner considered "the continued retention of the data, which was causing harm and distress to the individuals involved, was not necessary for policing purposes". The relevant police forces are appealing to the Information Tribunal and will retain the relevant information until the outcome of the appeal, which is due to be heard in early 2008.

Robin Shaw and Zoë Norden are lawyers with Davenport Lyons in London.



50-STATE SURVEYS

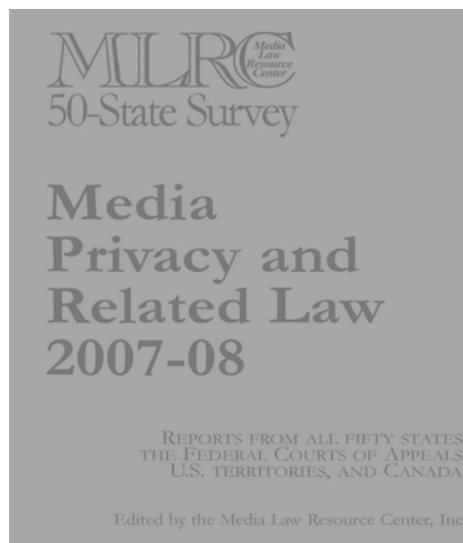
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Libel Terrorism Protection Act Introduced in New York Legislature

Bill Would Protect Publishers From Foreign Libel Judgments

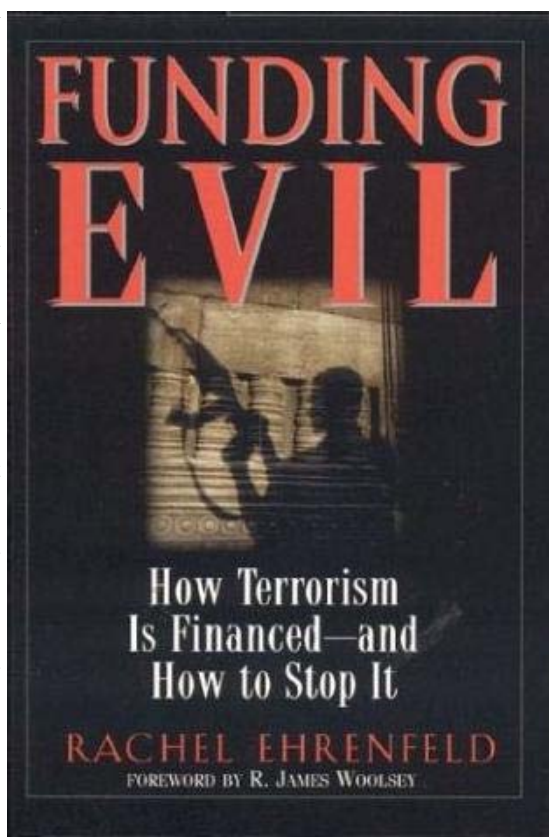
By Jason P. Criss

Last month, the New York Court of Appeals held that the New York long arm statute, Civil Practice Law and Rules (“CPLR”) § 302, did not support the exercise of jurisdiction over a Saudi plaintiff who had sued a New York author for libel in the United Kingdom. *Ehrenfeld v. Bin Mahfouz*, 2007 WL 4438940 (Dec. 20, 2007). But all is not lost, as the Legislature has taken up the Court’s invitation to respond to its decision by amending New York’s long arm statute.

If enacted, the [Libel Terrorism Protection Act](#) (S. 6687/A. 9652) would provide authors with greater protections from foreign judgments achieved without First Amendment protections. Among those who will benefit most from the bill are authors and publishers who are the victims of “libel tourism,” the practice of plaintiffs suing in foreign jurisdictions that have no legitimate connection to the challenged publication and that do not provide the same free speech protections as those afforded by the United States and New York constitutions.

Background

Rachel Ehrenfeld is a New York author and speaker who has published several works on international terrorism, including *Funding Evil: How Terrorism is Financed – and How to Stop It*, a book published by Bonus Books in 2003. The book was only published and offered for sale in the United States. Only 23 copies of the book were sold in the United Kingdom, and they were all purchased through United States internet sites. In *Funding Evil*, Ehrenfeld states that Khalid Bin Mahfouz, a Saudi Arabian subject, financially supported terrorist groups in the years preceding the September 11, 2001 terrorist attacks.



Bin Mahfouz sued Ehrenfeld in England for libel on the basis of these allegations. Ehrenfeld did not appear in the English action, and Bin Mahfouz obtained a default judgment against her. The judgment provided for monetary damages, an injunction against publishing the disputed statements in the United Kingdom, and a “declaration of falsity” in which the court determined that the challenged statements were false and defamatory. The court also ordered Ehrenfeld to issue an apology to Bin Mahfouz.

Declaratory Judgment Action

Ehrenfeld then filed suit in the United States District Court for the Southern District of New York, seeking a declaration that the English judgment is not enforceable in the United States on constitutional and public policy grounds. The district court granted Bin Mahfouz’s motion to dismiss for lack of personal jurisdiction. *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006). Ehrenfeld then appealed to the Second Circuit, which held that the dispute between the parties was ripe, and certified to the New York Court of Appeals the question whether CPLR § 302(a)(1), which provides for personal jurisdiction over a non-domiciliary who “transacts any business within the state or contracts anywhere to supply goods or services in this state,” conferred jurisdiction over Bin Mahfouz. *Ehrenfeld v. Bin Mahfouz*, 489 F.3d 542 (2d

Cir. 2007).

The New York Court of Appeals answered the certified question in the negative. The Court noted that its prior decisions held that “the overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within New York.” The Court of Appeals then held that Bin Mahfouz’s contacts with New York – sending a pre-filing demand letter to Ehrenfeld in New York and serving documents

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Libel Terrorism Protection Act Introduced

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in the English action on Ehrenfeld in New York – merely constituted actions “intended to further his assertion of rights under the laws of England” and did not “invoke[] the privilege or protections of [New York] State’s laws.”

The Court of Appeals acknowledged the problem of libel tourism, but stated that “however pernicious the effect of this practice may be, our duty here is to determine whether [Bin Mahfouz]’s New York contacts establish a proper basis for jurisdiction” under the current long arm statute. The Court of Appeals also rejected Ehrenfeld’s argument that Court of Appeals precedents protecting non-domiciliaries’ free speech rights “lead to the conclusion that CPLR 302(a)(1) must be interpreted to protect New Yorkers from the alleged chilling effect of foreign libel judgments. . . . [O]ur task is to interpret the New York statute as written. Thus, plaintiff’s arguments regarding the enlargement of CPLR 302(a)(1) to confer jurisdiction upon ‘libel tourists’ must be directed to the Legislature.”

Libel Terrorism Protection Act

Members of both houses of the New York State Legislature have responded to that invitation, and have introduced the Libel Terrorism Protection Act to amend the CPLR. The bipartisan legislation, sponsored by State Assemblyman Rory Lancman (D-Queens) and State Senator Dean Skelos (R-Long Island), would effectively overrule the Court of Appeals’ *Ehrenfeld* decision by amending two CPLR provisions. First, it would add to CPLR § 5304’s list of grounds pursuant to which a court has the discretion to not recognize a foreign judgment that “the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this state first determines that the defamation law applied in the foreign jurisdiction satisfies the freedom of speech and press protections guaranteed by both the United States and New York constitutions.” Libel Terrorism Protection Act (“Act”) § 2.

Second, the bill would amend New York’s long arm statute to provide for jurisdiction over a plaintiff who secures a foreign defamation judgment with a sufficient nexus to New York State, by adding this new paragraph to CPLR § 302:

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States

against any person who is a resident of New York, or, if not a natural person, has its principal place of business in New York, for the purposes of rendering declaratory relief with respect to that resident’s liability for the judgment, provided: 1. the publication at issue was published in New York, and 2. that resident (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment.

Act § 3. The bill further provides that the amendment to the long arm statute “shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.” *Id.*

These proposed CPLR amendments would fill significant gaps in the protections for libel defendants under current New York law. Under the current law, if Bin Mahfouz were to enforce the English judgment, a New York court likely would refuse to do so. *See, e.g., Bachanan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. County 1992) (declining to enforce an English defamation judgment because it would be repugnant to public policy to enforce a judgment imposed without First Amendment protections). But under the Court of Appeals decision, a libel defendant such as Ehrenfeld must wait for the foreign libel plaintiff to take action. This limitation permits a plaintiff like Bin Mahfouz to use the a foreign judgment to chill future criticism, while also ensuring that an American court will not have jurisdiction to declare the judgment unenforceable. If enacted, the Libel Terrorism Protection Act would allow the libel defendant to take the initiative by providing for personal jurisdiction over such a declaratory judgment action initiated by a New York resident. These New York declaratory judgment actions could prove to be a powerful check against libel tourists’ attempts to chill criticism by United States authors and publishers.

The Libel Tourism Protection Act has been referred to the State Senate’s Codes Committee and the State Assembly’s Judiciary Committee. The committees have not yet scheduled hearings on it.

Jason P. Criss, a associate with Covington & Burling LLP in New York, represented a group of press freedom organizations and media companies as amici in the Ehrenfeld proceedings before the Second Circuit and the New York Court of Appeals.

Nevada Supreme Court Dissolves Prior Restraint Barring MSNBC From Holding Candidates Debate

Lower Court Ordered MSNBC to Include Dennis Kucinich

Following an emergency appeal, the Nevada Supreme Court dissolved an extraordinary prior restraint that would have barred MSNBC from holding and broadcasting a Democratic Party presidential candidates debate. *NBC Universal, Inc. v. Kucinich*, No. 50889 (Nev., Jan. 15, 2008) (Gibbons, C.J., Maupin, Hardesty, Parraguirre, Douglas, Cherry, Saitta, JJ.). This decision reversed a trial court ruling ordering MSNBC to include Ohio Congressman Dennis Kucinich in the debate.

Background

The whirlwind of litigation began when MSNBC chose not to include Kucinich in a Democratic candidates' debate that was held prior to the Nevada caucuses. MSNBC had originally extended invitations to the top four Democratic Party candidates to appear in the debate, but after the Iowa caucus and the New Hampshire primary, MSNBC decided that only the top three candidates should appear. Kucinich had failed to gain any delegates at the Iowa caucus and had less than 2% of the vote in New Hampshire. The other Democratic contender, former Alaska Senator Mike Gravel, was never invited to the debate.

Lower Court Decision

Kucinich, angered by MSNBC's decision, sued MSNBC in Nevada state court the day before the January 15 debate. In his complaint, he sought a temporary restraining order against NBC forcing it to include him in the debate or barring the debate altogether. He had two claims as to why such an order was proper.

Kucinich's first claim was breach of contract. He alleged that when MSNBC invited him to the debate, his acceptance made that a binding contract. For this alleged breach, he sought specific performance rather than damages. The second claim was that NBC, as partial owner of MSNBC, was not fulfilling its duty to act in the "public

interest." The Federal Communications Act of 1934, section 315 requires that NBC provide equal opportunity to candidates for office.

The Court recognized the importance of NBC's emergency petition as evidenced by it setting the matter for an en banc hearing just hours after the petition was filed.

MSNBC immediately appealed the decision to the Nevada Supreme Court. The Court recognized the importance of NBC's emergency petition as evidenced by it setting the matter for an en banc hearing just hours after the petition was filed.

Nevada Supreme Court

MSNBC argued on appeal that the judge's ruling was a prior restraint on speech and violated their First Amendment rights. Kucinich's lawyer urged the court to act in the "public interest" and include him in the debate. To allow MSNBC to hold the debate without Kucinich "would be detrimental to the voters."



Dennis Kucinich

Kucinich's attempt to claim promissory estoppel failed because he did not raise the issue at the trial level.

The court returned a decision just hours before the debate was scheduled to start. In a unanimous ruling, the court reversed and found that both of Kucinich's claims failed. There was no breach of contract because there was no contract formed in the first place due to a lack of consideration.

Kucinich's attempt to

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The Nevada Supreme Court also found that the district court lacked jurisdiction to rule on any claimed violation of section 315 of the Federal Communications Act because Kucinich “failed to allege that he first requested and was denied relief from the FCC.” *Kucinich*, No. 50889 at *4. The proper role for a state court where a section 315 violation is alleged is to review an FCC determination.

Overall, the court found the lower court’s threat to en-

join the debate was an “unconstitutional prior restraint” on MSNBC’s First Amendment rights. *Kucinich*, No. 50889 at *5 n.15. The debate went on as scheduled without Kucinich who later announced he was abandoning his candidacy for President.

Donald J. Campbell and Colby Williams of Campbell & Williams in Las Vegas represented NBC. Kucinich was represented by William W. McGaha of DeLanoy, Schuetze & McGaha, P.C. in Las Vegas.

Published This Month! MLRC Bulletin 2007:4

ARTICLES & REPORT ON SIGNIFICANT DEVELOPMENTS WITH AN UPDATE ON CRIMINAL LIBEL DEVELOPMENTS

KEYWORD ADVERTISING PROGRAMS: TO BUY OR NOT TO BUY?

By Mitchell H. Stabbe

“One major issue that is now working its way through the courts is the legality of “keyword advertising” programs offered by Internet search engines by which a search for a phrase or term that may include a trademark can generate advertisements of companies other than the trademark owner. ... Many trademark owners, however, object to this practice. They complain that keyword advertising provides consumers who are seeking information about their products with information about competitors and ultimately may steer such consumers to someone else’s goods or services.”

WHEN IS A FICTIONAL CHARACTER DEFAMATORY?

By Jonathan Bloom

“Whether or not based on actual people, works of fiction occasionally attract libel suits from individuals asserting that a character in the work depicts him or her in a false and defamatory way. Because fiction writers so often model their characters at least in part on real people, these claims may have some basis in reality. ...For this reason the “of and concerning,” “false factual statement” and fault elements of a libel claim are inherently tricky.”

REYNOLDS PRIVILEGE: WHERE ARE WE NOW?

By Kevin Bays and Paul Chamberlain

“This so-called ‘Reynolds privilege’ is a slightly different creature from the traditional qualified privilege from which it sprang, that of privilege founded on a relationship where the emphasis was on the existence of a privileged “occasion.” In this scenario, protection does not depend on the extent to which the maker of a statement has made proper enquiries, but rather on the nature of the occasion and whether it is a privileged one.”

Utah Supreme Court Adopts Shield Law Rule

New Rule of Evidence Provides Broad Protection

By **Jeffrey J. Hunt and David C. Reymann**

The Utah Supreme Court has approved a reporter's shield rule for Utah. Acting with remarkable speed, the Court adopted Rule 509 of the Utah Rules of Evidence just one day after the public comment period on the Rule closed. Utah Supreme Court Chief Justice Christine Durham signed the order promulgating the rule effective as of January 23, 2008.

Rule 509 was supported by the Utah Media Coalition, a coalition of Utah's leading news and journalism organizations, which has been lobbying for a shield rule for nearly three years. The rule creates a near-absolute privilege for confidential sources. The only exception: when disclosure is necessary to "prevent substantial injury or death." This language is even more protective of confidential sources than existing Utah case law.

The rule also protects unpublished non-confidential newsgathering material, e.g., video outtakes, notes, photographs, drafts, subject to the multi-factor balancing test that the Utah federal and state courts have been using for the past twenty years. This test derives from *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) and *Bottomly v. Leucadia National Corp.*, 24 Media L. Rep. 2118, 1996 U.S. LEXIS 14760 (D. Utah, July 2, 1996). Before compelling disclosure of such material, a court must consider (1) whether alternative sources for the information have been exhausted; (2) whether the information sought goes to the heart of the matter; (3) whether the information is of certain relevance; and (4) the type of controversy.

Once the court makes an initial determination that information claimed to be privileged should be disclosed, the court is required to conduct an in camera review of the information before making a final determination requiring disclosure.

The new Utah rule provides some of the strongest protections to news reporters of any shield law in the nation. The rule was supported by Utah Attorney General Mark Shurtleff, who worked with the Utah Media Coalition to advocate its adoption.

The Utah Supreme Court's adoption of the rule culminates a nearly three-year-long campaign to enact a reporter's shield law in Utah. There were many ups and downs along the way. A prior version of the rule that went out for public comment was so conceptually and analytically flawed that the Utah news media and Utah prosecutors opposed it. The Utah Supreme Court scrapped that version and directed its Advisory Committee to try again. After further study and re-drafting, the Committee proposed the current Rule 509.

Our thanks to all who submitted public comments on the rule, including, in particular, the MLRC. The public comments, along with the testimony of journalists who have been on the receiving end of subpoenas seeking their sources and newsgathering material, were critical in educating Utah lawyers, judges, and the Utah Supreme Court about the need for a meaningful shield rule and its value in ensuring the free flow of information to the public.

Jeffrey J. Hunt and David C. Reymann are partners at Parr Waddoups Brown Gee & Loveless in Salt Lake City, Utah, and represented the Utah Media Coalition.



Rule 509: News Reporters

UTAH

(a) *Definitions.* As used in this rule:

(a)(1) "News reporter" means a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.

(a)(2) "Confidential source information" means the name or any other information likely to lead directly to the disclosure of the identity of a person who gives information to a news reporter with a reasonable expectation of confidentiality.

(a)(3) "Confidential unpublished news information" means information, other than confidential source information, that is gathered by a news reporter on condition of confidentiality. This includes notes, outtakes, photographs, tapes or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting to the extent such records include information that was provided on condition of confidentiality.

(a)(4) "Other unpublished news information" means information, other than confidential unpublished news information, that is gathered by a news reporter. This includes notes, outtakes, photographs, tapes or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting.

(b) *Privilege for Confidential Source Information:*

A news reporter or confidential source has a privilege to refuse to disclose and to prevent any other person from disclosing confidential source information, unless the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.

(c) *Privilege for Confidential Unpublished News Information:*

A news reporter has a privilege to refuse to disclose confidential unpublished news information, unless the person seeking such information demonstrates a need for that information which substantially outweighs the interest of a continued free flow of information to news reporters.

(d) *Privilege for other Unpublished News Information:*

A news reporter has a privilege to refuse to disclose other unpublished news information if the person claiming the privilege demonstrates that the interest of a continued free flow of information to news reporters outweighs the need for disclosure.

(e) *Who may Claim:*

The privileges set forth in this rule may, as applicable, be claimed by the news reporter, the organization or entity on whose behalf the news reporter was acting, the confidential source, the news reporter or confidential source's guardian or conservator or the personal representative of a deceased news reporter or confidential source.

(f) *In Camera Review:*

Once the court makes an initial determination that information which is claimed to be privileged under this rule should be disclosed, the court shall conduct an in camera review of that information before making a final determination requiring disclosure.

Second Circuit Vacates Tasini Settlement

Unregistered Copyrights a Jurisdictional Bar to Class Settlement

The Second Circuit vacated a district court's approval of the post-*Tasini* settlement between publishers and freelance authors. [*In re Literary Works in Electronic Databases Copyright Litigation*](#), 2007 WL 4197413 (2d Cir. Nov. 29, 2007) (Straub, Walker, Winter, JJ.). A divided court held that courts have no jurisdiction to adjudicate claims involving unregistered copyrights.

Background

The settlement attempt stemmed from the Supreme Court's ruling that publishers needed specific authorization to reproduce a freelancer's work electronically. *New York Times v. Tasini*, 533 U.S. 483 (2001). After the *Tasini* decision, freelance writers sought damages over the use of their work in electronic archives. Eventually both sides agreed to an \$18 million settlement, and the District Court for the Southern District of New York approved it. The settlement divided the freelancers into three classes: those who had registered (Category A); those who had registered after litigation began (Category B); and those who had never registered (Category C). Category A received a flat fee, Category B a flat fee or a percentage of the price of the original work (whichever was greater) and Category C received the same as B, except that if the claims exceeded \$18 million then Category C's claims are to be reduced while A and B's remain intact.

Some members of Category C objected that they were not properly represented, given the disparity in the settlement. The district court went ahead and certified the class and approved the settlement despite these objections.

On Appeal

Objectors appealed to the Second Circuit over the adequacy of representation of the Category C claimants. However, the Second Circuit chose to focus on an entirely different issue. The court of appeals looked to whether the district court had the jurisdiction to certify a class that included those with unregistered copyrights.

Section 411(a) of the Copyright Right Act grants federal courts jurisdiction over copyright claims only if they have been registered. However, the Second Circuit had never addressed whether this applies to class actions involving copyright claims. Comparing it to other jurisdictional requirements for class actions (such as, all parties must have Article III standing) the Second

Circuit found that all members of the class must have registered their copyrights in order for the court to have jurisdiction.

The Dissent

Judge Walker dissented, stating "the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement." He gave several reasons for reaching this conclusion. First is that he viewed the section 411(a) requirement as merely being a claim-processing rule instead of a jurisdictional bar. Thus Judge Walker viewed the registration requirement as a procedural rule that did not bar jurisdiction in the lower court.

Judge Walker pointed out that the registration requirement is a prerequisite to receiving certain damages rather than dictating jurisdiction. Also, section 411(a) creates multiple opportunities for jurisdiction without registration, such as when a registration is pending before the Copyright Office or it has yet to act on a registration. To this end, some circuits have held that injunctive relief is proper even where the claim is an unregistered copyright. Finally, Judge Walker noted that statutory standing is not necessary for class action plaintiffs, but constitutional standing is and the plaintiffs had all met that requirement.

Representing Objectors was Charles D. Chalmers, Fairfax, CA. Defendants were represented by Charles S. Sims, Stephen Rackow Kaye, Joshua W. Ruthizer, Proskauer Rose LLP, New York; Kenneth Richieri, George Freeman, The New York Times Company, New York; Henry B. Gutman, Simpson Thacher & Bartlett, New York; James F. Rittinger, Satterlee Stephens Burke & Burke, New York; Jack Weiss, Gibson Dunn & Crutcher LLP, New York; Juli Wilson Marshall, Latham & Watkins, Chicago; Ian Ballon, Greenberg Traurig LLP, Santa Monica, CA; Michael Denniston, Bradley, Arant, Rose & White, LLP, Birmingham, AL; Christopher M. Graham, Levett Rockwood P.C., Westport, CT; Raymond Castello, Fish & Richardson PC, New York. Plaintiffs were represented by Michael J. Boni, Joshua D. Snyder, Kohn Swift & Graf, P.C., Philadelphia; Diane S. Rice, Hosie MacArthur LLP, San Francisco; A.J. De Bartolomeo, Girard Gibbs & De Bartolomeo LLP, San Francisco; Gary Fergus, Fergus, A Law Firm, San Francisco.

Entertainment Law: Jury Rejects Quasi-Contract Claim For "Services" On *The Sopranos*

By Peter L. Skolnik

A New Jersey federal jury of seven women and one man took just 82 minutes to conclude that plaintiff Robert Baer had no reasonable expectation of monetary compensation for whatever assistance he gave series creator David Chase in 1995, when Chase was preparing the initial pilot script for *The Sopranos*. *Baer v. Chase*, No. 02-2334 (jury verdict Dec. 19, 2007) (Pisano, J.).

District Court Judge Joel Pisano had previously determined that Baer's "services" could be characterized as those of a "location scout, researcher and consultant"; but at trial the jury accepted Chase's position that in return for providing those services, Baer could only have reasonably hoped that Chase might help Baer – an aspiring screenwriter – to pursue a career in the television business. The jury's special verdict also found that Baer could not reasonably have expected compensation from *Chase* – rather than from Chase's then-employer, Brillstein-Grey Entertainment, with whom Chase was under contract to develop television series.

Background

Baer, a former municipal court judge who had recently retired from a New Jersey prosecutor's office, was introduced to Chase through a mutual friend in June 1995. Chase – a New Jersey native and already an established writer-producer (*The Rockford Files*, *Northern Exposure*, *I'll Fly Away*) – agreed to read and offer advice on the Jersey novice's first screenplay. A few months later, when Chase was developing the initial *Sopranos* pilot script for Fox Television, Baer offered to introduce Chase to some acquaintances who knew something about the Jersey mob, and to show Chase some mob-related locations in North Jersey.

Chase – who had previously written several TV episodes and feature scripts about the Mafia – spent three days with Baer in October 1995, listening to facts and true stories told by Baer's associates. Chase then returned to L.A. to complete the pilot script. When it was done, Chase sent copies to industry colleagues, and to Baer, inviting comments.

During 1996, Fox – and every other broadcast network –

passed on Chase's initial script for *The Sopranos*; but in early 1997, HBO expressed interest as it expanded its push into original programming. Chase decided to re-write the pilot, and to find a real Mafia expert to help him better understand the mob's hierarchy and cash flow. He found such an expert in Dan Castleman, head of the Investigations Division of the Manhattan D.A.'s office. Castleman wasn't paid for his consulting services during the period when Chase was re-writing the *Sopranos* pilot, but went on to serve as the show's technical consultant during its entire run.

At about the same time Chase was beginning his HBO re-write in February 1997, Baer sent Chase a letter that included some flattering comments on the much-rejected initial pilot script Chase had sent him in late 1995. Baer's letter also asked Chase for a favor: to read Baer's recently-completed second script. Chase read it, found it both unsatisfying and a disappointing indication of Baer's lack of progress and commitment to screenwriting; he told Baer he didn't think much of the script. Baer never asked Chase for another favor. Indeed, Chase never heard from Baer again until mid-2002, when Baer sued him.

Pretrial Litigation

Baer filed suit against Chase and his loan-out company in May 2002, with a complaint alleging that "were it not for [his] enormous, but uncompensated efforts, it is a virtual certainty that the cultural icon known as *The Sopranos* would have never come to fruition." The complaint (as subsequently amended) asserted ten causes of action, including *inter alia* fraud, breach of fiduciary duty and misappropriation. But the suit was, in essence, one for breach of an alleged oral agreement.

According to Baer, in exchange for his "extensive contributions," Chase had promised to "take care of" Baer if *The Sopranos* succeeded – by compensating Baer for the "true value" of his role in "creating and developing" the series. In the initial conference with the Magistrate, Baer estimated his "true value" as half of Chase's earnings from *The Sopranos*.

Following a year of peculiar discovery (Baer took no

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depositions and served no interrogatories), in late 2003 defendants moved for summary judgment on all claims, which was granted by the District Court. *Baer v. Chase*, 2004 WL 350050 (D.N.J. Feb. 20, 2004). Baer's express and implied contract claims were dismissed for vagueness and lack of essential terms; his fraud claims were dismissed on the ground that Chase's supposed "promises" related solely to future events.

More significantly for the subsequent litigation, Baer's misappropriation claim was dismissed on the ground that in the absence of an enforceable contract, his supposed "ideas" for the show required, but lacked, sufficient "novelty": they consisted merely of public domain facts, real places, and true stories that Chase had been told not by Baer, but by Baer's associates. And Baer's quasi-contract claim – subject to New Jersey's six-year statute of limitations – was dismissed on the ground that while Baer filed suit in May 2002, his deposition testimony acknowledged that whatever his services, they had been completed in October 1995.

Baer appealed. The Third Circuit affirmed summary judgment on all but the quasi-contract claim. *Baer v.*

Chase, 392 F.3d 609 (3d Cir. 2004). In his opposition to summary judgment, Baer argued that he had misspoken during his deposition; that his February 1997 letter (which Chase had produced in discovery) in fact constituted his "final service" – rendering his claim timely. The district court had rejected the ploy on the basis of the "sham affi-

davit" doctrine, which generally prohibits reliance, during opposition to summary judgment, on an affidavit that contradicts deposition testimony.

But the Third Circuit took the occasion to explore what it viewed as the somewhat uncertain contours of the doctrine, and concluded that a contradictory affidavit could be credited when it was corroborated by independent evidence in the record. Here, according to the court, the February

1997 letter provided such corroboration. In an opinion that placed much of its logic into two long and convoluted footnotes, it ordered the district court on remand to consider Baer's affidavit and his February 1997 letter, holding that the letter would "at least at this time ... serve as the 'last service rendered'" for purposes of the statute of limitations. But it also invited the district court to "com[e] to a conclusion contrary to ours."

Chase filed again for summary judgment, submitting additional affidavits to demonstrate that Baer's letter conferred no benefit and constituted no service. The district court agreed, and once again dismissed the quasi-contract claim as untimely. *Baer v. Chase*, 2005 WL 1106487 (D.N.J. Apr. 29, 2005).

Baer returned to the Third Circuit, in an appeal that did little more than debate what the Circuit had meant in its two earlier footnotes which, according to Judge Pisano, had "confused the matter." A divided panel reversed the district court again, 177 Fed. Appx. 261 (3d Cir. 2006), granting summary judgment to Baer on the statute of limitations issue, and leaving its dissenting member to "empathize with" the district judge's "predicament (and soon to be frustration)" caused by "our troublesome footnotes."

It had become clear that although Baer's "ideas" had been rejected as the basis for a *misappropriation* claim, he continued to believe they remained in the case as a "service" rendered in quasi-contract. Similarly, against a

body of case law that often speaks of entitling a quasi-contract plaintiff to recover in restitution the "benefit received by the defendant," Baer believed he could seek discovery into Chase's earnings from *The Sopranos*, and then offer a jury expert testimony that would attribute some portion of those earnings to Baer's "ideas" and other services. Accordingly, once Baer's quasi-contract claim survived,

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Chase moved to limit the services it might encompass, and the damages it might yield.

The district court granted both prongs of defendants' motion. *Baer v. Chase*, 2007 WL 1237850 (D.N.J. Apr. 27, 2007). It agreed with defendants that under New Jersey law – which had adopted the standard established by the Second Circuit in *Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000) – “novelty” is as necessary to a

Baer's services had a market value of zero, since the television industry doesn't pay for services like Baer's during the period when pilot scripts are being written.

property-based quasi-contract claim like Baer's as it is to a misappropriation claim. The court accepted, too, defendants' reliance on the conclusion reached by Professor Candace S. Kovacic's comprehensive *Proposal to Simplify Quantum Meruit Litigation*, 35 Am. U. L. Rev. 547 (1986) – that when a defendant has requested services (as Chase had here), his benefit or gain should be measured by the reasonable market value of the plaintiff's services, since that is the cost he has avoided.

Thus, the district court held that the assistance for which Baer might recover was limited to his services as a “location scout, researcher and consultant,” and he would be required to establish “what others in the entertainment industry would pay Baer (or someone else) for those or similar services.” Nevertheless, because Baer continued to trot out different formulations under which his supposed “ideas” could be presented to a jury, defendants successfully moved *in limine* for explicit preclusion of trial evidence concerning each of the ideas Baer had identified. *Baer v. Chase*, 2007 WL 4165385 (D.N.J. Nov. 20, 2007).

The Trial

Baer's case emphasized (i) an assumption that Chase would compensate him; (ii) the supposed importance of the locations he showed Chase and of the introductions he arranged for him, and (iii) Chase's failure to pay. His expert John Agolia, former president of NBC Enterprises, testi-

fied that the market value of Baer's services was about \$95,000. Astonishingly, although it was the only thing that had permitted Baer's quasi-contract claim to survive summary judgment, Agolia also testified – on *direct* – that he attributed no value to Baer's February 1997 letter.

The defense case urged that Baer had provided modest services in the hope that by scratching Chase's back, Chase might return the favor by helping Baer pursue a screenwriting career. Chase did so, reading and commenting on the only scripts Baer ever wrote, but never being asked for further career help. The defense emphasized that Baer had rejected monetary compensation three times, and could not have reasonably expected to be paid by Chase – who Baer knew to be a salaried employee of Brillstein-Grey.

Chase also contrasted Baer's nominal help with the extensive assistance Chase's true mob expert, Dan Castleman, had provided while Chase was re-writing the *Sopranos* pilot. Finally, Chase introduced both fact and expert testimony – through, respectively, Kevin Reilly (now President, Entertainment, of Fox Broadcasting) and Jake Jacobson (former head of business affairs for Paramount's network television division) – establishing that Baer's services had a market value of zero, since the television industry doesn't pay for services like Baer's during the period when pilot scripts are being written.

Following five days of testimony and less than an hour and a half of deliberations, the jury returned a special verdict. Under a “preponderance of the evidence” standard, the jury found that although Baer reasonably expected some compensation, he had established neither (i) a reasonable expectation of monetary compensation, rather than a hope of future career opportunities through Chase, nor (ii) a reasonable expectation of compensation by *Chase*, rather than by Brillstein-Grey or some other entity.

Baer has appealed the no-cause judgment, the order granting defendants' motion that eliminated his “ideas” claim and limited his damages to market value, and the order granting defendants' motion *in limine* and delineating the specifically-precluded “ideas.”

Peter Skolnik, David Harri, Michael Norwick and Matthew Savare of Lowenstein Sandler PC represent David Chase and DC Enterprises, Inc. Robert Baer represented himself pro se, along with solos Harley Breite and Michael Kasanoff.

2007 in Review: Single Publication Rule and the Internet

By Carolyn Conway

The single publication rule traditionally holds that the statute of limitations begins to run at the time of first publication of a book, newspaper or periodical – no matter how many times this initial print run is distributed. As information is increasingly published online, courts have been considering how the single publication rule should apply to online material, if it at all.

One issue is whether a posting on the Internet is “republished” each time it is accessed, such that effectively there would be no statute of limitations. Another issue is whether a third-party’s republication can restart the statute of limitations. If the single publication rule does apply, what sort of alteration or revision to the Internet material would constitute a republication? And if identical hard copy and online material is read by separate audiences, are they separate publications for purposes of the single publication rule?

Several courts have addressed the first issue, holding that the single publication rule applies to the Internet and the statute of limitations begins tolling the day the material is posted, not each time it is accessed. These jurisdictions include Arizona, California, Colorado (federal court), Florida, Georgia, Kentucky (federal court), Massachusetts, Mississippi (federal court), New Jersey, New York, North Dakota (federal court), Texas (federal court) and the Ninth and District of Columbia circuits. See accompanying sidebar.

2007 Cases & Issues

This year three more jurisdictions dealt with the application of the single publication rule to the Internet, considering some of the more nuanced issues.

In an interesting non-media case involving allegations made by the International Crisis Group (“ICG”) against a Serbian businessman and his companies, the D.C. Circuit ruled that the single publication rule applies to the Internet. *Jankovic v. International Crisis Group*, 494 F.3d 1080 (D.C. Cir. July 24, 2007).

The ICG is a non-profit organization aimed at preventing and ending deadly conflict. At issue were two reports issued by the ICG concerning reforms in Serbia after Prime Minister Zoran Djindjić was assassinated and an email along the same lines. All three contained references to the

plaintiff as being involved with Slobodan Milosevic and other nefarious activities, including weapon running. Plaintiff brought suit more than one year after the email and one of the reports were published, and the district court held the complaint was untimely as to them.

To attempt to defeat the statute of limitations defense, the plaintiff argued that one of the reports was republished on the Internet by a third-party. The D.C. Circuit noted that while many courts have applied the single publication rule to allegations of defamation on the Internet, the issue of third-party republication appeared to be one of first impression. Noting the purpose of the single publication rule, the court held that the rule still applied here. “In the print media world, the copying of an article by a reader—even for wide distribution—does not constitute a new publication. The equivalent occurrence should be treated no differently on the Internet.” *Id.* at 1087.

In Florida this year, an appeals court affirmed without opinion a 2006 decision that held the single publication rule applied to the Internet and foreclosed a claim on statute of limitations grounds. *Holt v. Tampa Bay Television, Inc.*, No. 03-11189 (Fla. Cir. Ct. 2006), *aff’d per curiam*, No. 2D06-1815 (Fla. 2d Dist. Ct. App. May 11, 2007). On appeal, plaintiff had argued that, contrary to the majority of published opinions on the issue, the single publication rule did not apply to the Internet. The defendant countered this position by pointing out that such a ruling would negate any statute of limitations as they would continually toll any time a user viewed the Internet posting.

In a non-media case involving a claim under the federal Privacy Act, a Florida federal district court echoed the *Holt* decision. *Mudd v. U.S. Army*, 2007 WL 2028832 (M.D. Fla. July 10, 2007). There the court stated that it was “satisfied that the single publication rule applies in internet situations.” *Id.* at *4.

The Fifth Circuit agreed with a lower court finding that Texas would apply the single publication rule to the internet. *Nationwide Bi-Weekly Administration v. Belo Corp.*, 2007 WL 4465124 (5th Cir. Dec. 21, 2007), *aff’g* No. 3:06-CV-0600-N (N.D. Tex. 2006). Plaintiff had argued that there is republication each time an individual accesses an article online. The court found this argument unpersuasive, citing other courts that have struck down similar arguments. *Id.*

A federal court in South Carolina produced a muddled response to the issue. *Taub v. McClatchy Newspapers*,

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Inc., 2007 WL 2302503 (D.S.C. Aug. 7, 2007). The case concerned an article that accused the plaintiff David Taub, a former mayor of Beaufort, South Carolina, of pleading guilty to illegally importing monkeys. The article was published in the hard copy and online versions of the *Beaufort Gazette*. The Associated Press (“AP”) changed the article and put the new version on its wires, which was automatically republished to the *Beaufort Gazette’s* website. It turned out that the plea agreement over the illegal importation of monkeys was between the former mayor’s company and did not involve Taub personally. Taub then brought suit against both the newspaper and the AP for defamation.

The court granted summary judgment for defendants on the original *Beaufort Gazette* article, both in print and online, and on the original AP article, but denied the *Beaufort Gazette’s* summary judgment motion for the archived AP article, which had remained on the newspapers website. Although the article in question was well within the statute of limitations, the court addressed the single publication rule in the context of continuous publication.

The court speculated that if South Carolina courts were faced with the question, they might not apply the single publication rule at all. *Id.* at 78 n.5 (“[T]he Court does not find that South Carolina follows the single publication rule.”). Thus the court considered the archived article to be continuously published. To reach this decision, the court relied on a state appeals case involving personal jurisdiction over an out-of-state book publisher where, in dicta, the court referred to a book being checked out of a library as a “new publication.” *Id.* at 79 (citing *Moosally v. Norton*, 394 S.E.2d 878 (S.C. App. 2004)).

The federal court was therefore uncertain whether South Carolina would apply the single publication rule in any context. As the court acknowledged, the *Moosally* decision seems to negate the need for South Carolina’s statute of limitations on defamation claims. *Id.* at 79 n.6. Yet, “the Court is bound to follow the law of South Carolina, and at this juncture, the Court cannot find that South Carolina follows or will follow the single publication rule.” *Id.*

Are Print and Online Editions Separate Publications?

A New York trial court recently addressed the applica-

tion of the single publication rule to a newspaper’s hard copy and online version. *Rivera v. NYP Holdings, Inc.*, 2007 WL 2284607 (N.Y. Sup. Aug. 2, 2007). At issue were news reports discussing a judge’s possible role in a corruption scandal. The judge brought separate counts of defamation over an article that appeared in hard copy and on a newspaper’s website. Although the news content was identical in the print and online versions, the court held that they were separate publications because they were intended for separate audiences. *Id.* at *2.

The court cited to the New York Court of Appeals decision in *Firth v. State*, 98 N.Y.2d 365 (2002) which was one of the first decisions to consider this area of law. In *Firth*, the plaintiff argued that each day a report about him appeared on a government website it was republished for statute of limitations purposes. New York’s highest court disagreed, and held that the single publication rule applies to online content and begins tolling when the information was posted. *See also Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375 (N.Y. Sup. 2006) (holding that the statute of limitations begins tolling when comments are posted to a pay website, not each time the material is accessed by a paying user).

But the court in *Rivera* cited a portion of the *Firth* decision discussing the traditional rule that morning and evening editions of a newspaper are intended for separate audiences and constitute separate publications. Applying that rationale, the court in *Rivera* concluded that “Similarly, the website publication is also a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet.” *Rivera*, 2007 WL 2284607 at *3.

Changes to a Website

Both the Ninth Circuit and a federal court in California this year affirmed previous decisions holding the single publication rule applicable to the Internet. In a non-media case in a federal California court based on California law, the plaintiff argued that either the single publication rule does not apply to the internet, or alternatively, that even if it does apply, the statements in question were republished when the website header was altered within the statute of limitations period. *Sundance Image Tech. Inc. v. Cone*

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Editions Press Ltd., 35 Med. L. Rep. 2451 (S.D. Cal. Mar. 7, 2007).

The court first briefly responded to plaintiff's argument that the single publication rule did not apply by citing *Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392 (2004), which held that the rule does apply to the Internet. *Id.* at 2457. Next the court addressed plaintiff's allegation that the web information was republished.

The first allegation was that the number of visitors to a website has bearing on republication. The court disputed this argument, calling evidence of website visitors "irrelevant." *Id.* Next the court rejected the contention that providing a link to material previously published on the web constituted republication. *Id.* The plaintiff's next allegation, that a header change constituted republication akin to a new edition of a book, received favorable attention from the court. The court acknowledged that such a header change could constitute republication, but in this case made no difference because the change was not within the statute of limitations. *Id.* at 2458.

The Ninth Circuit, similar to its previous decision in *Oja v. U.S. Army Corps of Engineers*, 2006 WL 618915 (9th Cir. 2006) and also in a non-media case based on federal law, ruled that the single publication rule applied to material on the web. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. May 3, 2007). The *Canatella* court stated that once a plaintiff was aware or reasonably should have been aware of the injury, the single publication rule mandated there be only one cause of action. *Id.*

Going Forward

To date, most of the cases have involved failed attempts by plaintiffs to treat publication on the Internet as continuous. Courts have held that online publication is generally no different than traditional hard copy publication for purposes of the single publication rule. But new questions will continue to arise to test how the rule applies to the dynamic online world of websites, social networking sites, and blogs.

Carolyn Conway is MLRC's 2007-2008 Legal Fellow.

The single publication rule has been applied to the internet under the law of the following jurisdictions:

D.C. Cir.: *Jankovic v. International Crisis Group*, 494 F.3d 1080 (D.C.Cir. July 24, 2007)

9th Cir.: *Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. May 3, 2007); *Oja v. U.S. Army Corps of Engineers*, 2006 WL 618915 (9th Cir. 2006)

Arizona: *Simon v. Ariz. Bd. of Regents*, 28 Med. L. Rep. 1240 (Ariz. Super. 1999)

California: *Sundance Image Tech. Inc. v. Cone Editions Press Ltd.*, (S.D. Cal. Mar. 7, 2007); *Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392 (2004)

Colorado: *Bloom v. Goodyear Tire & Rubber Co.*, 2006 WL 2331135 (D. Colo. Aug 10, 2006)

Florida: *Mudd v. U.S. Army*, 2007 WL 2028832 (M.D. Fla. July 10, 2007) *Holt v. Tampa Bay Television, Inc.*, No. 03-11189 (Fla. Cir. Ct. Mar. 17, 2006), *aff'd per curiam*, No. 2D06-1815 (Fla. 2d Dist. Ct. App. May 11, 2007)

Georgia: *McCandliss v. Cox Enter., Inc.*, 265 Ga. App. 377 (2004)

Kentucky: *In re Davis*, 347 B.R. 607 (W.D. Ky. 2006); *Mitan v. Davis*, 243 F. Supp. 2d 719 (W.D. Ky. 2003)

Massachusetts: *Abate v. Me. Antique Digest*, 2004 WL 293903 (Mass. Super. 2004)

Mississippi: *Lane v. Strang Communications Co.*, 297 F. Supp. 2d 897 (N.D. Miss. 2003)

New Jersey: *Churchill v. State*, 378 N.J. Super. 471 (N.J. App. 2005)

New York: *Rivera v. NYP Holdings, Inc.*, 2007 WL 2284607 (N.Y. Sup. Aug. 2, 2007); *Albert Furst von Thurn und Taxis v. Karl Prince von Thurn und Taxis*, 2006 WL 2289847 (S.D.N.Y. 2006); *Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375 (N.Y. Sup. 2006); *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87 (2d. Cir. 2003); *Firth v. State*, 98 N.Y.2d 365 (2002)

North Dakota: *Atkinson v. McLaughlin*, 2006 WL 3409130 (D.N.D. 2006)

Texas: *Nationwide Bi-Weekly Administration v. Belo Corp.*, 2007 WL 4465124 (5th Cir. Dec. 21, 2007); *Hamad v. Center for the Study of Popular Culture*, No. A-06-CA-285-SS (W.D. Tex. 2006)

OPEN Government Act Restores Promise of FOIA

by James C. Ho

Christmas came a few days early this year for advocates of open government when, on December 18, Congress passed the first major reform of the Freedom of Information Act in over a decade. Just hours before the beginning of the new year, the President quietly signed into law the Openness Promotes Effectiveness in our National Government Act. [The OPEN Government Act](#) reflects years of perseverance of two longstanding champions of FOIA, Senators Patrick Leahy (D-Vt.) and John Cornyn (R-Tex.).

Background

FOIA offers every American one simple promise: the right to know what your government is doing. Under that law, our government is based on a presumption in favor of disclosure. Openness must sometimes give way to competing values, such as individual privacy or national security. But the people have a fundamental and presumptive right to know, and the burden is on the government to prove otherwise – not the other way around.

As good government advocates across the political spectrum have long realized, however, the promise of FOIA has not always been fulfilled.

When first signed into law by a reluctant President Lyndon Johnson on July 4, 1966, FOIA required all federal agencies, “upon request,” to make agency records “promptly available to any person,” unless the record is specifically exempted by law. Individuals could seek injunctive relief against recalcitrant agencies in federal district court, where government lawyers would have the burden to justify the decision to withhold documents.

But the law contained noticeable weaknesses. It imposed no consequences if an agency failed to comply with a request for documents; no deadlines on agencies to respond to such requests; and no limits on how much an agency could charge requestors. Congress amended FOIA in 1974 in response to these concerns, and again in 1986 and 1996. But important gaps remain.

Recovery of Attorney Fees

For example, under the 1974 amendments, any person can

now seek to recover the costs of attorney fees from the government, in the event that an agency forces the requestor to go to court, and the court subsequently rejects the agency’s basis for nondisclosure. This was an important development, because unlike other causes of action, there are no money damages for winning one’s FOIA claim – and thus no compensation available to pay for one’s attorney fees.

But federal agencies have since uncovered a loophole that allows them to effectively avoid reimbursing citizens for attorney fees at will, notwithstanding the express language and underlying spirit of FOIA. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the U.S. Supreme Court, by a 5-4 vote, announced a new principle of law for determining when a party may recover attorney fees under federal statute.

It is well established that a party may seek recovery under an attorney fee statute when the government loses a lawsuit on the merits or agrees to a settlement enforced by consent decree. Under *Buckhannon*, however, the government does not have to pay attorney fees absent a “judicially sanctioned change in the legal relationship of the parties” (emphasis added).

That means that any government agency can effectively nullify FOIA’s attorney fee provision simply by refusing to disclose documents, forcing the requestor to file suit, and then relinquishing the documents moments before a court enters judgment against the agency. An agency may thereby moot the litigation, and avoid payment of fees, even if it is clear that it would not have disclosed the documents but for the lawsuit – because under these circumstances, the requestor will not have received any “judicially sanctioned” form of relief.

The late Chief Justice William Rehnquist himself acknowledged these risks. As he explained in his majority opinion in *Buckhannon*, “fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.” As noted, monetary damages are not available under FOIA. Justice Antonin Scalia likewise observed that the *Buckhannon* ruling will “sometimes den[y] fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment.”

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OPEN Government Act Restores Promise of FOIA

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Thus, as Senator Cornyn testified before a House committee on May 11, 2005, “the *Buckhannon* ruling effectively taxes all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients – and many FOIA requestors could stop making even legitimate and public-minded FOIA requests – rather than pay what one might call the *Buckhannon* tax.”

He supplemented his testimony with various incidents in which courts suspected government agencies of exploiting this loophole but were nevertheless required to deny attorney fees under *Buckhannon*. See, e.g., *Landers v. Department of Air Force*, 257 F. Supp. 2d 1011 (S.D. Ohio 2003).

Yet despite this evidence, Justice Department lawyers vociferously denied the existence of any *Buckhannon* effect throughout negotiations with Capitol Hill. A Department representative even testified against the need for any change in law.

The OPEN Government Act eliminates the *Buckhannon* tax. Under section 4 of the Act, the agency may now be required to pay attorney fees if, by filing suit, the requestor secures a judicial order, an enforceable written agreement or consent decree, or “a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.”

Agency Deadlines and Penalties

The 1974 amendments also imposed a 10-day deadline (expanded to 20 days in 1996) on agencies to prepare at least an initial response to any request for documents. But the deadlines have always lacked teeth.

In fact, according to a survey by the National Security Archive, 53 of 57 federal agencies reported backlogs in processing. At least 12 agencies admitted holding requests that have been pending for more than 10 years. The oldest unprocessed FOIA request has languished at the State Department since 1987.

When it was first introduced by Senators Cornyn and Leahy in 2005, the OPEN Government Act would have imposed dramatic consequences for agency tardiness. Any agency failing to respond within the 20-day period would be denied the opportunity to assert any exemption under FOIA (except under limited circumstances such as endangerment to national security or disclosure of personal private information

protected by the Privacy Act of 1974) unless the agency could demonstrate, by clear and convincing evidence, good cause for failure to comply with the time limits. This enforcement mechanism was inspired by similar provisions under Texas law – and by the desire, in Senator Cornyn’s words, to “bring a little Texas sunshine to Washington.”

As enacted, the OPEN Government Act imposes more modest sanctions for agency tardiness. The 1974 amendments placed important limits on the fees that agencies may charge requestors for the costs of searching, reviewing, and duplicating documents. Under Section 6 of the OPEN Government Act, agencies are further restricted from imposing such fees if they fail to comply with the statutory deadlines without cause. This legislation marks the first time that agencies will suffer consequences of any kind for failing to meet deadlines under FOIA. (The provision takes effect at the end of 2008.)

Improving FOIA Administration

The Act also provides important updates to various provisions of FOIA, in light of changes in technology and government administration.

In particular, section 3 of the Act codifies a definition of the term “representative of the news media” for purposes of FOIA’s privileged fee status for media requestors. The definition recognizes the growing influence of the Internet, and gives bloggers and other Web-based publishers, for the first time, an opportunity to take advantage of FOIA’s fee waiver provision.

Section 9 makes clear that FOIA applies even when the government subcontracts recordkeeping functions to private contractors.

Other provisions of the OPEN Government Act are designed to further improve the administration of FOIA in a variety of ways. For example, Section 7 of the Act requires all agencies, by the end of this year, to establish individualized tracking numbers for all FOIA requests that will take longer than 10 days to process, and to put into place a telephone or Internet service to allow citizens to track the status of their requests.

The Act requires each agency to designate a chief FOIA officer, at the Assistant Secretary level or higher, to strengthen political accountability for FOIA compliance –

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OPEN Government Act Restores Promise of FOIA*(Continued from page 30)*

thereby codifying into law similar provisions of an executive order issued by President Bush on December 14, 2005.

It also improves agency disclosure requirements regarding compliance with FOIA, including disclosure of the ten oldest active requests pending at each agency and other statistical information concerning agency response time and delay.

Finally, the Act also establishes a new Office of Government Information Services, within the National Archives and Records Administration, to review and improve FOIA compliance policies across the executive branch, and to recommend further changes to Congress and the President. In addition, the new office may serve as a FOIA ombudsman and mediate disputes between requestors and agencies as an alternative to litigation, including the issuance of advisory opinions. (Recent press reports indicate, however, that the Administration may be attempting to locate the new office in the Justice Department, which defends the federal government in FOIA suits, rather than the National Archives.)

Conclusion

The OPEN Government Act offers renewed hope that the spirit of openness that motivated the original drafters of FOIA will, at long last, become a reality. It is also a shining demonstration that bipartisanship can still thrive, even in today's partisan Washington. As Senators Cornyn and Leahy explained in a joint op-ed announcing their effort in March 2005: "Openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable – albeit ultimately unpersuasive – fear of arming its enemies and critics. Whatever our differences may be on the various policy controversies of the day, we should all agree that those policy differences deserve as full and complete a debate before the American people as possible." There is real cause for hope that the OPEN Government Act will help improve the quality of that debate.

James C. Ho is of counsel and a member of the Media and Entertainment practice group of Gibson, Dunn & Crutcher LLP. He previously served as chief counsel to Senator John Cornyn and played a critical role in drafting the OPEN Government Act.

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‘Tis the Season: Congress’s Attention Turns to Media Issues as the 2007 Session Comes to a Close

By Kathleen A. Kirby and Shawn A. Bone

The close of the 2007 session of the 110th Congress has been characterized by a flurry of activity on media issues. Prompted both by actions at the Federal Communications Commission and by Congress’s longstanding interest in media-related public policy, legislation addressing many vital issues has been advanced. The sparse number of legislative days left this year, however, suggests that many of these issues will linger into the new year.

Of the media policy issues that have captured Congress’s attention this year, the most significant have been the federal shield law, FOIA/open government, media ownership, the DTV transition, cameras in the courtroom and photography on public lands. An overarching concern that has arisen in recent months, however, has been the operations of the FCC. It has become clear that Congress has serious questions about transparency and accountability at the Commission – questions that will probably remain into next year. Significant Congressional oversight of the FCC is likely to continue, focusing both on substantive policy and the Commission’s operations.

The 2008 Presidential election will probably limit the work of Congress in the coming year. Presidential politics tends to dominate Congress’s schedule, a reality that probably will be exacerbated by the fact that so many Presidential candidates are members of Congress. That said, expect media issues to remain on the front burner for Congress, particularly as both Democrats and Republicans stake out policy positions in anticipation of the new Administration in 2009.

Federal Shield Legislation

Both the House and the Senate have addressed federal reporter shield legislation this congress. Both bills would provide reporters with a qualified privilege as to their sources and information, with specific guidelines as to when a court can compel disclosure of such information. The House “Free Flow of Information Act,” H.R. 2102, was debated by the House Judiciary Committee on August 1 and approved by voice vote. On October 16, that same bill was debated on the House floor, where it was adopted by an overwhelming majority on a vote of 398 to 21.

The Senate has moved less quickly on its version of the Free Flow of Information Act. After much internal discussion amongst the members of the Senate Judiciary Committee, Senator Specter (R-PA) introduced his proposed federal shield legislation, S. 2035, which was debated by the Committee on September 27 and October 4, 2007. The bill was finally approved by the Committee on October 4, but it has languished on the Senate calendar since that time.

The overall effort to pass a federal shield law in this Congress has run up against several snags. Most importantly, Congress has yet to finally resolve whether and to what extent bloggers will be covered by the proposed shield. The two bills have also had to address the national security implications of the proposed law, including the level of protection to be provided to a reporter who releases classified information and whether terrorist organizations should be covered by the shield.

Although the House and Senate bills are quite similar in scope, should the Senate act on its version of the Free Flow of Information Act before the session ends (an unlikely event given the legislative calendar), a conference committee would have to be convened to iron out the differences between the bills. It is more likely that the federal shield law will be addressed next year.

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Media Ownership

The announcement by FCC Chairman Martin of his intention to reform the newspaper/broadcast cross-ownership rule on December 18 led to a flurry of Capitol Hill activity on media ownership this fall. The Chairman has proposed new standards for deciding when a newspaper/broadcast combination is appropriate in a given market, retaining a case-by-case review of each proposed combination. In the Top 20 markets, the presumption would favor a combination if (1) the combination is between one newspaper and one broadcast station; (2) there would be at least eight independent voices remaining in the market after the combination is approved; and (3) if the broadcast outlet is a TV station, it is not one of the top four stations in the market. The proposal would also define the factors the Commission will consider if a waiver is sought for other combinations not addressed by this presumption.

The House and Senate Commerce Committees have held hearings on the issue, and the House Judiciary Committee has scheduled a hearing in January. Members of the Committees have been mixed in their reaction to the proposal, and several members have questioned why Chairman Martin pushed for a vote on his proposal in December of this year.

Senators Dorgan and Lott have introduced, and the Senate Commerce Committee has approved, legislation (S. 2332) that would put certain procedural restraints on the ability of the FCC to approve new media ownership rules. Specifically, the bill would require the Commission to complete its proceeding on localism and release any rules on localism for a 60-day public comment period no less than 90 days before a final vote on those rules. Once that proceeding is complete, then the Commission must release its final media ownership rules for a 60-day public comment period no less than 90 days before they are adopted. Senator Dorgan is pressing for passage of this bill as soon as possible, and may be looking at including its language as an amendment to other bills in the final days of the session.

Representative Stearns has introduced H.R. 4167 that would direct the FCC to repeal the newspaper/broadcast cross-ownership ban.

DTV Transition

As expected, the Congress has taken significant interest in the preparations taken by the federal government, specifically the FCC and the National Telecommunications and Information Administration, to prepare for the digital television transition scheduled for February 17, 2009. While legislation has not been forthcoming, several oversight hearings have been held in the House and Senate exploring the challenges posed by the transition.

These hearings have revealed serious concerns held by Members about the approaching transition, and led (in part) to the departure of the head of NTIA, Assistant Secretary John Kneuer. Members of Congress remain convinced that the government is not devoting enough public money to educating consumers about the transition. They are also worried about the effectiveness of the proposed digital television converter box program, particularly in light of the announcement from NTIA that the program will not begin until February of next year at the earliest. These concerns have been exacerbated by a recent report released by the Government Accountability Office questioning the leadership of these agencies when it comes to the transition and the lack of a comprehensive plan to ensure the transition's success.

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Although Members continue to voice support for keeping the transition date firm, they are expected to continue to examine the effectiveness of the converter box program and the education efforts being undertaken by the federal government and private parties. It is likely that oversight hearings will continue next year, and legislation may become a priority should problems with the conversion arise.

Cameras in the Courtroom

Both the House and the Senate have dealt with the question of allowing television cameras in federal courtrooms in recent months.

The House “Sunshine in the Courtroom Act of 2007,” H.R. 2128 (introduced by Representative Chabot), was passed by the House Judiciary Committee on October 24 by a vote of 17-11. In general terms, the bill permits the presiding judge of any federal district or appellate court, including the Supreme Court, to permit television camera coverage of a particular federal court’s proceedings. It includes certain protections for the due process rights of defendants, as well as provisions permitting witnesses to be obscured and protecting the anonymity of jurors. The bill now awaits consideration by the full House.

The Senate Judiciary Committee is still debating S. 352 (its almost-identical version of the “Sunshine in the Courtroom Act of 2007”). S. 344, which would require the televising of Supreme Court oral arguments unless the Justices determine, by a majority vote, that such televising would violate due process, has been reported out of committee. The debate is likely to continue into January. An identical House companion to S. 344, H.R. 1299, has yet to be addressed.

Commercial Photography in National Parks

In 2000, Congress authorized the Department of the Interior to assess fees and to recover costs associated with commercial photography in the nation’s parks, wilderness areas and federal lands. Since the passage of Public Law 106-206, a hodgepodge of disparate policies have been implemented to regulate commercial photography in and on the lands managed by the Department of the Interior (DOI) through its Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service. In August 2007, the DOI proposed a new set of regulations that attempts to standardize the fee and permit policies across its bureaus and services.

Although they would not require photography permits for still or video photography deemed “news coverage,” this phrase is not defined. The proposed regulations thus leave journalists with scant guidance on whether activities, such as filming a documentary or an interview with a public official, would constitute “news coverage” or “commercial photography.” In addition, the proposed regulations would permit park and land administrators to subject “news coverage” to an amorphous set of “time, place, and manner” restrictions that could either encourage park administrators to unify media policies across the Department’s constituent services or could provide sufficient leeway to retain existing policies.

Currently, journalists face an array of divergent policies governing their ability to gather footage on public lands without first seeking a permit and paying the associated fees. Some parks have taken a relatively hands-off, credentials-based approach. For example, the Florida Everglades’ policy exempts “news photographers and television crews” from the permitting process, provided that they do not use sets or props in their coverage. Other parks have adopted more intrusive policies. For example, the administrators of Yosemite National Park do not require permits to cover “breaking news” (which they define as an event that

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cannot be filmed at another time or place), but require that journalists obtain a permit to cover non-“breaking” stories. Yosemite’s policies go on to allow park administrators to condition the grant of a permit on their own determination “that the park would benefit from the increased public awareness” from the coverage.

On December 12, 2007, the House Committee on Natural Resources conducted an oversight hearing on the proposed regulations and the existing policies related to the fee and permit processes for commercial photography on public lands. The Committee heard testimony from two representatives of the DOI as well as from representatives of the Society of Environmental Journalists, the Radio-Television News Directors Association, the National Press Photographers Association, the Professional Outdoor Media Association, and the American Society of Media Photographers. Media representatives questioned the Department’s perceived intrusion on journalists’ newsgathering abilities and editorial discretion.

Other Updates

The House Energy and Commerce Committee has opened an oversight investigation into the operations of the FCC. In a letter to Chairman Martin in November, Representative John Dingell, Chairman of the Committee, indicated displeasure with the operations of the agency, pointing to allegations that Commissioners are being given inadequate time to review issues and orders before they are asked to vote on them and the refusal of the Commission to release proposed rules for public comment. Chairman Martin was questioned at length about these allegations during an oversight hearing convened by the Subcommittee on Telecommunications and the Internet on December 5, 2007, and it is expected that the Committee’s Subcommittee on Oversight and Investigation will convene a hearing on the allegations contained in the letter next year.

As discussed in the May 2007 issue of *MediaLawLetter*, in May and June of this year, Congress considered legislation that would have severely restricted the ability of drug companies to advertise newly-approved drugs directly to consumers. As mentioned at that time, the move to ban such ads for a new drug for up to two years had faltered due to questions of the ban’s constitutional validity. Congress eventually passed and the President signed a bill, H.R. 3500, that permits the FDA to pre-review direct-to-consumer television ads and recommend changes to them. The bill also increases the fines for disseminating false and misleading ads to consumers.

With the release of the test results in August by the FCC, where it determined that the agency could not be assured that mobile devices veiling unused bits of radio spectrum between licensed television stations, known as “white spaces,” would not cause interference, Congress has been silent on the issue. Congress seems willing to trust the Commission to do more testing on “white space devices” before passing legislation to authorize their use.

The decision by the Second Circuit in the “fleeting expletives” case led to a flurry of legislative activity earlier this year. The Senate Commerce Committee passed S. 1780, proposed by Senator Rockefeller, which would overturn the Second Circuit decision and permit the Commission to fine broadcasters for fleeting expletives. The bill awaits further action by the Senate. In the House, Representative Lipinski has introduced a bill, H.R. 2738, that would apply the current FCC rules on indecency to multichannel video program distributors who refuse to offer consumers a family tier or the ability to block certain individual channels at their discretion. On a related note, Senator Rockefeller has yet to introduce his promised legislation regulating violence on television.

Representative Ed Markey, Chair of the House Subcommittee on Telecommunications and the Internet, has indicated that he would like to revisit the question of net neutrality early next year. The move comes on the heels of allegations that Verizon Wireless and Comcast have degraded or prohibited the transmission of certain types of content over their networks. Senators Dorgan and Snowe have introduced a bill in the Senate, S. 215 (the “Internet Freedom Preservation Act”), that would regulate the ability of network operators to block or degrade content on their networks. The Senate has seemed reluctant to address the issue.

The House and Senate Judiciary Committees and the Permanent Select Committee on Intelligence have continued to address the fall-out from the CIA wiretapping scandal this year. Congress is still debating proposed reforms to the Foreign Intelligence Surveillance Act, including whether telecommunications carriers should be provided immunity from suits for their compliance with the wiretapping program. That debate will likely continue next year.

White House Visitor Lists are Public Records Under the FOIA

Secret Service Must Disclose Names

U.S. District Court Judge Royce Lamberth ruled this month that White House visitor lists are public records under the Freedom of Information Act (“FOIA”) and subject to disclosure. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Homeland Security*, No. 06-1912 (D.D.C. Dec. 17, 2007) (“*Crew I*”). In a companion case, Judge Lamberth held that CREW lacked standing to challenge Secret Service procedures for handling the lists after they had been turned over to the White House. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Homeland Security*, No. 06-0883 (D.D.C. Dec. 17, 2007) (“*Crew II*”).

The lawsuit began with a FOIA record request by CREW, a nonprofit organization and government watchdog, seeking the Secret Service’s White House and Office of the Vice President (“OVP”) visitor lists. These visitor lists had been available to the public in previous administrations and were available in the Bush administration until 2006.

The visitor lists are created by the Secret Service for the purpose of conducting background checks on all visitors to the White House and the OVP. Each proposed visitor submits information to the Secret Service, including their name, date of birth, social security number, time of visit, etc. The Secret Service then uses this information to perform background checks.

In 2006, the Bush administration sought to keep these visitor lists secret. After the visits were over and the Secret Service was through using the visitor lists, the administration attempted to shield the lists from public view by having the Secret Service turn them over to the White House. President Bush then claimed executive privilege over the documents to exempt them from the FOIA. Vice President Cheney also attempted to keep his visitor lists secret by claiming national security.

CREW sought records on visits by nine Christian leaders, including James Dobson and Jerry Falwell (*Crew I*) and in a companion case also sought the visit records of disgraced former lobbyist Jack Abramoff and his associates (*Crew II*).

In *Crew I*, the Secret Service moved for summary judgment making two arguments. First, they argued that the visitor lists were not “agency records” under the FOIA and second, that the constitutional avoidance doctrine required

the court to construe the records in such a way that exempted them from the FOIA.

Judge Lamberth began by addressing the issue of whether the visitor lists were “agency records.” According to the Supreme Court, an agency record is “(1) created or obtained by the agency, and (2) under agency control at the time the FOIA request was made.” Citing *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). The court found the first part of the test easily met. The Secret Service argued that although it does create the lists, the information comes from the White House and the OVP, and thus the lists are not truly “created” by the Secret Service.

However, Judge Lamberth found that the Secret Service creates the record when it performs the background check with the information it is given. Furthermore, these lists are created by the Secret Service for its own use in protecting the President and Vice President.

For the second part of the test, whether the records were under agency control, Judge Lamberth looked to four factors used to evaluate whether an agency has control. Citing *Burka v. U.S. Dep’t of Health & Human Serv.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting *Tax Analysts v. U.S. Dep’t of Justice*, 845 F.2d 1060 (D.C. Cir. 1988)). The first factor is “the intent of the document’s creator to retain or relinquish control over the records.” On the issue of intent, the Secret Service argued, and the court agreed, that although it had control during a visit, it *intended* to give up that control once a visit is over.

The next factor is “the ability of the agency to use and dispose of the record as it sees fit.” The Secret Service argued that the White House and the OVP had control over the use and disposal but failed to explain why they did, the issue at the heart of the case, and Judge Lamberth was not convinced by this circular reasoning. Instead, he found that the Secret Service had both the ability to use and the ability to dispose of the visitor lists, since until 2006 it was regularly destroying the daily lists and it currently destroys requests for access.

Judge Lamberth next examined “the extent to which agency personnel have read or relied upon the document.” Since the purpose of visitor lists is to protect the president and vice president, it would seem obvious that the Secret

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White House Visitor Lists are Public Records Under the FOIA

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Service both reads and relies on the lists extensively. The Secret Service attempted to argue that although it does read and rely on the lists, they only do so briefly. The court failed to see the merit in this brevity argument and found that the Secret Service failed to counter this factor.

Finally, Judge Lamberth analyzed “the degree to which the document was integrated into the agency’s record system or files.” Here, the court found that the White House visitor list was integrated into the Secret Service system, finding unconvincing the Secret Service’s argument that because the records were deleted every 30 to 60 days, they were not truly integrated into its system. However, the court was unable to determine whether or not the OVP visitor lists were integrated.

Balancing all the factors, Judge Lamberth found that the Secret Service’s intent that the records be under the control of the White House and the OVP was outweighed by its actions, as reflected in the other factors.

Judge Lamberth was also unconvinced by the Secret Service’s constitutional avoidance argument. The Secret Service argued that the court should avoid finding that the visitor lists were public records because that would create a

separation of powers problem by not allowing the president and vice president to privately confer with individuals about policy issues. The court disagreed with this argument. First, the constitutional avoidance doctrine only applies when a statute is ambiguous, which Judge Lamberth did not find the FOIA to be.

Second, the court was not persuaded by the Secret Service’s argument that private, policy-sensitive information would be revealed by these lists. Most visitors, Judge Lamberth pointed out, are not there to conduct policy discussions. Even for those who are there to discuss policy, lists of names without other information does not reveal what those discussions would concern. If the President or Vice President feel there is a particular name that must remain secret, they can still use Exemption 5 of the FOIA. This allows the government to withhold records from disclosure on matters ranging from attorney client privilege to the state secrets privilege.

In *Crew II*, where CREW was seeking records related to Abramoff and his associates, the court found that it lacked standing to bring suit to prevent the Secret Service from destroying records after it had transferred them to the White House. However, the National Archivist still must grant permission before the Secret Service can destroy records.

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Summary Judgment for the CIA Reversed on JFK Assassination FOIA Request

CIA Directed to Search its Files for Documents

By Kwamina Thomas Williford

The D.C. Circuit reversed a lower court decision denying access to CIA records of President John F. Kennedy's assassination investigation, finding several of the trial judge's reasons insufficient to withhold the documents under the Freedom of Information Act. *Morley v. Central Intelligence Agency*, No. 06-5382 (D.C. Cir. Dec. 7, 2007) (Henderson, Rogers, Tatel, JJ.).

Background

For more than three and a half years, journalist Jefferson Morley has fought for records pertaining to deceased undercover CIA operations officer George Joannides. Joannides allegedly played a role in an anti-Castro organization believed to have had contact with assassin Lee Harvey Oswald in the months prior to the assassination.

Critics have charged that the CIA's actions to block access to these documents are a brazen attempt to circumvent the John F. Kennedy Assassination Records Collection Act of 1992 (JFK Act). The JFK Act was supposed to drive the full disclosure on the fiercely debated subject and suppress public doubt and confusion surrounding the assassination. The JFK Act mandates the immediate review, and release, of all government records related to President Kennedy's assassination.

Notwithstanding the JFK Act, the CIA declined to search its operational files and records it already has provided to the National Archive and Records Administration (NARA). The CIA also withheld information about its internal personnel rules and practices on the basis that there was no public interest in their disclosure sufficient to justify the administrative burden of searching for them. The CIA further withheld inter-agency correspondence on the basis that the documents were part of the deliberative process privilege. In addition, the CIA withheld files containing biographical information on the basis that the documents were personal in nature.

The federal district court agreed with the CIA's reasoning for withholding the documents pursuant to FOIA. That court

granted the agency's motion for summary judgment. Morely appealed.

D.C. Circuit Court Decision

On appeal, in addition to challenging the district court's reasons under FOIA for withholding documents, Morely further challenged the district court for not holding that the JFK Act also required the disclosure of documents related to JFK's assassination. But the D.C. Circuit agreed with the district court that FOIA was the appropriate statute for determining whether Morely was entitled to documents. The appeals court held, however, that FOIA required the CIA to search its operational files because they were the subject of an inquiry central to a congressional intelligence committee investigation, and therefore the

files were not exempt from FOIA disclosure.

Moreover, the appeals court reasserted FOIA's policy of "full agency disclosure,"

holding that just because copies of records were transferred to the a third party under the JFK Act does not obviate the CIA's duty to produce documents that are responsive to a FOIA request.

The appeals court held further that many of the CIA's conclusory explanations for the withholding of documents were insufficiently detailed, especially with regard to internal personnel rules and biographical information. The appeals court instructed that, on remand, the CIA must show specific facts to warrant withholdings under FOIA.

But the appeals court upheld the sufficiency of the CIA's explanations for withholding other categories of documents related to security clearance procedures, intelligence activities or sources withheld under the National Security Act, and internal agency guidelines and techniques for law enforcement investigations and prosecutions. In these instances, the CIA had provided sufficient detail to demonstrate the particularized harm expected from the production of this information.

Kwamina Thomas Williford is an associate in the D.C. office of Holland & Knight LLP. James H. Lesar represented Jefferson Morley in this matter.

***many of the CIA's conclusory explanations
for the withholding of documents were
insufficiently detailed***

D.C. Circuit Holds Department of Defense Records Exempt Under FOIA

Advice on Terror Trial Commissions Exempt from Disclosure

In a 2-1 decision, the D.C. Circuit Court held that Department of Defense (“DOD”) records concerning the establishment of terrorist trial commissions are exempt under the Freedom of Information Act (“FOIA”). *National Institute of Military Justice v. U.S. Dept. of Defense*, 2008 WL 108734 (D.C. Cir., Jan. 11, 2008) (Henderson, Tatel, Williams, JJ.). The court found that although the records contained advice from nongovernmental lawyers, they were still “intra-agency” documents within the meaning of Exemption 5 of the FOIA.

Background

Soon after the September 11 terrorist attacks, the Bush Administration sought to establish a means of trying suspected terrorists. To this end, President Bush issued a Military Order that established military commissions to try non-citizens that were suspected of terrorism. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

As the DOD promulgated the regulations governing the military commissions, it sought the advice of nongovernmental lawyers on proposed regulations. According to the DOD, these individuals were told that their advice would never be released publicly. Although the DOD specifically sought the advice of certain individuals, none of them received compensation.

In 2003, the National Institute of Military Justice (“NIMJ”) made a FOIA request for the documents the DOD had received on the military commissions. The district court found that the records did fall under the FOIA, but that they were exempt under Exemption 5. Exemption 5 covers “matters that are ... inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

D.C. Circuit’s Decision

The NIMJ’s main argument on appeal was that the records were not intra-agency within the meaning of Exemption 5. Judge Henderson, writing for the majority, analyzed this argument by first examining D.C. Circuit precedent. In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the court of appeals held that documents from the Department of Justice

to senators about judicial nominees fell under Exemption 5. The court found that Exemption 5 applied because one of its purposes is to protect those in an advisory role to an agency though they fall outside of the agency itself.

Judge Henderson next looked to *Formaldehyde Institute v. Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989). There the court extended Exemption 5 to nongovernmental parties that had submitted a report for the Centers for Disease Control. In *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the court held that former Presidents Reagan and Bush were exempt even though they were not “agencies.”

Next, Judge Henderson examined Supreme Court precedent to define the boundaries of Exemption 5. In *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001), the Supreme Court acknowledged that there existed a “consultant corollary” to Exemption 5. This corollary is justified because documents prepared by those outside the agency are used the same way an internally prepared document would be. Taking together these cases, the majority found that records “submitted by non-agency parties in response to an agency’s request for advice – are covered by Exemption 5.” *NIMJ*, 2008 WL 108734 at *3.

NIMJ argued that *Klamath* did not support exempting these records from the FOIA for two reasons. First was that the Supreme Court had stressed that the words interagency and intra-agency be given “independent vitality” and thus documents from nongovernmental individuals outside the agency cannot be exempt. Judge Henderson countered that argument by explaining that it was “common sense” to allow documents prepared by disinterested outside parties, where such documents were used as if prepared by the agency’s own personnel.

NIMJ’s second argument was that *Klamath* had overruled *Ryan* and *Public Citizen*. The court however found that these cases had not been overruled because the focus of the Supreme Court’s concern in *Klamath* was only whether consultants were acting out of their own self-interest. In the present case, all parties agreed that the nongovernmental lawyers who submitted records to the DOD were disinterested.

Finally, the court of appeals offered some policy reasons for

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allowing the records to be exempt. In order for an agency to receive the best possible advice from those outside it, it must be able to keep the information they submit private. Furthermore, although the lawyers were unpaid, the DOD had made a formal solicitation to them, as opposed to a general solicitation in the Federal Register for comments, which would not be exempted.

Dissent

Concerned that the majority was overreaching in finding that the records fell under Exemption 5, Judge Tatel wrote a dissenting opinion. He began by acknowledging that the issue of whether the records were exempt was a close one, but that he felt the records should not be exempt. One reason why was that there was no formal relationship as the lawyers were unpaid

and there was no contract between them and the DOD. This, he felt, took away from the view of these nongovernmental parties as consultants to the agency.

Judge Tatel went on to point out that when dealing with FOIA requests, the exemptions should always be narrowly construed. The Supreme Court in *Klamath* had demanded this when it stressed that “independent vitality” must be given to the words interagency and intra-agency. Judge Tatel found that exempting the types of records that the DOD had is contrary to what “intra-agency” means.

Finally, Judge Tatel pointed out that although he felt it was good policy to keep confidential these types of records so that an agency could receive the best possible information, Congress, in writing Exemption 5, had made the decision not to allow these records remain secret.

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