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Protecting Confidential Sources in Canada – Good News and Not So Good

By Brian MacLeod Rogers

In the first Canadian appellate decision on use of contempt powers against a journalist refusing to disclose a confidential source at trial, the Ontario Court of Appeal recognized the importance of protecting journalists' sources and reversed a contempt citation and \$31,600 penalty. The case, *St. Elizabeth Home Society v. Hamilton (City) (Citation of Kenneth Peters)*, [2008] ONCA 182, released March 17, 2008, also established a clear procedural path for dealing with journalists' claims of privilege for confidential sources in court proceedings. The Court explicitly recognized that protecting sources was an aspect of freedom of expression that should receive protection under the *Canadian Charter of Rights and Freedoms*.

However, just a few weeks earlier, a different panel of the same court ruled that protection of sources should give way to a police investigation of an alleged crime. In *R. v. The National Post*, [2008] ONCA 139, the Ontario Court of Appeal reversed a lower court decision that had been based on journalists' right to protect confidential sources on constitutional grounds. The Court said that an original envelope and copy of a forged document sent to a journalist provided real evidence that could help police find the perpetrator of the alleged forgery. As a result, the need for the evidence outweighed the desirability of protecting the source, and a search warrant and assistance order for the documents were enforceable against the newspaper. Leave is being sought by *The National Post* to appeal the decision to the Supreme Court of Canada.

Ken Peters Case

In the *Ken Peters* case, the journalist (Peters) had been subpoenaed to testify at a 2004 civil trial because of stories published in *The Hamilton Spectator* in 1995. The stories concerned an investigation by municipal health authorities into allegations, such as patient abuse, negligence and reuse of food, against a nursing home run by the plaintiff, a religious non-profit organization. The stories were based on confidential municipal reports that had been leaked to Peters by a source, on the basis that "you didn't get them

from me."

In its lawsuit, the plaintiff claimed that the municipality was negligent and abusive in exercising its powers and that it was liable for damages arising from the defamatory newspaper articles. To establish the link, the plaintiff sought to prove the municipality responsible for leaking the documents – that is why the identity of the confidential source became a crucial issue at trial. No attempt had been made to obtain the information prior to the subpoena being served on Peters right at the end of the plaintiff's trial evidence after many months of trial.

The trial judge rejected a motion to quash the subpoena but held off deciding whether the source would have to be revealed. However, when testifying, Peters refused to answer a question that he believed would lead to his source, and he was immediately cited for contempt by the trial judge. Subsequently, Peters met with his source to help determine what questions could be answered, but the next day the source was independently identified by a municipal politician.

Then the source, a retired city councillor, testified at trial and admitted his role. Despite the fact that Peters' evidence was no longer required, the trial judge went ahead with a hearing on short notice and found him in contempt, imposing a penalty of \$31,600 to compensate the parties for their added costs. This was three times higher than any previous fine in a media contempt case.

In overruling the trial judge, the Court of Appeal accepted that journalists cannot claim a "class" privilege but rather one decided on a case-by-case basis, applying the traditional four-part Wigmore test. This test was developed by U.S. legal scholar, John Henry Wigmore, to determine when privilege should apply on a case-by-case basis and has been endorsed by the Supreme Court of Canada for that purpose. In four steps, the test looks at the confidentiality of the communication, the need for confidentiality for the relationship in which it was made, the desirability for society in protecting that relationship and, finally, a balancing of the harm to the relationship and the benefit for the correct disposal of the litigation caused by disclosure.

However, for the first time, the Court explicitly ruled

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that protecting confidential sources was an essential part of freedom of expression and that this should be taken into account when applying the Wigmore test, acknowledging that “it is sufficiently apparent that the likely effect of revealing a journalist’s confidential source would be to discourage from coming forward other potential sources who, for whatever reason, need to conceal their identity”.

The Court also accepted that the approach developed by the Supreme Court of Canada in a series of cases involving publication bans and sealing orders (*Dagenais v. CBC*, [1994] S.C.J. No. 104; *R. v. Mentuck*, [2001] S.C.J. No. 73; *R. v. Toronto Star Newspapers*, [2005] 2 S.C.R. 188) should be extended to this situation where the Charter values of freedom of expression and fair trial rights again appear to clash. As a result, the Court urged that contempt powers should be used most cautiously and as a last resort after exploring all alternate means, and it established a procedure respectful of the rights involved:

1. The court should first make an express ruling under the Wigmore test that the confidential source had to be revealed;
2. There should then be an opportunity to explore alternatives, so that the journalists can consider his or her position and consult with the source, if possible;
3. A contempt hearing should be postponed until the end of the trial when the impact of the journalist’s refusal would be clear;
4. If the evidence is provided through alternative means, there is no need for contempt proceedings;
5. Where there is no open defiance of the court, the trial judge should not initiate contempt proceedings, leaving them to the parties or the Attorney General; and
6. Any penalty imposed should carefully recognize all of the circumstances and not be disproportionate.

Since Peters had been polite and co-operative at all times and had taken a principled position in making his re-

fusal, and since the evidence came out through other means, contempt proceedings should never have been initiated by the judge, and the penalty imposed was clearly excessive. The contempt finding and penalty were set aside. No appeal to the Supreme Court of Canada is being sought.

National Post Case

The *National Post* case focused on a plain brown envelope and enclosed document that appeared to be a copy of a bank loan authorization from the Business Development Bank of Canada that suggested a link to then Prime Minister Jean Chretien. *The National Post* had been pursuing related stories for some two years through the efforts of investigative reporter Andrew McIntosh and with the help of confidential sources; the Prime Minister’s involvement in dealings with the bank was the primary focus of the series. In April 2001, the envelope arrived anonymously to McIntosh, who attempted to verify the document by sending copies to the bank, the Prime Minister and his lawyer.

All claimed the document was a forgery, and the *Post* decided against publishing details from it. Soon after, one of McIntosh’s existing confidential sources advised him that he/she sent the document and asked him to destroy the envelope in case DNA or fingerprints might help identify the source. McIntosh refused to do so but took steps to secure the documents and confirmed his commitment to confidentiality as long as he believed the source was not trying to mislead him through the forgery.

At the bank’s request, the Royal Canadian Mounted Police launched an investigation into the alleged forgery and the related offence of “uttering a forged document”, based on the allegation that the *Post* was meant to rely on it as if it was genuine. The RCMP obtained the search warrant and assistance order to require the *Post*’s editor to turn over the original documents on the basis they represented the actual criminal act of the second crime and could provide forensic evidence that would help lead to their source. The *Post* and McIntosh then successfully challenged the warrant and order, with the support of media interveners. That ruling was appealed by the Crown.

The Court of Appeal held that: “the gathering and dis-

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semination of news and information without undue state interference is an integral component of the respondents' constitutional right of freedom of the press under s. 2(b) of the Charter... However, this does not mean that press organizations or journalists are immune from valid searches under s. 8 of the Charter. And s. 2(b) does not guarantee that journalists have an automatic right to protect the confidentiality of their sources."

The Court again turned to the Wigmore test and found the first three criteria were met, accepting that confidential sources

were essential to journalists but pointing out that "journalists can never guarantee confidentiality" and "refusing to recognize the privilege in appropriate cases will not, in our view, cause media sources to 'dry-up.'"

However, the case for privilege was lost on the fourth criterion - the balancing of competing interests. The Court was convinced by the Crown's contention that the envelope and document represented the actual act of "uttering a forged document", available from nowhere else, and that the potential identifying forensic information was critical to the police investigation. The Court found the alleged offence was "an especially grave and heinous crime" – "if the document was forged, it would be evidence of a criminal conspiracy to force a duly elected Prime Minister from office." As a result, "the respondents are shielding a potential wrongdoer from prosecution for a serious crime by refusing to deliver to the authorities the items representing the *actus reus* of the offence." In sum, the Court stated:

We do not diminish the press' important role in uncovering and reporting an alleged wrongdoing. But in our society it is the police who are charged with a crucial role of investigating and prosecuting crime. And, to paraphrase what White J. said

in *Branzburg v. Hayes* at p. 692, it is not necessarily better to write about crime than to do something about it.

Fortunately, the Court rejected the Crown's position that law enforcement interests should always trump any claim to journalist/source privilege, but the breadth of the ruling's application to alleged criminal activity remains to be seen.

Could any whistleblower's release of confidential documents now lead to a police investigation? Will journalists best be advised to destroy any original

documents they receive (after making a copy) in order to protect their confidential sources? If so, will there be consequences in the event of a libel suit? In the meantime, at least reporters will know that if they are called upon to identify a source in court, the law of contempt is a little less the bludgeon that it once was, and they may have a better chance of protecting their confidential sources.

... reporters will know that if they are called upon to identify a source in court, the law of contempt is a little less the bludgeon that it once was...

Brian MacLeod Rogers (Toronto) was counsel for the Appellant, Ken Peters. In St. Elizabeth Home Society v. Hamilton (City), Sara Blake, Robin Basu and Sophie Nunnelley were counsel for the intervener, Attorney General for Ontario. Trisha Jackson and Charles Finlay were counsel for the intervener, Canadian Newspaper Association, John Norris was counsel for the interveners, Canadian Association of Journalists and Canadian Journalists for Free Expression. In R. v. The National Post, Robert Hubbard was counsel for the Appellant, Attorney General for Ontario. Marlys Edwardh and John Norris were counsel for the Respondents, The National Post, Matthew Fraser and Andrew McIntosh. Peter Jacobsen and Adrienne Lee were counsel for the intervener, Bell Globemedia Inc. Daniel Henry was counsel for the intervener, Canadian Broadcasting Corp.

D.C. Circuit Stays Extraordinary and Unprecedented Contempt Sanction Against Reporter

Orders Expedited Briefing and Argument on Common Law Reporter's Privilege

By Leslie Paul Machado

After a week in which the D.C. Circuit granted two emergency motions – one by former USA TODAY reporter Toni Locy to stay an unprecedented contempt order issued by the United States District Court for the District of Columbia in the matter of *Hatfill v. Mukasey*, Case No. 03-1793, and one filed by Dr. Hatfill to expedite briefing and argument – the Circuit is scheduled to hear argument on May 9, 2008 and decide, among other issues, the availability and scope of a common law reporter's privilege. The panel is scheduled to be comprised of Judges Ginsburg, Rogers and Kavanaugh.

First, some background: Only weeks after the terrorist attacks on the World Trade Center and the Pentagon, the sense of panic and fear that plagued the country was heightened when letters containing anthrax were sent to senators and newsmen, and traces of the deadly chemical were found at post offices and other buildings throughout the United States. Ultimately, five people – two U.S. Postal Service employees in Washington, D.C.; an employee at America Media, Inc. in Boca Raton, Florida; a woman in Oxford, Connecticut; and a New York hospital supply room worker – died of exposure to anthrax.

In August 2002, then-Attorney General Ashcroft publicly identified Steven Hatfill, M.D. as a "person of interest" in the government's ongoing anthrax investigation. Around this time, the media published several articles relating to the investigation, including the fact that Dr. Hatfill had been named as a "person of interest." Dr. Hatfill quickly called a press conference to deny any involvement in the attacks. He has never been charged in the case.

Privacy Act Claim

In August 2003, Dr. Hatfill filed a Privacy Act lawsuit against Attorney General Ashcroft, the Department of Justice, the Federal Bureau of Investigation, and several DOJ and FBI employees, alleging that a pattern of leaks from the FBI and DOJ had destroyed his life. The lawsuit sought a declaration that government officials violated Dr. Hatfill's constitutional rights, and sought an injunction against future violations. It also sought an undetermined amount of monetary damages.

A small part of Dr. Hatfill's Privacy Act lawsuit was based on two articles written by Ms. Locy in mid-2003. In the first article, published May 29, 2003, she reported that Dr. Hatfill had been under "24/7" surveillance since he was publicly identified as a "person of interest." Her May 29 article also reported that the evidence against Dr. Hatfill was "largely circumstantial;" that the term "person of interest" had no legal significance; that investigators had been unable to rebut Dr. Hatfill's claims that he had never visited Trenton or Princeton (where the anthrax letters were mailed); that investigators had found no traces of anthrax in Dr. Hatfill's apartment, his girlfriend's home, his cars, a dumpster near his house or several places he visited; and that one law enforcement source reported that investigators "sometimes wonder whether they focused on Hatfill too soon, and ignored someone who deserved more attention." In the second article, published June 10, 2003, Ms. Locy reported that the FBI had begun draining a pond near Dr. Hatfill's house.

In April 2006, Dr. Hatfill subpoenaed Ms. Locy to appear for a deposition to answer questions about her confidential sources for the two articles. At that deposition, she testified that she could not recall the names of the specific individuals who provided her with the information contained in the two articles. She explained that she had thrown out her notes shortly after writing the two articles years earlier (as was her practice); that she was not required to tell her editor her confidential sources in 2003, and did not do so; and that there were no drafts or other documents that could refresh her recollection.

Ms. Locy testified, however, that she had a broad "universe" of sources that she relied upon for her general anthrax/terrorism reporting. She refused to reveal the names of the members of this broader universe because that would implicate individuals who were not sources for the two articles at issue. However, because the two articles included references to her sources' employers, she was able to confirm that her sources were government officials.

More than one year later, Dr. Hatfill moved the district court to compel Ms. Locy (and five other reporters) to reveal the names of their confidential sources. In an [opinion](#) dated August 13, 2007, the district court granted that motion, finding

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that the qualified reporters' privilege set forth in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) and *Lee v. Dep't of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005) had been overcome.

Dr. Hatfill then deposed Ms. Locy a second time. At this second deposition, however, he did not ask her to name the sources of information for the two articles at issue. Instead, his questions were far broader and sought the names of confidential sources for information concerning her anthrax reporting in general. Ms. Locy respectfully refused to answer those broader questions, both to avoid disclosing the names of sources irrelevant to the issues in the case, and to preserve her ability to seek appellate review:

I fully respect the court's order. I do not remember the confidential sources who provided me with information about Steven Hatfill. Refusing to answer is the only way for me to have an appeals court decide whether I must reveal confidential sources who may not have provided the information at issue in this case.

Prior to her second deposition and continuing after the deposition, Ms. Locy reached out to her universe of confidential anthrax sources to see if any would release her from her promises of confidentiality and/or if any refreshed her recollection as to whether they were the source for the two Hatfill-related articles. Based on her efforts, and the efforts of other reporters, two individuals released her from any promises of confidentiality and were deposed by Dr. Hatfill. While both individuals recalled speaking with Ms. Locy, neither recalled whether they were the source for any of the information contained in her two articles.

Contempt Motion

Dr. Hatfill thereafter moved to hold Ms. Locy and Jim Stewart, now we had reported on the anthrax investigation for CBS News, in contempt. Both reporters opposed that motion. For her part, Ms. Locy reiterated that forcing her to reveal *all* of her confidential sources for general terrorism reporting would necessarily disclose confidential sources of information having nothing to do with Dr. Hatfill's case. She also explained that she intended to appeal any finding of contempt to the D.C. Cir-

cuit and, as a result, urged that any sanction be nominal and be stayed pending appeal.

Ms. Locy showed that, in the three most recent cases in which D.C. federal district courts had ruled on similar motions, they stayed the contempt sanction pending the appeal. *See In re: Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004); *Lee v. Dep't of Justice*, 327 F. Supp. 2d 26, 33 (D.D.C. 2004); *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 144 (D.D.C. 2005).

On January 11, 2008, while his contempt motions were pending against Ms. Locy and Mr. Stewart, Dr. Hatfill announced to the district court that he was prepared to proceed to trial, and was requesting a trial date in 2008. In response to multiple questions from the district court, Dr. Hatfill's counsel expressly agreed that he was prepared to proceed to trial on the current record, *without* evidence of Ms. Locy's or Mr. Stewart's sources, because he had more than sufficient evidence to prevail on his claims. Consequently, the court set the case for a pretrial conference in October 2008, preceded by mediation and cross-motions for summary judgment.

On February 19, 2008, the district court heard argument on plaintiff's contempt motions. After acknowledging that Ms. Locy could not recall the names of the individuals who gave her information about plaintiff, and finding her failure of recollection credible, the district court ordered Ms. Locy to reveal the names of *all* of her many confidential sources, on the premise that "somebody, apparently, among the group [] provided information to her, told her, about Dr. Hatfill."

The court reasoned that if all of Ms. Locy's many anthrax sources were revealed, Dr. Hatfill could "follow up" to see if any of the sources might remember providing relevant information to Ms. Locy in 2003. The court acknowledged that its ruling would require Ms. Locy to reveal the names of confidential sources who *did not* provide Hatfill-related information, but decided that Dr. Hatfill's interest in "following up" trumped any constitutional privilege.

To enforce its decision, the court imposed an escalating fine, starting at \$500 per day for the first seven days, escalating to \$1000 per day for the next seven days, and then rising to \$5000 per day for the next seven days for each day Ms. Locy refused to reveal her universe of anthrax sources. At the end of that period, the court would "reconvene a hearing to decide what further steps should be taken." The court temporarily

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stayed the sanction pending issuance of a written order.

At 9:15 p.m. on Friday, March 7, 2008, the district court issued a written [Opinion and Order](#), confirming its earlier decision and acknowledging again that it was ordering Ms. Locy to reveal the names of sources unrelated to the two articles at issue in plaintiff's case. According to the court, because Ms. Locy could not identify the sources for the two articles about Dr. Hatfill, "discerning the identity of the pertinent sources necessarily requires deposing all [of her confidential sources] to eliminate those who did not implicate Dr. Hatfill."

In addition, the court intensified its financial sanction on Ms. Locy by prohibiting her "from accepting any monetary or other form of reimbursement for the payment of the monetary sanction imposed by the Court." The sanctions were to become "effective as of 12:00 midnight on March 11, 2008." Finally, despite the concededly unprecedented nature of its ruling, the court refused to grant a stay to enable Ms. Locy to seek appellate review.

On Monday, March 10, Ms. Locy filed an emergency motion with the D.C. Circuit to stay the district court's order. In her [motion](#), Ms. Locy argued that the district court's order, forcing her to reveal the names of confidential sources who were not sources for the two Hatfill articles, violated the constitutional reporter's privilege long recognized in the Circuit, which requires that the source be "crucial" to the plaintiff's case.

Ms. Locy also argued that Dr. Hatfill has amassed significant evidence in support of his case, including the names of six sources and the government agency employers of numerous other sources, all of which led him to ask the district court to order the case to trial. These facts, Ms. Locy argued, confirmed that her testimony was not "critical" or "crucial" to Dr. Hatfill's case.

Ms. Locy's motion also argued that her appeal would allow the Circuit to squarely address the availability and scope of a common law reporter's privilege, and would let the Circuit resolve whether the names of her confidential sources were crucial to Dr. Hatfill's case or whether their government agency employer was sufficient in a Privacy Act claim – an issue ex-

pressly left open in the Circuit's decision in *Lee v. Dep't of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005). Ms. Locy's emergency motion was supported by an [amicus brief](#), drafted on 24 hours notice, and submitted on behalf of 29 companies.

After soliciting a response from Dr. Hatfill, the Circuit issued an [Order](#) on Tuesday, March 11 in which it granted the emergency motion for a stay, finding that Ms. Locy had "satisfied the stringent standards required for a stay pending appeal."

Two days later, on Thursday, March 13, Dr. Hatfill filed his own emergency motion with the D.C. Circuit, asking the Court to expedite briefing and argument of his appeal. In support of

his motion, Dr. Hatfill argued that, absent expedited consideration of Ms. Locy's appeal, he might be denied access to her confidential sources before his trial date later this year.

He also argued that Ms. Locy's memory might fade

while her case was on appeal; that the district court might delay consideration of his still-pending contempt motion against Mr. Stewart while Ms. Locy's case was on appeal, thereby depriving him of additional source information; and that his case could benefit from the Circuit's view on whether the identity of the leaker is necessary to prevail in a Privacy Act case, or whether the government agency employer is sufficient. After soliciting Ms. Locy's response, the D.C. Circuit granted Dr. Hatfill's [emergency motion](#) on Friday, March 14 and [ordered](#) expedited briefing and argument of the appeal.

Accordingly, Ms. Locy's merits brief, and any amici submission, is due March 28; Dr. Hatfill's opposition is due April 11; and Ms. Locy's reply brief is due April 18.

Robert C. Bernius, Leslie Paul Machado, Alycia A. Ziarno and Kimberly Jandrain of Nixon Peabody LLP represent Toni Locy. Stephen Hatfill is represented on appeal by Christopher Wright, Thomas G. Connolly, Mark A. Grannis, Tim Simeone and Patrick O'Donnell of Harris, Wiltshire & Grannis LLP. The amicus brief submitted in support of Ms. Locy's Emergency Motion for Stay was authored by Laura R. Handman, Brigham J. Bowen and J. Rory Eastburg of Davis Wright Tremaine LLP.

The court intensified its financial sanction on Ms. Locy by prohibiting her "from accepting any monetary or other form of reimbursement for the payment of the monetary sanction imposed by the Court."

Invasion Of The Privacy Act: How Recent Interpretations Threaten Confidential Sources

Editor's Note:

This article was recently published as a supplement to MLRC's New Developments Bulletin 2007:4. (Click here for that version of the article). In a very thoughtful discussion, the authors argue that the Privacy Act was not intended and should not be applied to unauthorized government disclosures about the status of ongoing criminal investigations. We are republishing it in the Media-LawLetter because of the importance of the issue, its relevance to the Toni Locy matter and related cases concerning the protection of sources in Privacy Act claims.

By Kevin Baine, Kevin Hardy and Carl Metz

In the wake of several recent high-profile confidential source cases, considerable time and attention has been devoted to the proposed enactment of a federal shield law which would create a statutory privilege in federal court comparable to the one already recognized in the overwhelming majority of state courts. *See, e.g., In re Grand Jury Subpoena (Judy Miller)*, 397 F.3d 964 (D.C. Cir. 2005); *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *In re Grand Jury Subpoenas (Mark Fainaru-Wada and Lance Williams)*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006); *Hatfill v. Gonzales*, 505 F. Supp. 2d 33 (D.D.C. 2007).

A federal shield law, however, will not put an end to the battles over the disclosure of confidential sources. Even if Congress enacts such a law, courts will still have to determine, on a case-by-case basis, whether there is an overriding need for the identification of a confidential source. And in two of the recent source cases, the law has taken a questionable turn – we have argued, a wrong turn – that will continue to haunt reporters in the future, whether or not a shield law is enacted.

In the *Wen Ho Lee* and *Steven Hatfill* cases, the courts have interpreted the federal Privacy Act of 1974, 5 U.S.C. § 552a, to create a cause of action against the government for the unauthorized disclosure of information about the status of active criminal investigations. That has enabled Dr. Wen Ho Lee and Dr. Steven Hatfill – respectively, a government scientist investigated for providing classified nuclear technology to a foreign government, and a bioweapons expert investigated for possible involvement in the 2001 anthrax attacks – to claim a need for identifying confidential sources within the government who gave reporters truthful information about the investigations into their activities.

The drafters of the Privacy Act surely did not foresee these developments. As explained below, they thought they were protecting citizens against the accumulation of inaccurate infor-

mation in government files and the disclosure of information that the public had no business knowing. And that is how the Privacy Act has been used for the most part.

In the more than thirty years since the law was enacted, there have been dozens of reported Privacy Act cases, but most are employment related cases that concern the disclosure of information contained in personnel files. For an illustrative list of adjudicated Privacy Act claims, *see* Wasil, *What Is 'Record' Within Meaning of Privacy Act of 1974*, 121 A.L.R. Fed. 465 §§ 7[a], [b] (West 1994 & 2006 Supp.).

Few cases that we have been able to identify have been premised on the theory that it is illegal for the government to disclose the status of an active criminal investigation, and the reported decisions in those cases either have not been on the merits or contain only superficial discussions of the Privacy Act. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), the D.C. Circuit's seminal decision on the reporter's privilege, reputed mobsters brought suit complaining that their rights under the Privacy Act were violated by the disclosure of transcripts of their conversations compiled from FBI wire taps. *Id.* at 707-08. After agreeing with the district court that the plaintiffs had not exhausted alternative sources, the Court affirmed summary judgment in the government's favor without passing on the merits of this Privacy Act theory. *Id.* at 716.

Two decades later, Dr. Lee and Dr. Hatfill expanded on the *Zerilli* theory to allege that the Privacy Act was violated not by the disclosure of intercepted private conversations, but by the disclosure of investigative information that does not implicate traditional notions of privacy. *Wen Ho Lee* complained, for example, of the statement by an unnamed government official that he had been removed from his position in a nuclear lab because of his refusal to cooperate with an FBI investigation into how the Chinese government may have acquired American nuclear secrets, an investigation in which Lee was reported to

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Invasion Of The Privacy Act: How Recent Interpretations Threaten Confidential Sources

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be a suspect. And Steven Hatfill complained, among other things, that Attorney General John Ashcroft violated the Privacy Act by confirming that he was a “person of interest” in the anthrax investigation—and that other unnamed sources committed separate violations by later confirming that Hatfill remained a person of interest. No sooner had Dr. Lee and Dr. Hatfill pressed these claims than an Oregon lawyer, Brandon Mayfield, sought recovery from the government for alleged violations of the Privacy Act, among other alleged wrongs, when he was wrongfully accused of participation in the 2004 train bombings in Madrid. See Compl. ¶¶ 38-40, *Mayfield v. United States*, No. 6:06-cv-00305 (D. Or.). (Mayfield’s counsel subpoenaed several journalists in the summer of 2006, but the case was settled before the issues of privilege were joined.)

Whether the Privacy Act should be construed to permit such claims – and whether, if it is so construed, it should be amended – are questions of obvious importance to news organizations facing the prospect that any reporting they engage in concerning a federal criminal investigation could one day beget a Privacy Act case in which the plaintiff seeks to subpoena their reporters’ sources. So how strong are these claims?

The Privacy Act’s Language

The statutory prohibition forming the basis for the suits in *Lee* and *Hatfill* is the Privacy Act’s ban on the unauthorized disclosure by the government of “any record which is contained in a system of records.” 5 U.S.C. § 552a(b). Whenever “records pertaining to an individual have been improperly disclosed,” that person is entitled to bring a civil action for damages and attorneys fees. *Lee*, 413 F.3d at 55. But what constitutes a “record” for these purposes is not always clear, as the statutory definition is less than precise:

[T]he term ‘record’ means any item, collection, or grouping of information *about an individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history *and that contains his name, or the identifying number, symbol, or other identifying particular* assigned to the individual, such as a finger or voice print or a photograph. . . .

5 U.S.C. § 552a(a)(4) (emphases added). Given this definition, it is perhaps unsurprising that the federal courts of appeals have split three ways on the proper interpretation of the term “record” as used in the statute. Compare *Boyd v. Secretary of Navy*, 709 F.2d 684, 686 (11th Cir. 1983) (per curiam) (A “record” must “reflect some quality or characteristic of the individual involved.”), with *Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992) (criticizing *Boyd* and holding that the “statutory definition of a record . . . [has] a broad meaning encompassing any information about an individual that is linked to that individual through an identifying particular”), and with *Bechhoefer v. Dep’t of Justice*, 209 F.3d 57, 62 (2d Cir. 2000) (following *Quinn* but limiting it to “personal information” about the individual).

For its part, the D.C. Circuit remains largely undecided, saying only that it rejects the tests adopted by the Third and Eleventh Circuits, and otherwise reserving the question for later cases. See *Tobey v. NLRB*, 40 F.3d 469, 472 (D.C. Cir. 1994). The U.S. District Court for the District of Columbia has added to the confusion with its own inconsistent results. Compare *Houston v. Dep’t of Treasury*, 494 F. Supp. 24, 28 (D.D.C. 1979) (Privacy Act merely prohibits “circulation of sensitive information about an individual’s private affairs”), with *Scarborough v. Harvey*, 493 F. Supp. 2d 1, 13-14 & n.28 (D.D.C. 2007) (“[T]he Act’s definition of information that is ‘about’ an individual is clearly drawn in broad and expansive terms. . . .”).

Applicable Principles of Statutory Construction

Despite the obvious disagreement over what constitutes a protected “record” under the Privacy Act, there are well-recognized principles supporting a narrow interpretation that would not include the kind of current, newsworthy information about an active criminal investigation that was at issue in cases like *Hatfill* and *Lee*.

First and foremost, the Privacy Act is a statute that effects a limited waiver of the government’s sovereign immunity. As a result, standard interpretive doctrine holds that it “must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires.” *Tomasello v. Rubin*, 167 F.3d 612, 618-19 (D.C. Cir. 1999) (alterations and quotations omitted) (construing the Privacy Act). See also *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002) (same), *aff’d*, 540 U.S. 614

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(2004). As the D.C. Circuit explained in *Tomasello*, this means that courts cannot embrace an interpretation of the Privacy Act that would impose liability on the government so long as there is at least one “plausible” alternative reading that would allow the government to prevail. *Id.* at 618.

This principle was invoked most recently in *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007). In that case, the court resolved a statutory ambiguity in the government’s favor and imposed strict requirements for proving that an unlawfully-disclosed record was, prior to its disclosure, actually retrieved from a government file bearing the plaintiff’s name (as opposed to being coincidentally within a file and disclosed by an official with personal knowledge of the information). *Id.* at 1123. The defendant agency did not dispute that information relating to the plaintiff had been released from a government file, but it argued as a defense that the information had been located in a file bearing another person’s name, and that this fact took the disclosure outside the purview of the Privacy Act. *Id.* The court acknowledged that the Privacy Act could equally have been read to reject the government’s argument, *id.*, but it found the language sufficiently ambiguous that it was required to side with the government and “construe [the statute’s] waiver of sovereign immunity narrowly.” *Id.* “Thus, for his action to survive, [plaintiff] must present evidence that materials from records *about him*, which the Marshals Service retrieved by *his name*, were improperly disclosed.” *Id.* (emphasis added).

Second, and related, is the fact that a violation of the Privacy Act is not merely a tort for which damages may be recovered against the government, but also a misdemeanor for which individual government employees can be prosecuted. 5 U.S.C. § 552a(i)(1). This is important because of the “rule of lenity,” an interpretive doctrine that requires (much like the sovereign immunity canon) that statutory ambiguities be resolved against a finding of wrongdoing. *See, e.g., United States v. Anderson*, 59 F.3d 1323, 1333 (D.C. Cir. 1995) (en banc).

From these principles, one can argue with some force that the notion of an “expansive” or “broad” reading of the Privacy Act is fundamentally at odds with the nature of the statute, which requires that it be read narrowly and with doubts about its meaning resolved against a finding of coverage. And when it comes to the question whether the Privacy Act prohibits the dissemination of current, newsworthy information about a

criminal investigation, there is substantial room to doubt that the statute has anything to say about the matter.

Legislative History

As more than one Court has found, the “legislative history indicates [that] the Privacy Act was primarily concerned with the protection of individuals against the release of *stale personal information* contained in government computer files to other government agencies or private persons.” *Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985) (emphasis added). The Congressional findings supporting the statute’s enactment manifestly reflect that concern:

[T]he increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information

Houston, 494 F. Supp. at 27-28 (quoting Privacy Act, Pub. L. No. 93-579, § 2(a), 88 Stat. 1896 (1974)); *see also* S. Rep. No. 93-1183, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (The purpose of the Privacy Act is to “promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files.”). The emphasis in the legislative history is on “the need to protect against governmental abuse of ‘*personal information*.’” *Bechhoefer*, 209 F.3d at 62 (emphasis added). There is no comparable suggestion of “any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people.” *Cochran*, 770 F.2d at 959 n.15.

As an historical matter, the Privacy Act was at least in part a response to the abuses of the Watergate era, as reflected in the Report of the House Committee on Government Operations:

Additional impetus in Congress to enact privacy safeguards into law has resulted from recent revelations connected with Watergate-related investigations, in-

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dictments, trials, and convictions. They included such activities as the break-in at the Democratic National Committee's headquarters in June 1972, the slowly emerging series of revelations of "White House enemies lists," the break-in of the office of Daniel Ellsberg's psychiatrist, the misuse of CIA-produced "personality profiles" on Ellsberg, the wiretapping of the phones of government employees and news reporters, and surreptitious taping of personal conversations within the Oval Office of the White House as well as political surveillance, spying, and "mail covers."

H.R. Rep. No. 93-1416, at 8-9 (1974). No one was suggesting at the time that there needed to be a remedy for providing information about the status of legitimate government investigations,

Indeed, a great deal of the Privacy Act has nothing to do with unlawful disclosures of information, but is instead addressed to the manner in which the government is permitted to collect and maintain information about individuals. 5 U.S.C. § 552(d), (e). Under the act, "records" are supposed to be gathered in the first instance by requesting the information from the person to whom it pertains, *id.* § 552a(e)(2), and that person has a qualified right to insist upon reviewing records maintained about him or her in order to verify their accuracy, *id.* § 552(d). Even if such provisions do not exclude the possibility that Congress was attempting to restrain the dissemination of broader categories of information in the government's possession, they at least suggest that the Privacy Act was in substantial part understood as a vehicle for protecting individual citizens' right to control the use of personal and sensitive information that the government might have a need to collect from them over the course of time.

The statute's definition of a "record" supports this understanding. It includes an illustrative list of items that would qualify, specifying an individual's "education, financial transactions, medical history, and criminal or employment history." 5 U.S.C. § 522a(a)(4). Each of those items is the type of *historical* and *personal* information that one would expect to find listed if Congress's intention was, as the legislative history suggests, to prevent the dissemination of sensitive personal information gathered by the government over time. Indeed, an ear-

lier draft of the Privacy Act passed by the Senate used the same illustrative list for its definition of the term "personal information," which meant "any information that identifies or describes any characteristic of an individual." See S. 3418, 93rd Cong. § 301(2) (as passed by Senate, Nov. 21, 1974). When Congress later substituted the term "record" in place of "personal information," it did not change this list of examples that comported with its definition of information protected by the Privacy Act. And while the statute says that the definition of a record is "not limited to" the listed items, canons of statutory interpretation suggest that anything else that could be called a record must share the same core attributes. See, e.g., *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle. Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated.").

This is not to suggest that the Privacy Act is wholly inapplicable to federal law enforcement agencies. Rather, the point is simply that not *everything* contained in a government file is information subject to the Privacy Act's restrictions on disclosure. A statute preventing the dissemination of *personal* information in the government's possession is not naturally read to encompass current, newsworthy information about a legitimate, ongoing criminal investigation, and there is ample basis in the text, structure and history of the Privacy Act to make it at least "plausible" that the statute does not restrict the disclosure of such information. And, as we have seen, plausibility is all the government needs to show to prevail in a Privacy Act case.

The Wen Ho Lee and Steven Hatfill Cases

To date, the federal courts in the District of Columbia have not seen it this way – at least, not in the course of considering the reporters' arguments that there is no overriding need for their testimony. In the *Lee* case, the district court focused attention on the information contained in the very first news article identifying Dr. Lee as a suspect in an FBI investigation, noting that the article included details that might reasonably be understood to contain core Privacy Act material – namely, information about his "employment history" and "personal financial situation." *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 19

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(D.D.C. 2003). Although such disclosures were generally confined to one “seminal story” about Dr. Lee, *id.* at 22, the court ordered other reporters who had not published the same kind of information to disclose the identities of their sources as well, *id.* at 24-25. That holding was challenged on appeal, with three reporters in particular arguing that the information they reported was not personal to Dr. Lee and did not implicate the Privacy Act, but was instead newsworthy information about the status of the FBI’s nuclear espionage investigation. The D.C. Circuit did not substantively address those arguments in its decision affirming the district court’s finding of contempt. *See Lee*, 413 F.3d 53.

In the *Hatfill* case, the claims are potentially even broader than in *Lee*. Dr. Hatfill seeks recovery under the Privacy Act not just for the disclosure of the fact that he was named as a “person of interest” in the FBI’s investigation into the 2001 Anthrax attacks – a fact that was disclosed on the record by then-Attorney General John Ashcroft in August 2002 – a but also for numerous additional disclosures about the status of the government’s investigation. Dr. Hatfill challenges, for example, the public disclosure of the fact that in 2003 divers searched a pond in Maryland near his home, where they recovered a clear box originally thought to have been used in the anthrax attacks, but that could not be positively linked by lab tests to the case. *See* First Am. Compl. ¶ 97, *Hatfill v. Dep’t of Justice*, No. 1:03-cv-01793-RBW (D.D.C.). He likewise challenges public reports to the effect that investigators’ suspicions about him were raised when specially-trained bloodhounds reacted strongly to his scent, and when he was seen dumping belongings in a dumpster. *Id.* ¶ 62. And, he challenges various reports concerning agents’ analysis of the strength of their case, including doubts about whether they had enough information to successfully prosecute him, or that they ever would. *Id.* ¶ 97.

None of these published reports – and there are other reports of the same character that we are not discussing for the sake of brevity – contained the kind of personal or private information one would expect to be covered by a Privacy Act. With few exceptions, the challenged disclosures describe facts witnessed by government investigators as they occurred, or subjective analyses of the strength of the government’s case – not personal and sensitive information that Dr. Hatfill ever had any inherent right to control.

Reporters challenged Dr. Hatfill’s subpoenas on that basis,

but the district court rejected their arguments. Relying upon its recent opinion in *Scarborough*, 505 F. Supp. 2d at 2-4, the district court found that the definition of a “record” was written in “undeniably expansive” terms and required only a finding that published information was to some degree “about” Dr. Hatfill. *Hatfill*, 505 F. Supp. 2d at 38-39. The court found that standard to have been satisfied through the publication of “investigative information” that led the FBI to suspect Dr. Hatfill’s involvement in the anthrax attacks: any reports containing “the identification of Dr. Hatfill by name and a description of his suspected involvement in criminal or otherwise suspicious activity are clearly about him and therefore not excluded from the Privacy Act’s definition of records.” *Id.* at 39.

Based on that interpretation of the Privacy Act, the district court ordered six journalists to identify their confidential sources. *Id.* at 51. (On March 7, 2008, the District Court held reporter Toni Locy, formerly of *USA Today*, in civil contempt for refusing to identify her sources. Ms. Locy has appealed that order to the D.C. Circuit, which stayed the order pending appeal. A motion to hold another reporter in contempt is pending before Judge Walton. *See* page 3)

If this is how the Privacy Act is to be interpreted, we can reasonably anticipate more such Privacy Act claims in the future by investigative subjects motivated to “fight back” against those who are pursuing them. It is hardly unusual for journalists to report that someone is a suspect in an investigation. Did Congress intend or contemplate that the Privacy Act would be invoked to challenge that disclosure? We don’t think so. And we suspect that the Congress that passed the Privacy Act would have appreciated the irony in such an application. A law that was passed to guard against the misuse of personal information of no legitimate interest to the public is being invoked to challenge the release of information of current public interest. And a law that was prompted by Watergate-era abuses brought to light by confidential sources is being invoked to challenge reporters’ rights to maintain their confidential source relationships.

The D.C. Circuit’s recent opinion in *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007), may prove to be a substantial first step towards correcting that interpretation. Although the decision does not directly speak to the definition of a protected “record” under the Privacy Act, the court’s reliance on sovereign immunity principles to limit the

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statute's scope provides a strong guidepost for courts later addressing the question whether Congress knowingly made it a tort for government officials to discuss the status of high-profile criminal investigations of the kind that were at issue in *Lee* and *Hatfill*. Moreover, even if *Sussman* does not lead courts to construe the term "record" narrowly, plaintiffs who would use the Privacy Act to complain generally about the fact that they were identified as suspects in a criminal investigation may simply find it too difficult to prove (as *Sussman* requires them to) that such information was actually retrieved from a government file bearing the plaintiff's name prior to its disclosure. That alone may discourage, if not altogether deter, these types of Privacy Act suits. Only time will tell whether *Sussman* has that effect.

Two Ways Out

There are ultimately two paths to victory for journalists in these cases. Either the Privacy Act is interpreted (or amended) to narrow its application, or courts faced with reporters' privilege claims will—either on their own or as a result of a federal shield law—factor into their equation the strength of the public interest in vindication of a Privacy Act claim. As Judges Tatel and Garland of the D.C. Circuit have noted, in a leak investigation the plaintiff will almost always be able ultimately to establish relevance and exhaustion. *Miller*, 397 F.3d at 997 (Tatel, J., concurring in the judgment) (“[W]hen the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter’s source unprotected regardless of the information’s importance to the public.”); *Lee v. Dep’t of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc) (same); *id.* at 302 (Garland, J., dissenting from denial of rehearing en banc) (“Barring an unexpected confession by the leaker, in most such cases the subject of the leak will be able to satisfy the centrality and exhaustion requirements cited in the court’s opinion. Thus, if the reporter’s privilege is limited to those requirements, it is effectively no privilege at all.”).

And if that is all that is required, the reporter’s privilege becomes nothing more than a scheduling order, requiring that the journalist’s deposition be scheduled last. If, on the other hand, the courts balance the public interest in the underlying reporting against the public interest in identifying the confidential source, the outcome is anything but a foregone conclusion. Judge Tatel, for one, has explained how he thinks the balance should be struck in a Privacy Act case like the one filed by Wen Ho Lee:

Without slighting Lee’s private interest in receiving compensation for governmental malfeasance, his claim *pales in comparison to the public’s interest in avoiding the chilling of disclosures about what the government then believed to be nuclear espionage*. This case is thus very different from [*Miller*]. Not only was that a criminal case, but there we held that the grand jury’s interest in securing the name of a source suspected of committing a felony outweighed any applicable privilege. [*Miller*], 397 F.3d at 973.

Lee’s private interest in this civil suit implicates no similarly critical concerns, and it’s hard to imagine how his interest could outweigh the public’s interest in protecting journalists’ ability to report without reservation on sensitive issues of national security.

Lee, 428 F.3d at 302 (Tatel, J., dissenting from denial of rehearing en banc) (emphases added). Reporters, of course, have every reason to be nervous about a test that balances their rights against the interests of litigants. As Judge Tatel’s analysis makes clear, however, a rigorously applied balancing test at least leaves room to hope that, as promised in *Zerilli*, confidential source relationships will be preserved in “all but the most exceptional cases.” 656 F.2d at 712.

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Unsavoury Northern Irish Libel Award Reversed on Appeal

Erroneous Fair Comment Instruction Given in Restaurant Review Case

By Leslie Caplan

The Northern Ireland Court of Appeal has set aside a controversial unanimous verdict reached by a jury in February 2007 to award £25,000 (about \$50,000) in libel damages to the proprietors of a Belfast restaurant in respect of a restaurant review published in the *Irish News*. The verdict raised serious questions about the extent to which the press could or should be restricted. *Convery v. Irish News Limited* [2008] NICA 14 (March 10, 2008) (Kerr, Campbell, Girvan, JJ.).

Many were concerned at the precedent of a restaurant securing significant damages over criticism in a review and the appeal was keenly awaited by newspapers, their reviewers and their legal advisors.

Background

The review at the center of the case written by Caroline Workman, an experienced food writer, and was published in the weekend section of the *Irish News* in August 2001. *The Irish News* is a Belfast-based newspaper with a circulation of about 50,000. The review described Ms Workman's less than enjoyable dining experience at Goodfellas, an Italian themed restaurant in West Belfast.

Published under the headline "Not good, fellas", the review was highly critical of the food, drink, attitude of staff and the smoky atmosphere. Ms. Workman gave the restaurant one star out of five, and rated it "stay at home." The owner of Goodfellas, Ciaran Convery, sued, claiming that the article was defamatory, damaging and hurtful.

The *Irish News* pleaded justification and fair comment, a defense that the statements were honest comment based on a matter of public interest. The jury found in favour of the newspaper in relation to its justification defense, but against

it on the defense of honest comment. The jury's decision and the award of £25,000 were appealed, and the matter was heard by the Northern Ireland Court of Appeal, which delivered its verdict on 10 March.

Appeals Court Decision

The three-judge appeal Court found that the trial judge had misdirected the jury on the issue of fair comment. Where this defense is pleaded, the jury must be carefully directed on how to approach the difficult question of whether words in the article are statements of fact, or alternatively, are comment. In the words of the Lord Chief Justice Kerr, who delivered the leading judgment of the Court of Appeal

"Only if the jury has a clear understanding of what is capable of constituting comment, can it begin to address the thorny issue of whether the facts on which the comment is based are capable of justifying the comment made."

The court held that the jury could not have properly recognized which statements in the review were fact and which were comment from the trial judge's directions. While it was possible, indeed the Lord Chief Justice considered it likely, that a properly directed jury would find in favor of the defendant, it was not a certainty and the court therefore ordered a retrial.

It is for Mr. Convery to decide if he wishes to bring the matter before the courts again, but the *Irish News* has stated that it is prepared to defend any further proceedings taken. The Court of Appeal's decision is certainly welcomed by reviewers and the press in general and we now await Mr. Convery's decision with interest.

Lesley Caplan is a solicitor in the Defamation and Media Group at McCann FitzGerald solicitors in Dublin.

Ms Workman gave the restaurant one star out of 5, and rated it "Stay at home."

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

By David Hooper

Blasphemy

Attempts by a Christian organisation to appeal against the ruling upholding the dismissal of the attempt to bring blasphemy charges against the BBC for screening *Jerry Springer: The Opera* were rejected by the House of Lords. See *MediaLawLetter* Dec. 2007 at 33.

The days of blasphemy on the statute book appear to be numbered. A clause scrapping the law of blasphemy, which applies only to the established Church of England religion and not the many other religions practiced in the UK, has been added by the Government to the current Criminal Justice Bill and should soon be law.

More from the Town Called Sue

Amongst the litigants of impeccable reputation who have beaten a path to the Royal Courts of Justice are the widely-known and respected Ukrainian businessman Rinat Akhmetov, who successfully sued the widely-read in the UK *Kyiv Post* for its highly topical story headlined "Appalling Kyiv City Council Land Grab." In my local pub they have been talking of little else.

Mr. Akhmetov was followed by the Icelandic bank Kaupthing, which successfully sued the Danish tabloid *Ekstra Bladet* for its English translation available on the internet of a story which falsely suggested that the bank's tax advice amounted to involvement in a tax fiddle. Damages were said to be "very substantial," and the case to have cost the Danish paper €270,000 in costs and damages.

Germany: Publication on the Internet

In marked contrast to the facility with which the UK courts assume jurisdiction when foreign newspapers are published in the UK on the Internet was the decision in the Dusseldorf Regional Court of 9 January 2008. There a claim by Boris Fuchsmann and Innova Film Limited against the *New York Times* based on an FBI report on the activities

of a US citizen called Ronald Lauder failed. The claimant could not prove that any copies of the *New York Times* had been published in Dusseldorf, so he relied simply on internet hits in the Dusseldorf jurisdiction.

This was insufficient in the view of a German court to find jurisdiction, as it was "not in accordance with the newspaper's intended use aimed at readers in the United States of America and particularly New York, where the subject of the article, Ronald Lauder, lived". The court further observed that circulation had to be "in the course of ordinary business or in accordance with the intended use and not merely by happenstance."

Privacy

Watch this space. Argument has recently been heard by the Court of Appeal in the *J K Rowling -v- Express Newspapers* decision. For background on the case see *MediaLawLetter* Oct. 2007, at 40. This raises the issue to whether the taking of photographs of J.K. Rowling's child in a public place by a long lens camera is a breach of privacy. The case will resolve the apparent conflict between the House of Lords in the Naomi Campbell case and the European privacy case of Von Hannover (Princess Caroline of Monaco). The Court of Appeal has reserved judgment.

On January 17, 2008, damages of £37,500 were ordered to be paid to the actress Sienna Miller, who was surreptitiously filmed entering a lake on a private estate naked during the filming of *Hippy Hippy Shake*, whence it ended up with the appropriately-named agency Xposure. News Group Newspapers published the photograph. Significantly, the claimant pursued the claim after publication and recovered fairly substantial damages. It may be a sign of things to come: namely that damages to privacy tended to be very modest and privacy cases were rarely about stopping publication in the first place. Now if courts are willing to award substantial damages, claims for privacy will be actively pursued by those who feel their privacy has been infringed.

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Libel Damages

Kate and Gerry McCann, parents of the missing child Madeleine, received agreed damages of £550,000 against Express Newspapers, which had published over 100 articles reporting some of the more shocking rumours and allegations circulating in Portugal about the parents suggesting that they were responsible for the death of their child and were guilty of a cover-up.

Commentators noted the incessant use of the name Madeleine in the headlines, when in reality there was no real news to report. Cynics noted that headlines in these papers alternated between the names Madeleine and (Princess) Diana and that purchasers who hoped to read anything remotely newsworthy were soon disappointed.

Cumulatively, the articles raised a suspicion of guilt about the McCanns. With two claimants and multiple cause of actions against four newspapers, damages could have been in the stratosphere. The newspapers each also carried a front-page apology.

Open Justice

There have been two interesting decisions recently. One concerned the public's right to inspect court documents including the detailed grounds of defence: in this case, why the UK government stopped the possible prosecution of BAE over allegations of corrupt arms dealing. *R -v- Cornerhouse Research* (decision of Mr Justice Collins 4 February 2008). The other concerned the disclosure of a Defendant's identity. *re Trinity Mirror plc*, 2008 All ER D12. The trial judge had attempted under Section 11 of the 1981 Contempt of Court Act 1981 to prevent the press reporting the name of a convicted child pornographer to prevent "significant suffering on the part of the defendant's own children."

The Divisional Courts held that there was no power to make such an order where the children were neither witnesses nor victims in the case nor did it have an inherent jurisdiction to produce what might be a desirable result (namely the avoidance of distress to the defendant's children). A group of papers led by Trinity Mirror successfully appealed against the trial judge's original order.

Press Complaints Commission

The recently published annual report of the PCC discloses a 31 percent increase in complaints dealt with. The figures are slightly skewed by the fact that 485 related to one report about the McCann case, captioned in immortal tabloid style designed to disparage anything foreign: "Up Yours Senor." Nevertheless, there has been a significant increase in matters being dealt with by the PCC, which must be a tribute to its increasing effectiveness. 483 of the complaints reached the resolution process. There are limits on what the PCC can do, as it cannot award damages and is not equipped to resolve disputed issues of fact. There is a feeling in some quarters that its composition makes it too sympathetic to the press, encouraging people to continue using the courts.

Reynolds Privilege – Latest Developments

[Seaga v Harper, 30 January 2008, Appeal 90 of 2006](#)

Edward Seaga, the leader of the Jamaican Labour Party, criticised at a public meeting the appointment of Leslie Harper as Commissioner of Police in Jamaica. Harper was successful in the slander action that he brought and this ultimately reached the Privy Council on the question of *Reynolds Privilege*. The council ruled that material should be looked at as a whole and in a practical manner and not piece by piece. Furthermore, there was no reason why the *Reynolds* defence could not apply in any medium. It was not restricted to print or broadcast. So far so good, but on the facts Seaga was found not to have exercised a sufficient of responsibility and what he alleged against Harper was felt not to rise above rumour, so the *Reynolds* defence failed.

[Malik v Newpost Ltd 2007 EWHC 3063](#)

Another *Reynolds* defense failure in that the defense was not available to a person who wrote an unsubstantiated defamatory allegation of fact in his reader's letter nor could the paper rely on *Reynolds* where it had not investigated the defamatory allegation of fact contained in the reader's letter.

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

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European Court of Human Rights

Mirosław Kulis v Poland, No. 00015601/02 18 (March 2008).

This case underlined the principle that people should have considerable latitude in criticising public figures. Kulis had published in a magazine comments made by a lawyer which criticised the deputy speaker in terms which were described as provocative and inelegant. The lawyer had represented two individuals who had been accused of kidnapping the politician's daughter. Kulis had been ordered by the Polish court to publish an apology and pay compensation.

The ECHR held that the deputy speaker had, as a public figure, to accept a higher degree of tolerance to criticism. The magazine had not gone beyond what was tolerable in public debate. The Polish court had failed to strike a fair balance between protecting the personal rights of a public figure and the magazine's freedom of expression on a matter of public interest.

Freedom of Information

There have been three significant cases. The first was *Export Credits Department v Friends of the Earth*, 2008 all ER(D) 2446. The Information Commissioner upheld the ECGD refusal to disclose its review of the social, environmental and human rights aspect of its decision to finance an oil and gas project off the coast of Russia. The ECG claimed that the performance of government functions required that the information should be kept confidential. The Commissioner felt that the applicants had failed to demonstrate sufficient public interest in the requested information.

The forces of light were more successful in FS50 165372 in securing access to government papers relating to the lead up to the Iraq war. The government had objected under Section 35 of the Freedom of Information Act that this related to the formulation of government policy and ministerial communications. However, this was subject to the public interest test. The Commissioner came down in favor of maximum transparency, not least because of the controversy relating to the changed legal advice by the Attorney General about the legality of the war and the fact that government ministers had resigned in protest against what they thought was an illegal war.

Interestingly, the first thing that crawled out the woodwork was the first draft of the UK's dossier on Saddam Hussein's weapons of mass destruction. Needless to say, this turned out to have been drafted by a government spin doctor with precious little knowledge of the subject matter. The demands for an enquiry into the decision-making that led to war are growing ever stronger this side of the pond. Americans, please note.

Another FOI triumph was the Commissioner's ruling that details of Members' of Parliament additional costs allowance, which totalled up to £22,000 a year and enabled our parliamentarians to refurbish their second homes at public expense, should be disclosed. There was, needless to say, a lot of parliamentary squealing on the grounds of invasion of privacy. On 25 March 2008, just before the order became effective, the House of Commons Commission appealed. The overwhelming feeling outside Parliament is that such information should be disclosed and indeed leading political figures are doing so voluntarily, so it is unlikely that the appeal will be successful; but watch this space.

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

Dutch Supreme Court Protects Statements of Opinion About Second World War Controversy

Press Protections Extend to Online Writer

By Jens van den Brink

The Dutch Supreme Court issued a very interesting decision in a libel case growing out of a 50 year old controversy about activities during the Second World War. *Van Gasteren v. Hemelrijk* (Jan. 18, 2008).

Background

On May 24, 1943, during the Nazi occupation of Holland, Louis Van Gasteren killed Walter Oettinger, a Jewish man who had been hiding in Van Gasteren's house in Amsterdam. In 1944 Van Gasteren was sentenced to four years' imprisonment for manslaughter. After the war Van Gasteren was granted a pardon and he went on to become a noted documentary filmmaker in Holland. Van Gasteren had said that he killed Oettinger because he would have exposed Van Gasteren and other members of the Dutch Resistance. Others have claimed that Van Gasteren killed Oettinger for his money. This topic has caused a public discussion that still continues to date as well as several libel suits.

In 1990 journalist Bart Middelburg wrote about the story in the newspaper *Het Parool*, casting doubt on Van Gasteren's explanation of the killing. Van Gasteren sued for libel. The Supreme Court found in favor of Van Gasteren, finding that the news articles contained an implicit accusation that Van Gasteren had committed "a (common) robbery and murder." In a judgment dated January 6, 1995, the Supreme Court concluded that the publications were unlawful towards Van Gasteren.

The controversy about the killing did not end with this judgment of the Supreme Court. Van Gasteren had applied for government benefits under Holland's Extraordinary Pension Act 1940-1945 (*Wet Buitengewoon Pensioen*) (WBP), which provides a special pension for anyone who participated and was injured in the

Dutch resistance against the German occupation. In legal proceedings instituted by Van Gasteren, the Central Appeals Tribunal ruled in 1997 that the request for a pension was rightfully refused and that the killing of Oettinger was not an act of resistance within the meaning of the WBP.

A few months later, in a portrait about him on the Dutch national broadcasting television program *het Uur van de Wolf*, Van Gasteren repeated his claim that killing Oettinger had been necessary in the interest of the Resistance.

Open Letter on the Internet

On November 2, 1999 journalist Pamela Hemelrijk published an "Open Letter to the Supreme Court" on the Internet, which begins as follows:

"Dear Supreme Court,

I am writing to you on a subject matter which, if I may believe the lawyers, I can never mention again. Well, I may do so but, according to these lawyers, I will immediately be sued for enormous damages, which case I am definitely going to lose. Why am I bound to lose this case? Because I am not allowed to drag up the past of movie maker Louis van Gasteren anymore. ... Strangely enough, Louis himself can drag up his past as much as he likes ..."

In the letter, Hemelrijk expressed her doubts about Van Gasteren's statement that he was a member of the Resistance and that killing Oettinger was a result thereof.

I know better than to speculate about Van Gasteren's real motives to kill this person in hiding. It is an established fact, though, that this person in hiding owned a

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Dutch Supreme Court Protects Statements of Opinion About Second World War Controversy

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small fortune of money, which he carried with him day and night ... Just like me, the Supreme Court is also aware that shortly after the murder witnesses have seen Louis with a large amount of money, which looked like it had been in the water. If I remember well, he was busy hanging the bank notes out to dry. But I am not going to speculate about Louis van Gasteren's real motives. I know better than that. Let the readers draw their own conclusions ..."

In 2001 Van Gasteren sued Hemelrijk, claiming that she acted unlawfully by repeating allegations which the Supreme Court had found libelous in the *Het Parool* judgment.

Pending the appeal proceedings in 2005, the WBP Chamber of the Pension and Benefits Board confirmed that Van Gasteren's pension application had been rightfully refused.

Supreme Court Judgment

The Supreme Court balanced two fundamental rights – on the one hand freedom of expression; and on the other, the right to a person's honor and reputation and the respect for his privacy. The Supreme Court ruled that Hemelrijk's freedom of expression prevailed, and denied Van Gasteren's claims. The judgment contains a number of important statements about press issues.

Definition of Press

Did the open letter fall under the scope of the freedom of press? Pursuant to established case law of the European Court of Human Rights, the press has a special position as a public watchdog. The Supreme Court argued that, partly because of the rise of the Internet, no exact definition of press can be given. Nowadays, private persons can also easily address the public. With the open letter Hemelrijk addressed a very wide audience and expressed her doubts about the act of resistance claimed by Van Gasteren. Hemelrijk acted in the public interest and the Court of Appeal has rightfully put the private online letter on a par with a press publication.

Protection for Opinion

The next question was whether the open letter could be put on par with a traditional opinion column. It is generally accepted in Dutch and ECHR case law that opinion columns have to meet less

strict requirements than normal publications. A column justifies stronger wordings, the blowing up of a topic and a simplifying approach. The Supreme Court not only confirmed this principle, but extended it to opinion-forming publications in general. In the view of the Supreme Court, it is not the label "column" but the contents that matter.

Encouraging a Public Debate

The Supreme Court furthermore stated that it is relevant that Van Gasteren once again sought publicity himself in *het Uur van de Wolf* and wrongfully created the impression that he had been rehabilitated. The Court of Appeal rightfully considered that there were compelling reasons of public interest which justified that the open letter was brought to the attention of the public. Next, the Supreme Court emphasized that the question whether or not these compelling reasons were actually a pre-requisite to justify the open letter need not be commented on because the open letter – unlike what the Supreme Court had read implicitly in the *Parool* publications – contains no accusation of murder and robbery and Van Gasteren's resistance claim is only "exposed in a cynical and provocative manner."

Conclusion

This judgment provides a boost for the freedom of the press. First of all by its acknowledgment of the more flexible regime for columns, and by the inclusion of opinion-forming publications in general in that regime.

Furthermore, the Supreme Court has rightfully refused to give an exact definition of "the press." This is a topical matter because many people, including the current Dutch Minister of Justice, argue that the codification of the right of journalists to protect their sources requires a definition of "journalist," which will probably result in an unnecessarily strict definition.

This judgment gives people who support the codification of the right of to protect sources, but oppose an exact definition of the term "journalist" a strong lobby tool. If there is a discussion on who is a journalist, it should be left up the courts to decide with regard to the specific facts of a case. For more information on this topic, I refer to the contribution in the previous newsletter about the *Voskuil* judgment. See *MLRC MediaLawLetter*, Jan. 2008 p. 27.

Jens van den Brink is a lawyer with Kennedy Van der Laan in Amsterdam, the Netherlands. The defendant Paula Hemelrijk was represented by Eberhard van der Laan of the same firm.

French President and Wife Win Damages Over Airline Advertisement Ad Infringed Exclusive Rights To Their Image

By Jean-Frédéric Gaultier

In two summary decisions given on February 5, 2008, a President of the Paris Civil Court ordered the low-cost airline Ryanair to pay one Euro to French President Sarkozy and 60,000 Euros to his wife, Mrs. Carla Bruni Tedeschi, on the grounds of infringement of their absolute and exclusive rights to their image.

Nothing is surprising in the fact that it was held that the image of the couple was used in an improper manner. This decision is, however, worthy of note, 1) in that it is the first time for almost forty years that a French President in office has initiated legal action related to the use of his image and, 2) the size of the award made to Bruni.

Background

Ryanair placed in a newspaper a promotional offer for plane tickets illustrated with a photograph of President Sarkozy and Mrs. Carla Bruni – official fiancée when the advertisement was published, officially married when the decision was given - with the following caption: "*With Ryanair, all my family can attend my wedding*". In two separate claims, President Sarkozy and Mrs. Bruni requested the Court to rule that this use of their photograph without their authorization and with purely advertising purposes infringed their rights to their image.

Decisions

In two separate decisions (one for Sarkozy, one for Bruni), the Court upheld the claims, awarding in damages one Euro to the president, and 60,000 Euros to his wife. Publication of the Bruni decision in the newspaper in which the advertisement had been published was also ordered.

The Court's finding that "Mr Nicolas Sarkozy, whatever his status and renown, has exclusive and absolute rights to his image" (the same applies to Bruni) is in line with case law. This abrupt wording requires some clarification. What is absolute and exclusive is one's right to make commercial use of one's own image. It is, however, less and less disputed that freedom of communication includes the right to communicate images.

The exclusive rights to one's image is thus limited by freedom of communication. This freedom to communicate images is itself limited when the publication of one's image damages

one's dignity. Courts will assess whether the context in which the image is published is legitimate, e.g. whether it amounts to an invasion of privacy, or to defamation, or to twisting the context in which the image was taken. In this matter, the photograph of the presidential couple was apparently taken during a press conference. Ryanair took the photograph out of the context in which it was taken, and used it for purely non-informational advertising purposes. It is therefore not at all surprising that Ryanair should have been found liable.

More open to criticism is the amount awarded to Bruni and the reasons set out by the court for granting this amount. The court first stated that damages 1) exist without it being necessary to prove a causal link between the breach of image rights and said damages and, 2) depend upon the person whose image is used. The court further stated that Bruni is a top model and singer, that her relationship with President Sarkozy is irrelevant, and that her profession only must be taken into account in assessing the harm that she suffered.

The court concluded "the patrimonial damages result from the use of Mrs Bruni Tedeschi's photograph for advertising purposes without the price having been paid." In the Sarkozy decision, the court very briefly ruled that "*in view of his*

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French President and Wife Win Damages Over Airline Advertisement

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status,” harm suffered can be compensated by damages of one Euro.

Were Bruni merely a top model and singer as she claimed, the amount of 60,000 Euros may be justified if that were the price usually paid by media to use her image. However, the context in which the advertisement was published cannot be disregarded. Ryanair did not use a photograph of Bruni alone, but one of the couple, and the presidential fiancé (now presidential husband) was awarded one Euro for the use of the same photograph “in view of his status.”

In addition to feeling sorry for seeing a couple being so unequally treated after a few days of marriage, one may consider that the court contradicted itself. The advertisement was quite obviously referring to the public announcement made by President Sarkozy that he was contemplating marriage with Bruni. The advertisement was not referring to Bruni's profes-

sional status but to her premarital one, “in view of the status” of her presidential husband. The couple should have been treated equally.

As in the case of Sarkozy, it seems that the prejudice suffered by Bruni was of a moral nature – to be associated with a promotion for cheap air tickets - rather than the loss of profits claimed by Bruni. In these circumstances, the announcement of the wedding being public – the wedding actually took place a few days before the decision was rendered - and the couple having largely publicized their relationship, it seems that 60,000 Euros is going too far. This amount is more like the kind of punishment ordered by the criminal courts.

In a word, stating that the harm arose from the fact that “the price was not paid” is, at best, clumsy.

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

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Able to Terminate Transfers in a Single Bound

Reflecting on the Superman Copyright Termination Case

By Toby Butterfield and Lisa Digernes

After years of litigation and attempted settlements, the heirs of Jerome Siegel, one of the original creators of “Superman,” finally had their day in court. A California federal district court ruled that Siegel’s widow and daughter, Joanne and Laura Siegel, had successfully terminated the copyright in the original Superman material published in the Detective Comics’ *Action Comics Vol. 1* by serving termination notices on defendants Warner Bros. Entertainment Inc., Time Warner Inc. and DC Comics, Detective Comic’s successors in interest. *Siegel v. Warner Bros. Entertainment, et al.*, No. 04-8400, 2008 WL 906718 (C.D. Cal. Mar. 26, 2008) (Larson, J.).

Background

The court’s 72 page opinion reviews Superman’s creation in detail, and finds its original story writer Jerome Siegel’s heirs validly terminated prior grants despite the technicalities of exercising termination rights under Section 304(c) of the Copyright Act. (The Siegel heirs are also separately pursuing the rights to Superboy in another case before Judge Larson in *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111 (C.D. Cal. 2007). And according to a footnote, the estate of the illustrator Joseph Shuster also recently filed

termination notices seeking rights to Superman.)

Siegel and Shuster had unsuccessfully attempted to terminate their grant to Detective Comics before, upon expiration of the first term of copyright under the 1909 Copyright Act.

The Second Circuit found that the creators had assigned their rights not only to the initial term of copyright, but also the renewal term,

and that the copyright grant was therefore still in effect. *Siegel v. National Periodical Publications, Inc.*, 364 F. Supp. 1032 (S.D.N.Y. 1973), *aff’d*, 508 F.2d 909 (2d Cir. 1974).

After that decision, the *New York Times* published an article describing Siegel and Shuster as “destitute” as a result. The bad publicity led DC Comics’ parent company Warner Communications to promise to provide the creators with annual payments and medical insurance, to credit them as the “creators of Superman,” and to provide survival spouse benefits to Siegel’s wife. Warner specifically stated that the payments were voluntary and would terminate if the creators or their representatives sued asserting any rights to Superman. Jerome Siegel died on January 28, 1996.

Right to Terminate

The Siegel heirs got another opportunity to reclaim the rights Jerome Siegel granted to defendants under Section 304(c) of the 1976 Copyright Act, which provided authors and their heirs the right to terminate grants of rights in their works executed before January 1, 1978 (the effective date of the Act), even if the grants were for the full term of copyright.

Section 304(c) provides that the termination of the grant may be effected any time during a five year period starting at the end of 56 years from when the copyright in work was secured. The termination notice must be served within a window of no less than two years and no more than 10 years before the effective termination date. As the court described, the specific requirements for the termination notice and for recording it with the Copyright Office are “intricate” and “oftentimes create unexpected pitfalls that thwart or blunt the effort of the terminating party to reclaim the full measure of the copyright in a work of authorship.” The decision offers a primer of those pitfalls and of the wide-ranging results if a plaintiff avoids them.

For example, the heirs’ termination notice had an effective termination date of April 16, 1999. Therefore, it did not terminate any copyrights secured before April 16, 1938, 56 years earlier. Defendants found a promotional announcement of the upcoming *Action Comics Vol. 1*, published only a few days before the April 16, 1938 date, and therefore outside of the termination notice.

The court thus concluded that defendants retain their exclusive rights to exploit the material first published in that announcement. The court mechanically dissected the announcement and compared

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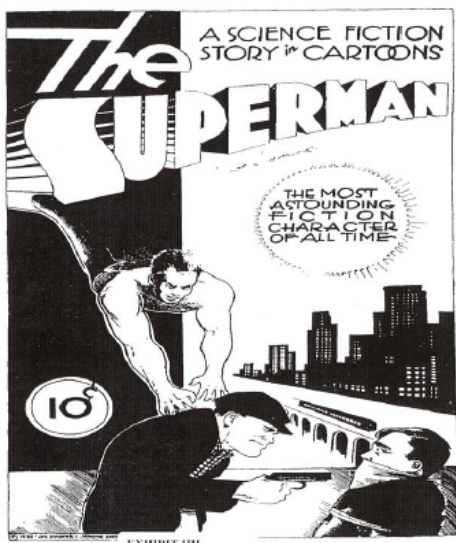
Able to Terminate Transfers in a Single Bound

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it to the various elements in the subsequently copyrighted Superman material covered by the termination notice, in order to determine what rights the Siegel heirs validly terminated.

As the announcement showed just a black and white illustration of Superman lifting a car, without any storyline, the Court concluded that defendants could continue to exploit “the image of a person with extraordinary strength who wears a black and white leotard and cape.” However, copyright in the entire storyline developed later, plus Superman’s distinct blue leotard with the red “S” on a yellow background, his red cape and boots and his Superman abilities, were all subject to termination. The court therefore effectively ruled without analysis that the announcement did not fully articulate the Superman character, and so did not publish the character.

Defendants’ many other attacks on the termination notices failed. For example, the court ruled that defendants’ argument that Siegel’s drawing was “work made for hire” (and therefore not terminable) was heard and rejected in the 1970s Superman renewal litigation, and therefore was collaterally estopped. The court also rejected defendants’ statute of limitations arguments.



continue to have the right to exploit derivative works they prepared before April 16, 1999, the effective date of the termination notice. The Siegel heirs are only entitled to participate in ongoing profits from exploitation of new works defendants prepared after April 16, 1999. Therefore, the income from the 1978 “Superman” film and the three sequels in the 1980s are unaffected by this decision. However, defendants’ profits from the “Superman Returns” sequel and related income from other post-1999 projects will presumably be included in the accounting to the heirs.

In a useful clarification, the court ruled that the terminating party only recaptures the domestic rights of the copyright grant, not profits from defendants’ foreign exploitation. Similarly, defendants’ Superman trademarks are not subject to copyright termination, so any accounting must parse out profits deriving from such exploitation.

In a final blow to defendants, the court also ruled that all the intricacies of inter-corporate transactions within the Time Warner empire may be reviewed to determine whether there were any “sweetheart deals” which could diminish recoverable profits. For example, the Siegel heirs could possibly share directly in the profits derived by DC Comics’ corporate sibling Warner Brothers Entertainment, Inc. (“WBET”) and its corporate parent, Time Warner, Inc. The court questioned whether the entities, which are closely related in ownership, entered into a “sweetheart” deal netting less than market value. This question of fact, along with many others, could not be answered on summary judgment.

While this decision arguably does not break much new ground, it is an object lesson in the many issues which arise in a copyright termination claim. If tried, the case may yet expose many arguments about the way inter-corporate negotiation and accounting operates within an entertainment industry giant. Copyright termination lawyers will stay tuned for another action packed episode.

Rights Upon Terminating

The Siegel heirs have various rights by virtue of their valid termination notice. First, the original Superman material is a joint work authored by Siegel and Shuster, so until the Schuster heirs obtain a valid termination of their grant, the Siegel heirs and the defendants are now co-owners of that work. As co-owners, they may separately grant non-exclusive licenses, subject to their duty to account to the other party. Apparently the Siegel heirs have already teamed up with ComicMix to publish new Superman stories.

On the other hand, under Section 304(c)(6)(A), defendants

Toby Butterfield, is a partner, and Lisa Digernes, an associate, at Cowan, DeBaets, Abrahams & Sheppard LLP in New York. Plaintiffs were represented by Marc Toberoff, Nicholas Calvin Williamson, Los Angeles. Defendants were represented by James D. Weinberger, Roger L. Zissu, Fross Zelnick Lehrman and Zissu, New York; Anjani Mandavia, Michael Bergman, Weissmann Wolff Bergman Coleman Grodin & Evall, Beverly Hills; and Patrick T. Perkins, Cold Spring, NY.

The “Real” Wedding Crasher Loses Idea Theft Suit

No Substantial Similarity Between Movie and Party Crasher Handbook

In an unpublished decision, a California appellate court affirmed summary judgment for the producers of the movie “Wedding Crashers” on an idea theft lawsuit brought by a veteran party crasher who claimed the movie was based on an idea he submitted to the defendants. *Reginald v. New Line Cinema Corp.*, 2008 WL 588932, No. B190025 (Cal. App. 2d Dist. Mar. 5, 2008) (Jackson, Vogel, Rothschild, JJ.).

After carefully comparing the movie as a whole to plaintiff’s idea for a movie, the court affirmed that there was no actionable similarity between the two.

Background

The plaintiff Rex Reginald is a veteran Hollywood “party crasher” with a 30 year history of attending various events uninvited, including movie premieres, weddings and awards shows. He wrote about his techniques and stories in an unpublished autobiographical work titled *The Party Crasher’s Handbook*.

In 1999, Reginald and an agent began approaching movie producers to discuss turning the handbook into a movie about his experiences as a party crasher. In 2002, he approached one of the defendants, United Talent Agency (UTA), with the idea of turning the handbook into a movie starring Jim Carrey. Reginald also crashed a movie premier to try and pitch his idea to a New Line Cinema executive. Both UTA and New Line turned him down.

Two years later, Reginald learned that New Line Cinema was producing a movie called *Wedding Crashers* that would star two UTA actors, Owen Wilson and Vince Vaughn. Reginald then filed suit, claiming breach of implied contract, breach of confidence and unjust enrichment. The trial court granted summary judgment for all defendants, finding no substantial similarity as a matter of law between the movie and Reginald’s idea.

Appellate Court Decision

On appeal, plaintiff argued that there were sufficient similarities between the movie and his handbook to show that defendants used his ideas. Plaintiff also argued that where evidence of access to an idea is great, plaintiff can offer less evidence of similarity. The defendants had conceded access only for purposes of their summary judgment motion. The court, however, held that in the context of an idea theft claim, there must be a showing of substantial similarity – and the degree of similarity

must be high. The claim requires the same proof of similarity as a plagiarism claim except the copied portions need not be protectable in the breach of contract claim. See *Weitzenkorn v. Lesser*, 40 Cal.2d 778, 795, 256 P.2d. 947 (1953).

Discussing several California Supreme Court cases, the appellate court noted that there is no precise formula for determining when substantial similarity exists between two works. In *Weitzenkorn*, the California Supreme Court considered a variety of factors: “form and manner of expression, basic dramatic core, similar moral message, the combination of characters, locale, use of a myth as an element, whether such items as the combination of characters, locale or mythical element are used for the same purpose, and divergence in characterizations, description, and events.” *Reginald*, 2008 WL 588932 at *5.

In *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956), the Court considered the sequence of events, attributes and types of key characters and the settings of each work.

These cases show that substantial similarity is not based on “merely words and phrases or the same basic idea” but is instead based on the same “material features of the works.” *Reginald*, 2008 WL 588932 at *6.

Plaintiff sought to rely on *Fink v. Goodson Todman Enterprises, Ltd.*, 8 Cal. Rep. 679 (Cal. App. 1970) to argue that sub-

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The “Real” Wedding Crasher Loses Idea Theft Suit*(Continued from page 25)*

stantial similarity could be found if the core elements of his work were used. This included, he claimed, the comedic nature of both, a story centering around two male buddies, and party crashing to “pick up beautiful women, eat gourmet food and drink and have fun.”

The appellate court, however, found that “[m]ost of the alleged similarities can be readily dismissed, in that they are not material elements in defendants’ motion picture.” *Reginald*, 2008 WL 588932 at *7, citing *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102 (Cal. App. 1984).

In *Klekas* the author of an unpublished novel claimed his work was used as the basis for the movie “*The Deer Hunter*.” The plaintiff cited numerous similarities between the two, including the theme of a Vietnam veteran returning home to a mill town, and specific bar scenes and settings involving deer hunting. But taken as a whole the similarities were “devoid of legal significance [or] necessarily flow from a common theme, elements that are common in any story about soldiers returning home from war.” 150 Cal. App. 3d at 1113.

Similarly in the instant case, although the two works shared a common theme of party crashing they were dissimilar in their material elements.

The Handbook is about how to crash parties and examples of the types of fun a crasher can have and other benefits the crasher can enjoy by doing that. From a structural standpoint, plaintiff’s concept does not include a dramatic sequence, an unfolding story.... *Wedding Crashers* is about relationships between people, some of whom are caught in a lie, and crashing the wedding is only the vehicle that gives rise to the relationships and the lie that creates the conflict which the rest of the motion picture focuses on resolving. It is structured as a story unfolding in a dramatic sequence which bears no resemblance to the illustrative vignette format of plaintiff’s concept. *Reginald*, 2008 WL 588932 at *9.

Plaintiff was represented by Richard Sherman, Robert Young and Armand Arabian. The *New Line* defendants were represented by Michael O’Connor, Edward Weiman and Allison Rother of White O’Connor Curry in Los Angeles. The *UTA* defendants were represented by Bryan J. Freedman, Freedman & Taitelman in Los Angeles.

Substantial similarity is not based on “merely words and phrases or the same basic idea” but is instead based on the same “material features of the works

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Karaoke Needs Separate License to Display Lyrics With Music

Visual Display of Song Lyrics Not a Fair Use

In an interesting copyright decision, the Ninth Circuit rejected a fair use argument made by the manufacturer of a karaoke device over the visual display of song lyrics. *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522 (9th Cir. Jan. 2, 2008) (O’Scannlain, Smith, Mosman, JJ.). The manufacturer had previously obtained the rights to reproduce the music.

The Ninth Circuit held that it also needed a synchronization license to display images of song lyrics in timed relation with recorded music.

Background

Leadsinger manufactures a “microphone” karaoke device which has recorded songs imbedded in a microchip in the microphone. When the microphone is plugged into a television, the lyrics of the song appear on screen as the song is playing, enabling users to sing along with the lyrics.

In 2004, a licensing dispute arose between Leadsinger and BMG Music Publishing, which owns and administers music copyrights. Leadsinger had previously obtained a compulsory license under § 115 of the Copyright Act to reproduce the music. BMG then asserted that Leadsinger must also obtain rights to have the lyrics to a song displayed while the song is playing.

Leadsinger brought a declaratory judgment action arguing that it was (1) entitled to use the lyrics under § 115’s mechanical license, or (2) the display of the lyrics along with the music was fair use. The district court dismissed Leadsinger’s action.

§ 115 Claim

On appeal, the Ninth Circuit first addressed the § 115 argument by analyzing whether the lyrics’ display was a “phonorecord” and thus subject to § 115. The Ninth Circuit found that the lyrics were audiovisual because they are “a series of related images” that are “presented sequentially.” Even though they are also literary works, this did not prevent them from being audiovisual because the court found that audiovisual and literary works are not mutually exclusive. Since § 115 only applies to “phonorecords,” which cannot be audiovisual, § 115 does not

apply to the separate display of lyrics.

The court further found that Leadsinger did not have the right under a § 115 compulsory mechanical license to reprint lyrics in accompanying materials to the karaoke machines.

Fair Use

The Ninth Circuit was skeptical from the outset about Leadsinger’s fair use argument. It had argued that the display of lyrics “teaches singing,” but it failed to develop this argument on appeal and the Ninth Circuit failed to see any educational purpose to karaoke.

Using the four factors enunciated in § 107, the court first found that Leadsinger’s use was solely commercial. That it may possibly help a customer learn lyrics was not relevant. What an end user may do with the information should not be considered, and instead Leadsinger’s commercial motive was indicative of the character of use.

The next factor is the nature of the work. Clearly, the lyrics were creative expression and the court noted that that is the type of work that copyright aims to protect. The third factor also weighed heavily in favor of BMG because Leadsinger was copying the entire work as opposed to just using small pieces. Finally, with respect to the impact on the market, Leadsinger argued that there is no market for song lyrics standing alone, citing the general industry practice where record companies reprint lyrics together with recordings without a reprint license. The Ninth Circuit found this recording industry practice was irrelevant to the “distinctly different context of karaoke.”

Considering all the factors, the court found that Leadsinger was not

engaged in fair use. Having failed on both arguments, the court affirmed denial of Leadsinger’s declaratory judgment action and also denied Leadsinger motion for leave to amend, finding that “amendment would be futile.”

Leadsinger was represented by Anthony H. Handal, Brown Rudnick Berlack Israels LLP, New York. BMG was represented by Karen R. Thorland, Loeb & Loeb LLP, Los Angeles.



Supreme Court to Hear “Fleeting Expletives” Indecency Case Court’s First Broadcast Indecency Case Since *FCC v. Pacifica*

The U.S. Supreme Court granted certiorari in *FCC v. Fox Television Stations*, a case involving the FCC’s recent enforcement policy against so-called “fleeting expletives.” See 489 F.3d 444 (2d Cir. 2007) (Pooler, Hall, Leval, JJ.), cert. granted, 2008 WL 695624 (U.S. Mar. 17, 2008) (No. 07-582).

The Supreme Court is expected to hear the case in the fall. It will be the Court’s first review of the broadcast indecency issue since *FCC v. Pacifica*, 438 U.S. 726, 732-35 (1978), which held that the FCC could regulate indecent material on public airwaves.

Fleeting Expletives

At issue was a November 6, 2006 FCC Order finding that unscripted statements made during the 2002 and 2003 Billboard Music Awards shows were indecent and profane. The order stated that “While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.” Fox television stations, 489 F.3d at 450.

In an acceptance speech at the 2002 Billboard Music Awards broadcast by Fox, Cher stated: “People have been telling me I’m on the way out every year, right? So fuck ‘em.” And in 2003 Nicole Richie, a presenter on the show, stated: “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”

Second Circuit Decision

Last year a divided Second Circuit panel, in a decision written by Judge Rosemary Pooler, held that the FCC’s enforcement policy violated the Administrative Procedure Act because it failed to provide a reasoned basis for the new policy. The majority decision noted that “for decades broadcasters relied on the FCC’s restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent.” *Id.* 461.

Moreover, the majority noted that the FCC’s new policy was “devoid of any evidence that suggests a fleeting exple-

tive is harmful, let alone establishes that this harm is serious enough to warrant government regulation” in the current landscape.

Fox and other media interveners had also briefed and argued constitutional objections to the policy. While the majority acknowledged that it was not necessary to decide these issues, the decision discussed at length the probable constitutional flaws with the policy and the FCC’s regulation of indecency in general. “We are skeptical that the Commission can provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.” *Id.* at 462. Moreover, the majority found that “it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.” *Id.* at 464.

Judge Pierre Leval dissented, finding that the FCC clearly announced the adoption of a new standard for fleeting expletives and furnished a reasoned explanation for the change.

“If anything, the change of standard has made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances. If there is merit in the majority’s argument that the Commission’s actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, that argument must be directed against the entire censorship structure. It does not demonstrate that the Commission’s change of standard for the fleeting expletive was irrational.” *Id.* at 471.

Government Applied for Certiorari

The government’s petition for certiorari argued that the FCC’s policy was sufficiently justified under the Administrative Procedures Act. And that the majority decision “was in reality directed against the entire structure” regulat-

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Supreme Court to Hear “Fleeting Expletives” Indecency Case

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ing indecency.

[T]he court’s approach is difficult to square with *Pacifica*, and effectively nullifies the prohibition on indecent language found in Section 1464, which was upheld as constitutional in [*Pacifica*]. That result would not be surprising, since the court of appeals made little effort to hide its hostility to *Pacifica*’s reasoning.

The court of appeals’ decision places the Commission in an untenable position. Although it orders a remand, the decision signals that there is no way for the Commission to regulate isolated expletives consistent with the parameters the court of appeals established. But Congress gave the Commission authority to regulate; *Pacifica* suggests

that contextual regulation is not forbidden by the First Amendment; and the public rightfully expects the Commission to exercise what authority it has to keep broadcast television suitable for children during certain hours. The court of appeals’ decision suggests that the Commission retains some authority, but denies the Commission any permissible scope to exercise it, and leaves the Commission accountable for the coarsening of the airwaves while simultaneously denying it effective tools to address the problem. Petitioners Brief at pp. 29-30.

On March 17, the Court granted certiorari with the following question presented: “Did court of appeals err in striking down FCC’s determination that broadcast of vulgar expletives may violate federal restrictions on broadcast of ‘any obscene, indecent, or profane language,’ 18 U.S.C § 1464, 47 C.F.R. § 73.3999, when expletives are not repeated?”

Other information regarding this case.

[Second Circuit Argument available here.](#)

[Coverage in 2005:2 MLRC Bulletin here.](#)

[Second Circuit decision in Fox v. FCC available here.](#)

[Government’s Petition for Certiorari available here.](#)

[Coverage on 2nd Cir. Decision in June, 2007 MLRC MediaLawLetter here.](#)

TV Game Show Promotion Offered In Connection With *Deal Or No Deal* Is Not “Gambling”

By L. Joseph Loveland, S. Stewart Haskins, II and Jonathan R. Chally

As with many reality television shows, the organizers of *Deal or No Deal* promoted the show by, among other things, sponsoring and administering the “Lucky Case Game,” a promotion designed to foster viewer participation in each broadcast. During each broadcast of *Deal or No Deal*, six gold briefcases were displayed on-air, and an announcer invited viewers to enter the Lucky Case Game and select the winning briefcase.

Later in the show, the winning briefcase was revealed, and one of the entrants who selected that case was randomly chosen as the winner of the promotion. Viewers could enter the Lucky Case Game either through the Internet, for free, or by sending a text message on their cellular phones, for a \$.99 fee in addition to standard text-messaging rates.

In *Hardin, et al. v. NBC Universal, Inc., et al.*, a putative class action filed in the United States District Court for the Northern District of Georgia, the plaintiffs challenged these promotional games, particularly the Lucky Case Game, claiming that the premium fee paid to enter these promotions via text message is illegal gambling under Georgia law. The plaintiffs sought to represent all Georgia residents who entered these promotions via text message. On behalf of the alleged class, the plaintiffs in *Hardin* attempted to recover the fees under O.C.G.A. § 13-8-3(b), a Georgia statute that allows a “loser” of “gambling consideration” to recover that consideration from the “winner.”

On certified questions from the District Court following the defendants’ motion to dismiss, the Georgia Supreme Court recently ruled in favor of the defendants. See *Hardin v. NBC Universal, Inc.*, No. S08Q0323 (Ga. April 22, 2008). The Court held that O.C.G.A. § 13-8-3(b) did not provide the plaintiffs a civil claim for relief to recover the text message fees paid to enter the Lucky Case Game. The Georgia Supreme Court held that the Lucky Case Game was not “gambling” as prohibited by O.C.G.A. § 13-8-3(b). Immediately after the Supreme Court’s opinion, the plaintiffs in *Hardin* dismissed their case.

The *Hardin* decision is a noteworthy development in the defense of these widely popular promotional games. This article describes the *Hardin* case, beginning with a discussion of the defendants’ arguments in their motion to dismiss the complaint, the motion that ultimately led to the dismissal of the lawsuit.

Lucky Case Game Did Not Involve Gambling

Shortly after the plaintiffs filed the *Hardin* complaint, the defendants jointly moved to dismiss. The defendants argued that the Lucky Case Game was not “gambling” as prohibited by O.C.G.A. § 13-8-3(b). The Georgia Supreme Court had construed O.C.G.A. § 13-8-3(b) in *Martin v. Citizens’ Bank of Marshallville*, 171 S.E. 711, 713 (Ga. 1933), and held that the essence of an agreement to gamble is that two or more parties “bet” or “wager” on the outcome of an uncertain, chance, or contingent event: “In a gambling contract one of them is certain to lose. By the terms of such a contract the consideration must fall to the one or the other upon the determination of the specified event.” *Id.*

The defendants argued to the District Court that the *Martin* case was squarely on point and that it required dismissal of the plaintiffs’ claim. In the Lucky Case Game, neither party incurred “risk” with regard to the \$.99 fee that the plaintiffs paid to enter the promotion. The defendants designated the prize amounts in advance of the promotion and were obligated to pay those amounts regardless of the outcome of the promotion. In other words, the defendants’ obligation to award the prize was not contingent on which “Lucky Case” happened to be the winning case. Likewise, those participants who chose to enter the contest via text message did not risk the \$.99 charge because the obligation to pay that charge was in no way dependent on the outcome of the promotion. Regardless of which Lucky Case was the winning case, participants who chose to play via text message were obligated to pay that charge.

The District of New Jersey recently considered an analogous issue in *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *7-8 (D.N.J. June 20, 2007). The plaintiff in *Humphrey* challenged the validity of an Internet-based “fantasy sports league” in which participants paid a fee in order to play a fantasy sports game with the prospect of winning a prize if they won the contest. *Id.* at *7-10. The court rejected this claim on a number of grounds, including that the fee charged to enter the contest did not constitute “gambling” consideration. *Id.* Relying in part on Georgia law, the *Humphrey* court observed:

[I]n paying for the right to participate . . . and receive Defendants’ services, participants simply do not “lose” anything, and certainly suffer no cognizable “gambling” loss. Whether or not a participant is a successful league

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TV Game Show Promotion Offered In Connection With Deal Or No Deal Is Not “Gambling”

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manager [and thus wins a prize], their entry fee never hangs in the balance in any way in connection with their participation in the league. Indeed, once participants have selected their team and begin their season, the fee cannot be recovered. There is no “loss” on these facts, and this exchange of consideration is an “ordinary contract,” in which “both parties may ultimately gain by entering into the agreement.” *Id.* at *10 (citing *Martin*, 171 S.E. at 713).

According to the defendants in *Hardin*, the same logic applied with regard to the Lucky Case Game. The text message fees did not hang in the balance of the Lucky Case Game. Rather, the participants chose to pay that fee because they wished to play the promotion by text message. Once that charge was incurred, it had no bearing on the promotion.

Defendants Not Winners Of Lucky Case Game

Moreover, as the defendants in *Hardin* argued, the defendants were not the “winners” of the Lucky Case Game, and, therefore, could not be held liable under O.C.G.A. § 13-8-3(b). O.C.G.A. § 13-8-3(b) allows “[m]oney paid or property delivered upon a gambling consideration” to be recovered only “from the winner.” (Emphasis added). The defendants, as the sponsors of the promotion, awarded the prize. The defendants did not participate in the promotion and certainly did not win the prize. Nor could they. According to the rules of the Lucky Case Game, the defendants could not “win” the promotion under any circumstances.

Because the defendants could not even participate in the promotions, the defendants could not be the winners of those promotions. On this issue, the *Humphrey* decision was again instructive: “To suggest that one can be a winner without risking the possibility of being a loser defies logic and finds no support in the law.” *See, e.g., Humphrey*, 2007 WL 1797648 at *9-10 (rejecting the argument that receipt of fees paid by contest participants made defendants who awarded prizes “winners”); *see also Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961) (offering prize to winner of athletic or similar competition does not give rise to a wagering contract if the offeror does not participate and has no chance of gaining back the prize offered).

According to the clear terms of the promotion’s rules, therefore, the defendants argued that they were not winners of the Lucky Case Game.

Plaintiffs’ Response to Motion to Dismiss

In response to the defendants’ motion, the *Hardin* plaintiffs injected a new theory into the case. In their opposition brief, the plaintiffs claimed that the Lucky Case Game was a “lottery” as prohibited by Georgia’s criminal code. The plaintiffs further argued that this lottery allegation alone was sufficient to state a claim for liability under the civil recovery statute, O.C.G.A. § 13-8-3(b). In other words, according to the plaintiffs, because the Lucky Case Game meets the criminal definition of a “lottery,” it no doubt constitutes “gambling” under O.C.G.A. § 13-8-3(b).

While the defendants disputed the plaintiffs’ allegation that the Lucky Case Game was a lottery, the defendants responded to this new theory primarily by relying on various authority in which Georgia courts concluded that the “gambling” activity prohibited by O.C.G.A. § 13-8-3(b) did not include activity alleged to be a “lottery” under Georgia’s criminal code. *See Lasseter v. O’Neill*, 162 Ga. 826 (1926) (discussing predecessor version of O.C.G.A. § 13-8-3(b), noting that it historically did not address lotteries); *Moore v. Atlanta Athletic Club*, 79 Ga. App. 41 (1949) (holding that a slot machine was a lottery but not gambling and therefore was outside the reach of Section 13-8-3); *Thompson v. Ledbetter*, 74 Ga. App. 427 (1946) (same).

In *Thompson*, for example, the plaintiff sued to recover losses sustained by playing slot machines, a practice that Georgia courts had repeatedly recognized to constitute a lottery prohibited by the criminal code. 74 Ga. App. at 428. Despite the fact that Georgia law criminalized the maintenance of a lottery, the court held that the plaintiff could not recover under the civil recovery statute. *Id.* at 428-29. According to the court,

Although all gaming and gaming or wagering contracts are denounced by our law, the instance stated above [the predecessor to O.C.G.A. § 13-8-3(b)] is the only one in which there is legislative authority for a loser to recover from a winner money or property paid by the loser on a gaming contract. All other instances of gaming, including lotteries and transactions in the nature of lotteries, would come under the general principle that illegal contracts will not generally be enforced, the law leaving the parties where it finds them. When money is actually paid over upon an illegal contract it is clear that it cannot be recovered back, the contract being executed and both parties being in pari delicto. The only exception to this general rule is that contained in [O.C.G.A. § 13-8-3(b)]

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TV Game Show Promotion Offered In Connection With *Deal Or No Deal* Is Not “Gambling”

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which we do not think is applicable to the facts of the instant case because the transaction here involved was a lottery. Even though lotteries are illegal, there seems to be no statute authorizing the recovery of money paid out or lost in the operation of a lottery. *Id.* at 429 (citations and internal quotations omitted) (emphasis added).

The plaintiffs sought to distinguish this authority, contending that it had been abrogated by the Georgia Legislature when the Legislature amended O.C.G.A. § 13-8-3(b). The plaintiffs further contended that even if the Legislature had not abrogated this rule, the Court should not follow it in *Hardin*.

Certified Question to State Supreme Court

On October 23, 2007, the District Court issued an order in response to the defendants’ motion to dismiss, certifying questions to the Georgia Supreme Court. Specifically, the District Court agreed with the defendants that the Lucky Case Game was not “gambling” as the Georgia Supreme Court had defined the term in *Martin*. But, the District Court held that the plaintiffs’ allegation that the Lucky Case Game was a lottery might nevertheless be sufficient to allow their claim to proceed. The District Court, therefore, requested that the Georgia Supreme Court construe O.C.G.A. § 13-8-3(b), and certified the following two questions to the Court:

- (1) Does O.C.G.A. § 13-8-3(b) authorize the filing and maintenance of a civil suit to recover money paid out or lost on account of one’s participation in an illegal lottery?
- (2) If § 13-8-3(b) authorizes a civil suit to recover money paid out or lost on account of an illegal lottery, may the plaintiff in such a suit recover from the lottery’s promoter or organizers?

Game Did Not Involve Gambling

On April 21, 2008, in a unanimous decision, the Georgia Supreme Court held that the Lucky Case Game was not gambling. Relying on *Martin*, the Court held that the Lucky Case Game “does not involve a bet or wager, neither defendants nor any participant is certain to lose, and the contract’s consideration [the \$.99 text messaging entry fee] never hangs in the balance.” Slip. Op. at 5 (citing *Martin*).

The Court further held that the Georgia Legislature had not abrogated this definition of “gambling” activity as provided in *Martin*. The Court also concluded that “gambling” as defined for purposes of O.C.G.A. § 13-8-3(b) was distinct from a lottery as defined in Georgia’s criminal code. Therefore, the plaintiffs’ allegation that the Lucky Case Game was a lottery, whether factually accurate or not, had no bearing on the plaintiffs’ claim for relief under O.C.G.A. § 13-8-3(b).

Ultimately, the Court held that “O.C.G.A. § 13-8-3(b) does not authorize the filing of a civil suit to recover the text message fees paid by plaintiffs in this case.” *Id.* at 7. Having ruled for the defendants on this first question, the Court failed to reach the second question that the District Court certified.

Of course, the *Hardin* decision construes Georgia law and is

The Georgia Supreme Court’s emphatic conclusion that there was no “gambling contract” created in connection with the Lucky Case Game is a significant development in defense of this and other, similar promotional games.

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essarily binding on other courts considering challenges to other promotional games under other state’s laws. Nevertheless, the opinion, and the Georgia Supreme Court’s emphatic conclusion that there was no “gambling contract” created in connection with the Lucky Case Game, is a significant development in defense of this and other, similar promotional games.

L. Joseph Loveland is a senior litigation partner in King & Spalding’s Atlanta office and was lead counsel representing the defendants in this case. S. Stewart Haskins, a partner in King & Spalding’s Business Litigation Practice Group, also represented the defendants in the Hardin case together with Jonathan R. Chally, an associate in the firm’s Business Litigation Practice Group. Plaintiffs were represented by Jerry Buchanan of Columbus, Georgia.

Ninth and Seventh Circuits Consider Scope of Section 230 Immunity

Craigslist and Roommate Decisions May Not Substantially Alter Broad Immunity Under Sec. 230

By Patrick Carome and Samir Jain

Two federal courts of appeals recently tested the scope of the immunity provided by Section 230 of the Communications Decency Act, 47 USC § 230, in the context of claims under the Fair Housing Act.

In *Chicago Lawyers Committee v. Craigslist*, 519 F.3d 666 (7th Cir. Mar 14, 2008), the Seventh Circuit addressed whether an online classifieds site could be held liable for allegedly discriminatory advertisements in its housing section. In *Fair Housing Council v. Roommates.com*, Nos. 04-56916, 04-57173; 2008 WL 879293 (9th Cir. Apr. 3, 2008), the Ninth Circuit considered, *en banc*, whether an online roommate-search service could be held liable for eliciting allegedly unlawful housing preferences from its users and providing tools that enabled users to find profiles based on such preferences.

Though the decisions considered different aspects of Section 230 and reached different results regarding the extent to which the service provider defendant was immune, neither decision appears to depart significantly from the consensus interpretation of Section 230 that has been adopted by courts across the country.

Protecting the Robust Nature of Internet Communications

Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” An “information content provider,” in turn, is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Thus, subject to a few exceptions specified in the statute, Section 230 prevents courts from assessing liability on the provider of an interactive computer service if doing so would “treat” the provider as the “publisher or speaker” of information that came from a third party.

As many courts have recognized, Congress passed Section 230 to serve two important goals: facilitating the growth of Internet communications and eliminating disincentives for service providers to remove offensive or illegal content. Congress understood that allowing service providers to be held liable for

third-party speech would have a chilling effect on Internet communication by creating a “heckler’s veto,” under which service providers faced with complaints that particular content was tortious or otherwise unlawful would have strong reasons to remove the content regardless of the validity of the complaint.

Additionally, Congress sought to negate the effect of a New York case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995), where Prodigy was held liable as a “publisher” of a defamatory bulletin board posting. In the *Stratton Oakmont* court’s view, Prodigy had acted like a publisher by screening at least some of the content on its network. Congress found that the *Stratton Oakmont* decision actually discouraged service providers from regulating third party content because doing so would increase, rather than decrease, their risk of liability. Section 230’s grant of immunity corrected the incentive scheme.

Consistent with these important purposes, courts have read Section 230 to provide broad-based immunity for providers of interactive computer services. Beginning with the Fourth Circuit’s decision in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), courts have consistently endorsed the view that this immunity bars *any* cause of action that would make service providers liable on the basis of information originating from a third party. As Judge Wilkinson recognized in *Zeran*, “Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”

The First, Third, Ninth and Tenth Circuits all adopted the Fourth Circuit’s interpretation of Section 230, and the industry has generally relied on this interpretation over the past decade.

Craigslist and Liability for Third-Party Housing Ads

In the *Craigslist* case, the plaintiff argued that the website operator was liable under the Fair Housing Act for the allegedly discriminatory content of third-party housing ads that users had posted on the site. The Fair Housing Act makes it unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference,

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limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.” 42 U.S.C. 3604 (c).

The district court, in a 2006 decision, rejected the *Zeran* approach, which bars all claims based on third-party content, but nonetheless held for Craigslist. 461 F.Supp.2d 681, 696 (N.D.Ill. 2006). Citing a snippet of *dicta* from *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (Easterbrook, J.), the district court held that Section 230(c)(1) provides protection from only those claims for which publishing is an element, and that Section 3604(c) was such a claim.

On March 14, 2008, the Seventh Circuit affirmed and held that Section 230(c)(1) protects Craigslist from the Fair Housing Act claims. Aside from its direct holding, the Circuit’s relatively brief decision, penned by Chief Judge Easterbrook for a unanimous three-judge panel, is largely inconclusive about the scope of Section 230.

The grounds for the Seventh Circuit’s decision in favor of Craigslist are not entirely clear. Judge Easterbrook’s opinion begins with a lengthy, verbatim recitation of his *dicta* in the *Doe v. GTE* case, in which he had mused about possible alternative interpretations of Section 230(c)(1) immunity before ruling in favor of the defendants on state law grounds. This *dicta*, Judge Easterbrook writes in *Craigslist*, explains why Section 230 “cannot be understood as a general prohibition of civil liability for web-site operators.”

Judge Easterbrook also cited to the Supreme Court’s decision in the famous *Grokster* copyright case as support for this same proposition. This reference to *Grokster* is curious, given that Section 230 contains an explicit exception for intellectual property claims, which would seem to make that case irrelevant to the statute’s scope.

See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Judge Easterbrook’s discussion of *Doe* and *Grokster* appears to be prefatory, and an acknowledgment of the plaintiffs’ primary argument for abandoning the corpus of case law developed from *Zeran* on. Indeed, the bulk of his lengthy recitation from *Doe* suggests that subsection 230(c)(1) — the provision of the statute on which Craigslist relied — has no independent function, but

merely defines how a separate part of the statute (subsection 230(c)(2)) is supposed to operate.

Yet Judge Easterbrook’s opinion in *Craigslist* could not have been clearer in rejecting his earlier suggestion: “We read each [subsection] to do exactly what it says. So did the district court. A natural reading of 230(c)(1) in conjunction with [the Fair Housing Act] led that court to grant summary judgment for Craigslist.”

Beyond this acknowledgment of agreement with the district court’s holding, the affirmative reasoning supporting the holding in *Craigslist* is rather opaque, and does not offer much of a window into the appellate court’s interpretation of the statute. As noted above, the district court had held, based on two lines of the *Doe dicta*, that Section 230 bars only claims (such as defamation) for which “publishing” is an explicit element.

The Seventh Circuit’s opinion, while endorsing the district court’s decision generally, does not indicate whether it endorses the full scope of the district court’s analysis, or simply its result, or something in between. Indeed, although some language in the Judge Easterbrook’s opinion suggests that the Court was inclined to adopt a narrower reading of Section 230 than the prevailing interpretation, the opinion also recognized the difficulties that would be imposed by requiring a service such as Craigslist to filter or screen for discriminatory content and how imposing such a duty would make the service impractical or substantially increase its costs.

All told, *Craigslist* does not appear to represent a significant departure from the body of case law interpreting Section 230. The facts presented a relatively easy case that did not entail a nuanced analysis of the scope of Section 230 immunity. Even under the narrowest reading of the statute, ignoring the broad formulation endorsed by *Zeran* and its progeny, Craigslist would prevail because the advertising ban in the Fair Housing

Act involves “publishing” as one of its elements. The Seventh Circuit did

not have to choose between a narrow and broad reading of Section 230. *Craigslist* therefore seems to leave for a later day any definitive ruling from the Seventh Circuit regarding the general scope of protection afforded by Section 230(c)(1).

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Among all the Section 230 cases to date, the Roommates decision presents the most thorough analysis of the meaning of the term “information provided by another information content provider.”

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Roommates.com and “Neutral Tools”

In contrast to the *Craigslist* decision, the Ninth Circuit’s en banc opinion in the *Roommates* case, Nos. 04-56916, 04-57173; 2008 WL 879293 (9th Cir. Apr. 3, 2008), initially might appear to be a new benchmark, potentially opening the door to greater liability for providers of interactive computer services. Among all the Section 230 cases to date, the *Roommates* decision presents the most thorough analysis of the meaning of the term “information content provider.”

The decision, however, does not announce itself as a watershed moment in Section 230 law and, indeed, goes to great lengths to square its holding with prior precedents supporting broad immunity. Because the holding itself is limited narrowly to the specific architecture of the *Roommates* web site, the decision ultimately does not change the landscape significantly.

The *Roommates* case involved a website, *Roommates.com*, which helps to match prospective roommates by allowing its users to create profiles indicating personal information about themselves and their roommate preferences. The plaintiffs argued that the site violated the Fair Housing Act by requiring users to answer questions about their gender and family status – prohibited discriminatory grounds under the Act – as well as allowing users to search for potential roommates using those criteria, and giving users space to fill in “additional commentary” without specific guidance.

In a thorough decision authored by Chief Judge Kozinski for an 8-3 majority of the en banc court, the Ninth Circuit held

that *Roommates* could be held liable for requiring users to enter discriminatory criteria and giving them the ability to search based on such criteria, but that it had immunity from claims based on the additional comments box.

Unlike the Seventh Circuit, which appeared to focus on the “publishing” element of Section 230 immunity, the Ninth Circuit concentrated on whether *Roommates* could itself be deemed an “information content provider” of the allegedly illegal information on its service. Significantly, the en banc court

held unanimously, and consistently with *Zeran* and its own Section 230 cases, that *Roommates* could not be held liable for the “additional comments” users entered without a prompt.

The court found, however, that *Roommates* had “developed,” at least in part, the portions of its users’ profiles generated by their answers to certain

specific questions about their preferences. Users could not create profiles of themselves for display on the *Roommates.com* site without answering these questions, and they could answer these questions only by choosing from a list of pre-set responses provided in a drop-down menu. As a co-developer of the portions of user profiles derived from these compelled answers, Judge Kozinski reasoned, the resulting material was not “information provided by another content provider,” and therefore immunity was unavailable. Further, Judge Kozinski held that *Roommates* lacked immunity for allowing users to search for roommates based on the criteria embodied by those illegal questions.

The en banc Court was careful to base its decision on the

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Ninth and Seventh Circuits Consider Scope of Section 230 Immunity

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particular facts of the Roommates.com site. This is particularly evident from its discussion of how its holdings are consistent with prior Ninth Circuit precedent. In *Carafano v. Metro-plash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), the court had

held that the provider of a dating website could not be treated as an “information content provider” of its profiles, even though the site required its users to answer a pre-set list of multiple-choice answers in order to create their profiles.

In the court’s view, the users were still making the choices, even if the web site structured their responses. To distinguish the *Carafano* holding from *Roommates*, Judge Kozinski explained that the questions on Roommates.com had “materially contributed” to the illegality of the responses – Roommates required its users to provide illegal information. By contrast, the dating web site in *Carafano* provided only “neutral tools” which had been abused by a hoaxster who created a fake and defamatory profile of the plaintiff.

In making this distinction, Judge Kozinski seemed to be crafting a new test for determining when content ceases to be third-party content for which immunity is available: a web site that affirmatively compels its users to submit illegal information will not have immunity, while a web site that provides only “neutral tools” — including search engines such as those provided by Google and Yahoo! — will retain immunity.

As the dissenting opinion of Judge McKeown explained, Judge Kozinski’s approach to this question is troubling at least theoretically because it arguably makes the meaning of the phrase “information provided by another information content provider” dependent on an analysis of whether the content was in fact illegal. Whether or not *Roommates* creates a new test, though, its analysis is tightly bound to the specific facts of the case.

The Court was presented with the rare situation where a website elicits answers that are (allegedly) illegal in every pos-

sible permutation and additionally requires users to answer those questions as a condition of posting a profile. In light of these unusual facts, the opinion does not purport to disagree

Interactive service providers and their clients should not rush to overcompensate by, for example, removing all multiple choice questions or drop-down menus from their sites.

with *Zeran* and the other leading precedents, and it may

prove to be of little practical relevance to the vast majority of interactive services.

Section 230 After Craigslist and Roommates

Ultimately, the much-anticipated decisions in both *Craigslist* and *Roommates* may not substantially alter the broad immunity courts have afforded interactive service providers under Section 230. Writing on the issue *de novo* in the Seventh Circuit, the panel in *Craigslist* issued a decision that was short on law and devoid of any clear pronouncements that can be easily extrapolated to future cases. The Ninth Circuit, given the opportunity to reshape its doctrine of Section 230 liability, opted instead to limit its decision to the unique factual situation of the Roommate website.

Because these decisions do not substantively disturb the doctrine, interactive service providers and their clients should not rush to overcompensate by, for example, removing all multiple choice questions or drop-down menus from their sites. Allowing users to provide dynamic, standardized sets of information and preferences that are easily searchable has contributed to the growth, usefulness, and pervasiveness of Internet services in every day life – just as Congress intended when it passed Section 230 over a decade ago.

Pat Carome and Samir Jain are partners at Wilmer Cutler Pickering Hale and Dorr. They represented Craigslist in the Seventh Circuit and various amici in the Ninth Circuit Roommates case. The views expressed herein are their own and do not necessarily reflect those of their clients.

Federal Judges Reject Attempts to Take Down Documents Posted Online

By Laura Handman and Amber Husbands

In two recent cases, federal judges in Massachusetts and California rejected attempts by litigants to obtain injunctions requiring websites to take down newsworthy documents posted online, holding that First Amendment prohibitions on prior restraints apply.

Facebook Case

In November, Judge Douglas Woodlock in federal district court in Massachusetts rejected an attempt by Facebook and its founder, Mark Zuckerberg, to remove confidential documents from the website of *02138* magazine. *ConnectU, et al. v. Facebook, Inc., et al.*, No. 1:07-cv-10593-DPW (D. Mass).

Plaintiffs in the underlying lawsuit are three Harvard graduates and their company, social networking site ConnectU. Plaintiffs allege that Zuckerberg stole their idea when he was hired to write code for their website, and sued him over the dispute in 2004. The long-running lawsuit has been described by one judge as a “blood feud” and protective orders are in place to protect confidential information in the case.

The cover story in the November/December issue of *02138* magazine (a magazine directed at Harvard alumni, though not affiliated with the school) was called “Poking Facebook” and



examined the ongoing lawsuits regarding the origins of Facebook and Zuckerberg’s claims to have created it. The article was based largely on documents filed in the federal lawsuit and which the reporter obtained from the court file, portions of which were filed under seal.

After the article was published and *02138* posted some of

the documents on its website, Facebook filed an emergency motion on November 29, 2007 for a temporary restraining order requiring *02138* to remove four of the documents posted on its site: an email from Zuckerberg to Harvard administrators, a Facebook “statement of cash flow,” excerpts from an online diary Zuckerberg had written while at Harvard, and excerpts

the appending of the source documents is, it seems to me, fundamentally beneficial to expression...[and] a salutary development in journalism generally

from deposition testimony.

Facebook claimed the removal of the documents was necessary to prevent dissemination of personal, private, and commercially sensitive information, and a hearing was scheduled for the next day. *02138* filed a response the next morning, shortly before the hearing, in which it set out the caselaw on the heavy presumption against prior restraints, and explained that the documents were lawfully obtained and that it was not bound by any protective order in the case. Further, it argued that the “cat was out of the bag,” as the documents had been on the Internet for three days, accessed by over 3200 visitors, and reproduced on other websites.

During the hearing, Facebook’s lawyers were mainly concerned with how the reporter obtained the documents, as they were convinced that Plaintiffs were involved in the dissemination. They offered handwriting and metadata analyses, and requested discovery from Plaintiffs and from *02138* regarding the source of the documents. In fact, as made clear at the hearing, the documents (although filed under seal) had been provided to the reporter by the clerk’s office. The reporter had identified himself as a reporter and copied documents from the court file over the course of several days.

At the hearing, Judge Woodlock focused on harm to unrelated third party (non-public-figure) individuals, including an individual identified in Zuckerberg’s online diary by a perjorative and an individual identified in deposition testimony as being present at a party. Judge Woodlock asked whether *02138*, as a matter of editorial discretion, would be willing to redact sensitive information about these third parties (the magazine later agreed, although the judge’s ruling was not conditioned on

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its agreement).

Judge Woodlock ruled from the bench on both the TRO and preliminary injunction, holding that when journalists obtain documents, “there is not a basis, unless there’s something very compelling, for a court to restrain it. ... that’s not to say the magazine is not subject to ex post remedies.” The judge specifically held that the selection of documents to post on the web was itself an editorial choice and that “this form of journalism, which I’ll define as publication in the conventional sense of an article accompanied by opportunities to review the primary-source material ... is perhaps a more democratic form of expression in the sense that it permits someone to read the article and then read the source materials.”

The judge went on to hold that “what *O2138* undertook was, it seems to me, core First Amendment activity, to comment upon matters of public interest. Moreover, the appending of the source documents is, it seems to me, fundamentally beneficial to expression...[and] a salutary development in journalism generally, one that one can treat as providing for a more democratic, if unruly, form of expressive activity.”

In sum, the court found, “[t]here hasn’t been shown to be a justification for inflicting the harm against the First Amendment which a prior restraint would impose. ... My decision is not based on practicality or resignation but, rather, on the principled analysis of what the First Amendment means in this context for this case.”

After the reporter and magazine voluntarily provided declarations detailing that the documents were obtained from the court (but declining to name additional documents in their possession but not posted), Facebook withdrew its request for further discovery.

WikiLeaks Case

As detailed in the February 2008 *MediaLawLetter*, Bank Julius Baer (which operates in Switzerland and the Cayman Islands) filed a complaint against Wikileaks, a website that invites users to post leaked materials with the goal of discourag-

ing unethical behavior by businesses and governments, and against Wikileaks’ domain name registrar, Dynadot, alleging various California state tort claims.

The bank alleged that in January 2008, a disgruntled ex-employee posted numerous stolen documents on Wikileaks that revealed confidential client information. The bank filed an *ex parte* motion for a temporary restraining order on February 8, to which Wikileaks did not respond, and on February 15, 2008, Judge White issued a permanent injunction (stipulated to by Dynadot) requiring Dynadot to shut down access to the site through www.wikileaks.org, and a TRO enjoining Wikileaks “all others who receive notice of this order” from disseminating any of the Bank’s documents. *Bank Julius Baer, et al. v. Wikileaks, et al.*, No. 3:08-cv-00824 (N.D. Cal.).

Following the ensuing media outcry, an *amici* brief was filed on February 27 on behalf of twelve news organizations and media groups. The Media Amici argued that the permanent injunction was an overbroad prior restraint because it shut down the entire website. Further, the Media Amici argued that the TRO was an impermissible prior restraint; in addition to detail-

ing the strong constitutional presumption against any prior restraint, the amici argued that privacy interests cannot justify a prior restraint and that the California tort laws cited by the bank did not authorize any punishment against Wikileaks.

Finally, the Media Amici argued that Section 230 of the Communications Decency Act barred the claims against Wikileaks. Additional groups applied to intervene as party defendants, raising in addition the lack of subject matter jurisdiction because the parties were not completely diverse and no federal claims were alleged.

On February 29, after hearing oral argument from the various *amici*, prospective intervenors, and the domain name registrant of wikileaks.org (but not from Wikileaks, which still had not entered an appearance), Judge White dissolved the perma-

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Federal Judges Reject Attempts to Take Down Documents Posted Online

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injunction shutting down the URL, declined to extend the TRO, and denied the motion for a preliminary injunction.

The same day, Judge White issued an order setting forth his rationale, first noting that the prospective intervenors' argument that the court may lack subject matter jurisdiction over the action was of concern, but not ruling on the argument. In rejecting the injunction, the court held that:

"[a]s made abundantly clear by the various submissions of the *amicus curiae*, the current request for an injunction, as well as the Court's original entry of a stipulated injunction, raises issues regarding possible infringement of protections afforded to the public by the First Amendment. . . . [I]t is clear that in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of the constitutional concerns is impermissible."

The court also discussed the efficacy of an injunction, holding that "even the broad injunction issued as to Dynadot had exactly the opposite effect as was intended," and that the Bank had not made a showing that any injunction would be effective. The court indicated that it may be amenable to an injunction

lowering the court's order, however, the Bank voluntarily dismissed the underlying complaint without prejudice on March 5. The website was once again accessible through the www.wikileaks.org URL as of the afternoon of February 29.

Judge White dissolved the permanent injunction shutting down the website, declined to extend the TRO, and denied the motion for a preliminary injunction.

Laura Handman, Rob Balin, Amber Husbands, and David Shapiro of Davis Wright Tremaine and Liz Ritvo of Brown Rudnick represented 02318 magazine in the Facebook case. The Facebook defendants were represented by Steven Bauer and Mark Batten of Proskauer Rose and I. Neel Chatterjee of Orrick, Herrington & Sutcliffe.

Laura Handman, Tom Burke, Kelli Sager, Amber Husbands, and David Shapiro of Davis Wright Tremaine represented the Media Amici in the Wikileaks case. Dynadot was represented by Garret Murai of Wendel, Rosen, Black & Dean. Daniel Matthews (erroneously named by plaintiffs as an officer of Wikileaks) was represented by Joshua Koltun. John Shipton (the owner and registrant of wikileaks.org) was represented by James Chadwick of Sheppard Mullin and Roger Myers of Holme Roberts & Owen. Amici/Proposed Intervenors Project on Government Oversight, ACLU, Electronic Frontier Foundation, and Jordan McCorkle were represented by Ann Brick of the ACLU, Steven Mayer of Howard Rice, and Kurt Opsahl of the EFF. Amici/Proposed Intervenors Public Citizen and California First Amendment Coalition were represented by Karl Olson of Levy, Ram & Olson, Paul Alan Levy of Public Citizen, and Peter Scheer of the California First Amendment Coalition. Plaintiffs were represented by Marty Singer, William Briggs, and Evan Spiegel of Lavelly & Singer.

“ ... could become as important a journalistic tool as the Freedom of Information Act. ”
—Time Magazine

Wikileaks

global defense of sources and press freedom, circa now
Wednesday 27 February, 2008

Here documents the world needs to see?
>> We protect your identity while maximizing political impact <<

SUPPORT OUR FIRST AMENDMENT APPEAL AGAINST THE US ORDER TO PERMANENTLY CENSOR WIKILEAKS.ORG!
Back our defense fund by emailing supporters@sunshinypress.org with your pledge!
For press coverage of the case, see [Google news](#) ☞

Wikileaks is developing an untraceable mass document leaking and public analysis. Our primary interests are in Asia, the former Soviet Bloc, Latin America, Sub-Saharan Africa and the Middle East, but we expect to be of assistance to peoples of all countries who wish to reveal unethical behavior in their governments and corporations. We aim for maximum political impact. [\(more\)](#)

Interested in how you can help out? Need to contact us as a media representative? Visit our [collaborative portal](#) for more information.

Analysis	Fresh leaks requiring analysis	Top countries
• Media and civil liberties organizations file briefs	• Kingston University witness intimidation	United States • United Kingdom

requiring a limited redaction of private identifying information, if the Bank could produce sufficient evidence to show that such an injunction was constitutionally permissible.

After the heavy media coverage and a drop in its stock fol-

Bloggers And Prior Restraints

Cases Put Pressure on Traditional First Amendment Protections

Although prior restraints are extraordinarily rare, several courts have recently attempted to enjoin speech on the internet. The most striking example is the WikiLeaks.org case, but there are other recent unpublished cases involving bloggers shut down by courts. These cases involve people blogging about personal and public issues in a new medium that continues to put pressure on traditional First Amendment analysis and protection.

Blogging A Divorce

There is nothing new about spouses exchanging heated words during a divorce proceeding. What is new, with the advent of the Internet, is the ability to spread those words around the world. A recent divorce case from Vermont has garnered attention because of a bizarrely acrimonious blog created by the soon to be ex-husband.

Claiming that his wife abruptly left him after nine years of marriage and a recent cross-country move, William Krasnansky turned to the internet to air his grievances. His blog, lookatmy-pugs.livejournal.com, is a “work of fiction” that chronicles a failed marriage and impending divorce. In addition to his own writings, which are undoubtedly inspired by real life, he has also included quotes from his wife’s diary and scanned copies of passages from it.

Claiming the blog was defamatory and a form of harassment, the estranged wife Maria Garrido asked a Vermont family court judge to order her husband to take down the blog. The judge agreed to do so without actually determining whether the blog was defamatory or an invasion of privacy.

The husband, however, refused to take it down. After another hearing the family court judge narrowed the order to only forbid the husband from posting his wife’s diary entries. The judge recognized there may be a copyright infringement claim, but acknowledged that determining infringement was beyond the family court’s jurisdiction.

Battling Ex-Spouses

The *MediaLawLetter* previously noted another prior restraint arising out of the bitter divorce dispute between Kristen Rhoad and ex-husband Phil Haberman. See “The Perils of Blogging: Harassment Law, Prior Restraints Applied to Fringe Bloggers,” *Media-*

LawLetter, Dec. 2006 at 36.

The couple met online (ironically) and divorced after a short marriage. Rhoad took to the web in a blog called “The Rhoad Warrior” to “warn” other women about her ex – accusing him about lying about his military record and “scamming” other women. Haberman accused his ex-wife of harassment and cyberstalking. A family court judge issued a spousal restraining order against Rhoad – but added an injunction ordering her to remove, or cause to be removed, all postings about her ex. The judge apparently gave short shrift to Rhoad’s claim that all the information on the blog was true.

Rhoad appears to have disregarded the order and her accusations against her ex-husband have also been posted to numerous third party blogs. When the battle caught the attention of the media, Haberman tried but failed to get an injunction against the Sarasota, Florida weekly newspaper *Creative Loafing* to stop it from publishing an article about the controversy. But Family Court Judge Robert B. Bennett granted a new order against Rhoad – now living in California – directing her to remove postings from a list of websites where her accusations appear. These include newspaper run blogs and forums from the *Las Vegas Review-Journal* and the (weekly) *Dallas Observer*.

After the order was ignored, and Rhoad failed to appear for a contempt hearing, Judge Bennett issued an arrest warrant – though it is not clear whether that can be enforced in California. *Haberman v. Rhoad*, No. 2006 DR 007754 SC (Fla. Cir. Ct., Family Div. order Jan. 29, 2008).

Custody Battles Online

Retired Reverend Anne Grant, a former director of a shelter for battered women, created the blog “Custody Scam” (custodyscam.blogspot.com), where she accused the Rhode Island Department of Children, Youth and Families (“DCYF”) of mishandling a child custody case -- a clear issue of public concern, at least for the mainstream press.

She accused DCYF of removing a child from her mother’s care and placing her with her father, who had been accused of sexual abuse. On the blog, Grant published a photograph of the girl and

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Bloggers And Prior Restraints

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her sister, but did not identify them by name.

The family court judge overseeing the custody dispute ordered DCYF to “advise” Grant that she should take down her blog post on the dispute.

DCYF, as temporary custodian of the children, is to advise Anne Grant, author of www.custodyscam.blogspot.com, to remove any and all written and pictorial information pertaining to the children in the above matter, from the inception of publication to the present and henceforth, and to cease publication of the blog as it pertains to these children. That mother and father are ordered to facilitate cooperation in this process.

DCYF warned that if Grant did not comply, the agency would bring the matter back before the family court. Grant took down the blog post. She tried to appeal the family judge’s order but the Rhode Island Supreme Court declined to review the case.

‘Liberty City Seven’ Gag Order

A more commonly accepted limit on speech gag orders that restrict the speech of litigants and counsel. However, a federal judge in Florida recently extended a gag order to a blog that was commenting on a criminal case.

The “Liberty City Seven” are men from Miami who were charged with attempting to aid al Qaeda in terrorist plots against the Sears Tower in Chicago and the FBI building in Miami. In their recent trial in a Florida federal court, one of the men, Lyglenson Lemorin, was acquitted. There was a mistrial for the other six defendants.

Following the mistrial, the judge imposed a gag order pending retrial of the remaining defendants. The gag order applied to witnesses, defendants, counsel – and the acquitted defendant Lemorin and his trial lawyer John DeFabio. A new lawyer was engaged to challenge the gag order against Lemorin. The lawyer, David O. Markus, publishes the “[Southern District of Florida Blog](#)” where he analyzes cases of interest before federal courts – including the Liberty City Seven case.

On January 10, the federal district judge hearing the criminal case extended the are gag order to “DeFabio’s agents.” In caution

Markus assumed that this included him and shut down his blog.

After shutting down the blog, Markus filed a motion to clarify whether in fact he was an “agent.” In the interim, another blog, “[Justice Building](#)”, stepped in to continue discussing the case while the motion was pending.

On January 24, the district court judge ruled that Lemorin’s lawyers cannot publicly discuss facts relating to the underlying criminal charges. David Markus filed an appeal to the Eleventh Circuit to overturn the gag order on First Amendment grounds.

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MLRC's Annual Study of U.S. Media Trials

Fewest Verdicts Since 1980 - Media Defendants Win Four, Lose One

MLRC's annual study of media trials reviews and analyzes the trials of 2007 – together with media trial data for the last 28 years. The past year saw the lowest number of verdicts in libel, privacy and related claims since the study began in 1980. In 2007 there were only five verdicts. Media defendants won four out of five verdicts, continuing the trend of increasing success rate in trials. The damage award in the one loss was a relatively modest \$305,250. The Bulletin analyzes damage awards over the years of the study, including state-by-state breakdowns.

The record low number of verdicts in 2007 is a continuation of a long-term downward trend in media trials. In the 1980s, the first decade of the study, there was an average of 26.8 verdicts a year. That declined to 18.8 in the 1990s. This decade the average has further declined to an average of 10.8 verdicts a year.

The media's success rate at trial has steadily increased over the study period. In the 1980s, media defendants won 36.6% of the verdicts. In the 1990s media defendants won 40.4%. And this decade media defendants have won 54.5% of the verdicts.

Verdicts in 2007 – Defense Wins

Germak v. Sieber, No. 329 of 2000 (Pa. C.P., Juniata County jury verdict Feb. 16, 2007). Plaintiff, a school board attorney and former district attorney, sued a local newspaper for libel over a letter to the editor that criticized him for holding meetings designed to “undermine the present administration.” The 12-member jury reached a unanimous verdict in favor of all the defendants. *Defense Counsel*: Scott C. Etter, Miller, Kistler, Campbell, State College, Pa. *Plaintiffs' Counsel*: *pro se* (previously Ronald Katzman, Goldberg, Katzman & Shipman, Harrisburg, Pa.)

Stephens v. Dolcefino et al., No. 199943183 (Tex. Dist. Ct. jury verdict Feb. 15, 2007). Plaintiffs, Houston Deputy Controller William Stephens and policeman Ray Jordan, sued KTRK-TV for eavesdropping for videotaping their conversation in a hotel courtyard with Houston City Controller Lloyd Kelley. After a two-week trial, the jury found for the station and reporters. *Defense Counsel*: Chip Babcock, Bob Latham John Edwards, Jackson Walker, Houston; Tanya Menton, ABC, Inc. *Plaintiffs' Counsel*: Marc L. Hill, Mosser Mallers PLLC, Dallas (representing Jordan) and Terry Yates, Yates Law Offices, Houston (representing Stephens)

Tilton v. McGraw Hill Companies, Inc., et al., Civil No. 06-00098 (W.D. Wash. jury verdict Dec. 11, 2007). Plaintiff sued for promissory estoppel and intentional infliction of emotional distress claiming that a *BusinessWeek* reporter had promised not to identify him in an article entitled “I’m a Bad Boss? Blame My Dad.” *Defense Counsel*: Gavin W. Skok, John D. Lowery, Riddell & Williams, Seattle. *Plaintiffs' Counsel*: Camden Hall, Seattle (See article on p. 3)

Weber v. Lancaster Newspapers, Inc., et al., No. CI-98-13401 (Pa. C.P., Lancaster County jury verdict July 31, 2007). Plaintiff, a law firm associate at the time of publication, sued two Pennsylvania newspaper publishers for libel over articles that discussed her involvement in a domestic dispute. After a seven-day trial and 50 minutes of deliberation, the jury found for the defendants. *Defense Counsel*: John C. Connell, Archer & Greiner, P.C., Haddonfield, N.J. (for Ledger Newspapers); George C. Werner, Barley Snyder LLC, Lancaster, Pa. (for Lancaster Newspapers, Inc.) *Plaintiffs' Counsel*: Ralph D. Samuel and Lynn Malmgren, Ralph D. Samuel and Co., P.C., Philadelphia

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Verdicts in 2007 – Plaintiff Wins

Kerrick v. Monitz, No. 2995-C-2004 (Pa. C.P., Luzerne County directed verdict for plaintiff Oct. 11, 2007).

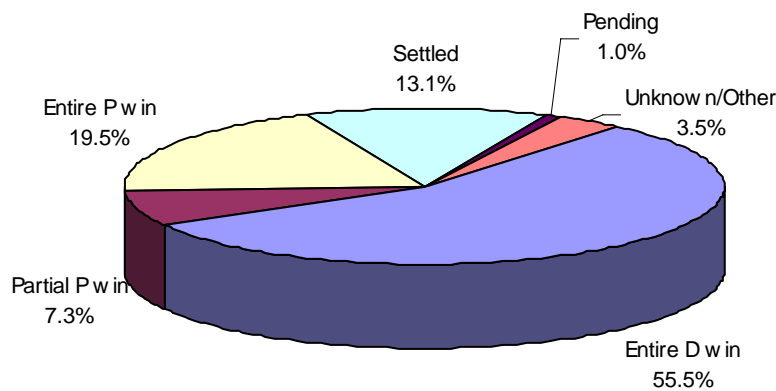
In a private figure trial, plaintiff sued a local newspaper for erroneously naming her as a suspect in a murder case. The court held that the statements in the article were negligent as a matter of law, so the only issue for the jury was damages. After eight days of testimony and two and a half hours of deliberation, the jury awarded \$16,500 for harm to plaintiff's reputation; \$51,250 for emotional distress; and \$237,500 for economic losses. After the verdict, the parties settled. *Defense Counsel*: Niles S. Benn, Benn Law Firm, York, Pa. *Plaintiffs' Counsel*: Cletus Lyman, Lyman & Ash, Philadelphia.

Mistrials

One case ended in a mistrial because of a deadlocked jury. *Mandel v. The Boston Phoenix, Inc. II*, Civ. No. 03-10687 (D. Mass. mistrial declared Dec. 11, 2007). The case was originally tried in 2004 under a negligence standard and the jury awarded plaintiff \$950,000. In 2006, the First Circuit reversed and remanded for retrial, holding that plaintiff, a former prosecutor, was deemed a private figure on an inadequate record at the summary judgment stage. *See* 456 F.3d 198, 34 Media L. Rep. 2272 (1st Cir. 2006). On remand, the district court concluded that plaintiff was a public figure and the case was tried under the actual malice standard.

Other Findings

- Over the 28 years of the Study defendants ultimately won 55.9% of trials when the results of post-trial motions and appeals are factored in (318 of 569).
- Plaintiffs won 19.5% of the trials (111 of 569), meaning that the initial damages amount awarded survived post-trial motions and appeals, if there were any. Plaintiffs partially won 7.4% of cases (42 of 569) – walking away with some damages, but less than the amount initially awarded at trial.
- The average damage award after post-trial motions and appeals in cases that were not settled was \$556,000, while the median of final awards is \$100,000.



The Ethical Issues That Terrorism Poses To Media Lawyers

By Peter Bartlett

September 11 and Beyond

The world watched in horror as the events of September 11 unfolded. Since then London, Spain, Bali and many other places have been attacked. Many other places have feared that they are next on the list.

Since September 11, we have seen levels of security that we would not previously have contemplated. Entering office buildings, sporting venues, airports continually confirms to us that the world has changed. Anti-terrorist legislation has been introduced in many countries.

Some say that aspects of that legislation go too far.

The threat of a terrorist attack and the war on terror create some novel issues for journalists and in turn their lawyers.

Extensive media coverage of terrorism, through newspapers, television, radio and the Internet, remains a motivation for terrorist attacks. In the words of political analyst Walter Laqueur, "classic terrorism is propaganda by deed, and propaganda is impossible without the use of the media."¹ Given the global nature of contemporary media, international and domestic terrorists have the opportunity to spread their propaganda more widely, endeavouring to gain the attention of governments and the public far beyond the immediate area of their target.²

Frighteningly, the modern terrorist is aware that the visual medium of television, with its immediacy and capacity to reach millions of people, should dominate their planning. The attacks on the World Trade Centre are examples of this. The method, timing, scope and target of these attacks were planned to gain maximum media coverage. The terrorists could have struck at night, but instead chose to strike in broad daylight, not only to cause as many deaths as possible, but also to highlight the spectacular images of fire and smoke.³ The first plane hit the north tower at 8:46 a.m. and the second hit the south tower approximately 17 minutes later, at 9:03 a.m..⁴ This provided the media networks time to have their cameras trained on the smoke billowing from the north tower at the precise moment the second plane struck. The television footage of the second plane hitting the south tower has been aired countless times. Moreover, the vision of the buildings imploding has become another devastatingly destructive image etched into the mind of the public. After days of watching these catastrophic events live on television, it seemed as if it were happening in our own backyard. As one commentator highlighted, "From the terrorists' point of

view the attack on America was a perfectly choreographed production aimed at American and international audiences."⁵

An added tragedy of September 11 is that the media, doing their job and graphically reporting the news, lifted the profile of al Qaeda and Osama bin Laden.

The media lawyers' role is to advise the client on the legal issues. Do media lawyers have a duty to raise any related ethical issues, including:

Should the media afford terrorists 'front page' coverage, even if this might encourage future terrorist attacks?

The likelihood of media-savvy terrorists manipulating the media;

Should journalists be allowed to keep their sources confidential, even if information they have would help police to prevent a terrorist attack?

Racial prejudices of journalists;

The need to control terrorists' access to information;

Covering terrorist kidnappings: What if the victim is a colleague or a friend?

Competition for profits and finding 'the scoop';

Guantanamo Bay;

Media coverage after an alleged terrorist is charged.

Should the media afford terrorists 'front page' coverage, even if this might encourage future terrorist attacks?

It is clear that "terrorism and the media are bound together in an inherently symbiotic relationship, each feeding off and exploiting the other for their own purposes."⁶ Margaret Thatcher once observed that the media supplies "the oxygen of publicity on which [terrorists] depend."⁷

From a terrorist's perspective, terror without publicity achieves relatively little. Terrorism is often a desperate action of the weak,⁸ therefore it is "only by spreading the terror and outrage to a much larger audience [that] terrorists gain the maximum leverage that they need to effect fundamental political change."⁹ Recently, television (and to a lesser extent other forms of media) has allowed the general public to watch terrorist activities as they unfold, and/or the immediate aftermath. Consequently, the media has increased the terrorists' power, as "without the media's coverage, the act's impact is arguably wasted, remaining narrowly confined to the imme-

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Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

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diate victim(s) of the attack, rather than reaching the wider target audience at whom the terrorists' violence is actually aimed."¹⁰

The terrorists' want, or need, for media coverage raises one of the major ethical issues for the media and their lawyers – whether or not to provide terrorist organisations with the benefits of front page and headline coverage.

On one hand, many fear that the front page coverage that terrorism currently attracts provides violent groups with the opportunity to have their ideology heard globally. Just as frighteningly, such extensive international coverage may encourage other groups to perpetrate attacks, as they become aware of the global attention that terrorism will attract.

On the other hand, many journalists argue that "what the public needs from the media, more than ever in the age of terror, is fewer ethical gatekeepers and more reporters."¹¹ Even though such journalists understand the power that the media affords terrorists, they assert that the public has a right to be informed. In other words, according to democratic freedoms, the profession should not be restricted from reporting important world events. "The public's right to information [is a] fundamental principle of journalism."

The point was well made in my country. *The Australian* newspaper, in its editorial on 10 November 2005, asserts:

We believe our first responsibility is to our readers, who have a right to know absolutely everything we can find out for them about the terror threat and Australia's response to it. Obviously, there are other responsibilities that can moderate this, including national security and respect for the legal rights of individuals, including their right to a fair trial. But the right of our readers to the best of our reporting and analysis, as unfiltered by other considerations as possible, has always been paramount.¹²

The ethics of journalists are relevant here. There are generally recognised standards that judge the news value of a story. If a story has strong news value according to those recognised standards, then prima facie it should be published prominently unless there is a 'clear and present danger' that overrides the duty to publish.

Such a situation would be very rare. I have seen it twice: where there was a threat to poison a city's water supply, and where there was an extortion threat against Qantas. In both cases the media delayed publication for 24 hours at the request of the authorities. In both cases the extortionist was apprehended within that

time frame.

The threat of media-savvy terrorists manipulating the media.

As a result of excessive media attention, "for the media-savvy terrorist, the conditions are ripe for exploitation."¹³ Astute terrorist organisations find their own niche ways to use the media to spread their propaganda. An example is al Qaeda's use of al Jazeera¹⁴, an Arab-language news channel, to air their dogmatic ideology. Through al Jazeera, al Qaeda has created a persona surrounding Osama bin Laden, who has become the international face of terrorism in the West.

Other examples of terrorist organisations manipulating the media are the many small Islamic terrorist groups who attribute their own terrorist attacks to al Qaeda, having learned that this will ensure the benefits of front-page coverage.

A further fear is that sometimes the statements of masterminds of terror, which are disseminated around the world, are coded messages that are understood by their supporters around the world. If true, this would be manipulation of the media at its best. However, many believe that this is highly unlikely.

Finally, the U.S.A., which has been described as a "media centre,"¹⁵ is a particular target for terrorist exploitation of the media. If an attack is on U.S. soil, or the victims are US citizens, then the violence will certainly gain more global attention, and terrorists know this. For example, in 1985, TWA flight 847 was hijacked by Lebanese Shi'a. During the first few days of the hostage crisis, the perpetrators released all hostages that were not of U.S. citizenship, retaining only 39 American men.¹⁶ Consequent public demand led to live coverage of the events throughout the entire 17-day crisis. During this period, the three major U.S. television networks (ABC, NBC and CBS) aired nearly 500 news segments concerning the developing hostage situation.¹⁷ It appears that the hijackers cleverly chose to retain Americans to harness the maximum media coverage.

Spin doctors are paid to manipulate the news to put the best possible spin on a story for their clients. It often takes a lot of time for a reporter to cut through the spin, to get the real story. There are many examples of reporters not having the time or energy to get through the spin.

Terrorists, their lawyers and even the law enforcement agencies seek to use the media. On very rare occasions the media lawyer can suggest that there is perhaps another side that could be heard or another argument that could be considered.

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Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

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Should journalists be allowed to keep their sources confidential, even if information they have would help police to prevent a terrorist attack?

Many argue that terrorist laws do not strike the correct balance between protecting the administration of justice and recognising the ethical obligation of journalists to protect confidential sources.

There are now serious sanctions under anti-terrorism legislation for not informing police of information that journalists have about terrorism. Law enforcement agencies can seek to compel journalists to produce documents or disclose sources. This can place the journalist, the media company and the lawyer in a difficult ethical position.

Media lawyers need to assist journalists to protect their sources. In the rare situation where there is a “clear and present danger” to public safety, the journalist, the media company executives and the lawyer would need to carefully review the options.

Racial prejudices of journalists.

Has 9/11 resulted in media coverage of issues being more anti Muslim than they would have been prior to 9/11?

Some would argue that what actually constitutes a terrorist attack can be difficult to categorise, as “one man’s terrorist is another man’s freedom fighter.” Sometimes it may be difficult to decide who is and who is not a terrorist or what is or is not a terrorist attack!

Where the media lawyer sees unbalanced reporting pre-publication, is there an obligation to mention it?

This is a difficult issue for a lawyer. Any personal prejudices we may have should not come into our advice. Our charter is to advise the client on the relevant legal issues, the legal risks. Our charter is not to advise on editorial issues unless they are relevant to legal issues. That said, our media clients rely on the strength of their masthead or brand name. The reputation of that brand name could be damaged by unbalanced reporting. In the rare occasion where we are particularly concerned about an unbalanced article pre-publication, we may feel inclined to say something to the in-house lawyer or editorial executive. We would feel more inclined to say something if we have a very strong relationship with that in-house lawyer or executive.

The need to control terrorists' access to information.

A further ethical issue for journalists and media lawyers is that reports of terrorist activities, and more importantly the police re-

sponse to terrorism and detail of police investigations, can give terrorists information which they would otherwise not have had. For example, on 4 November 2005 *The Australian* newspaper ran a story on the alleged terrorists in Melbourne and Sydney (ignoring the request of the Australian Federal Police to not run the story), which led to one of the key suspects evading capture for a few days and destroying what might have been vital evidence of his involvement in illegal activities.¹⁸

This is more an editorial decision rather than one for the media lawyer.

Covering terrorist kidnapping: What if the victim is a colleague or a friend?

Kidnapping has long been used by terrorists. Like any other kind of terrorism, kidnapping attracts media coverage. However, reports in the media often make it more difficult to negotiate the victim's release.

The pressure intensifies when the person kidnapped is a journalist.¹⁹ For example, when Associated Press reporter Tina Susman was kidnapped in Somalia, Judith Matloff (a journalist working for Reuters in South Africa) was asked by a mutual friend at Associated Press not to report anything on the kidnapping of Susman, fearing publicity could endanger negotiations. Matloff did not publish anything about the kidnapping. Susman was eventually released unharmed.

Should the media lawyer raise such issues with Media Executives?

I would have thought that if the media lawyer has a strong view, the media executive would welcome hearing it even if he or she does not agree with that view.

Competition for “the scoop.”

Hoffman writes in *Inside Terrorism* that “as the [TWA flight 847] hostage crisis dragged on day after day, at times with seemingly little or no progress towards a resolution, the vast media resources deployed for just this one story had to find or create “news” to justify the expense of continued presence.”²⁰

Except in extraordinary circumstances, I do not think that this raises ethical issues for the lawyer.

Guantanamo Bay

Should journalists restrict the exposure they give to people held in Guantanamo Bay?

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Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

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Should they restrict coverage of conditions at Guantanamo Bay? Should they restrict exposure of alleged human rights abuses to that disclosed in the US Supreme Court?

This is a paper on ethics, not politics. The war on terror has placed huge pressure on law enforcement agencies. Their track record is pretty good. That said, if there is evidence of human rights abuses or evidence that alleged terrorists do not have appropriate access to independent legal advice, the media has a duty to publish that material and media lawyers have a duty to assist the media by alerting them to legal and associated risks.

Media coverage after an alleged terrorist is charged

In January this year, the head of the Australian Federal Police claimed that the public's right to free speech should be delayed after a person is charged, to ensure a fair trial. He claimed that the right of the alleged offender to the presumption of innocence should take precedence over the public interest in knowing how the investigation was conducted and over the media's right to freely discuss elements of the crime and the police investigations. He added that the media's coverage was often inaccurate or ill informed.

Political leaders have distanced themselves from this claim and there have been calls for the police chief to resign. The comments do illustrate, however, the tension between law enforcement agencies focussed on protecting the public and in so doing, their aversion to undue publicity and the media seeking to keep the public informed. The media lawyers' role is to advise the media how far reporting of such issues can go, without breaching any terrorism related legislation or contempt laws.

Conclusion

The police and security forces around the world face extraordinary challenges. Their track record is impressive.

There are occasions, rare occasions, when journalists (sometimes advised by internal or external counsel) quite properly consider whether a story should be delayed or spiked permanently, as part of the war on terror. Terrorism attacks or threats and related police investigations raise novel issues. The media and media lawyers need to consider on rare occasions, not just the legal risks but the potential consequences that may follow from that article or broadcast.

Peter Bartlett is a partner with Minter Ellison in Australia. Ollie Howard assisted in the preparation of this article.

¹ Walter Laqueur, *The New Terrorism*, found in School of Political and Social Inquiry, *PLT1120 Fanatics and Fundamentalists: The Global Politics of Violence (Reading Package: Part A)*, Monash University, Melbourne 2005

² Brigitte Nacos, *The Terrorist Calculus Behind 9-11: A Model for Future Terrorism?* found at <http://www.lib.monash.edu.au/resourcelists/plt2650.html#8>, p.4

³ Brigitte Nacos, *The Terrorist Calculus Behind 9-11: A Model for Future Terrorism?* found at <http://www.lib.monash.edu.au/resourcelists/plt2650.html#8>, p.3

⁴ http://en.wikipedia.org/wiki/September_11%2C_2001_timeline_for_the_day_of_the_attacks#8:00_AM, accessed 23 September 2006, at 18:50pm

⁵ Brigitte Nacos, *The Terrorist Calculus Behind 9-11: A Model for Future Terrorism?* found at <http://www.lib.monash.edu.au/resourcelists/plt2650.html#8>, p.3

⁶ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.142

⁷ Quoted in R. W. Apple Jr, *Messe Suggests Press Code on Terrorism*, New York Times, 18 July 1985, found in Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.143

⁸ Martha Crenshaw, found in Charles W. Kegley Jr., *The New Global Terrorism: Characteristics, Causes and Controls*, Pearson Education, New Jersey 2003, p.97

⁹ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.132

¹⁰ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.132

¹¹ <http://www.theaustralian.news.com.au/story/0,25197,17193068-7583,00.html>, accessed 23 January 2008 at 9:30am

¹² <http://www.theaustralian.news.com.au/story/0,25197,17193068-7583,00.html>, accessed 23 January 2008 at 9:30am

¹³ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.138

¹⁴ <http://www.aljazeera.com/>, accessed 13 May at 1:18am

¹⁵ Lutz & Lutz, *Global Terrorism*, Routledge, New York 2004, p.42

¹⁶ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.132

¹⁷ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.132

¹⁸ Hirst & Patching, *Journalism Ethics*, Oxford University Press, Melbourne 2007, p.99

¹⁹ Hirst & Patching, *Journalism Ethics*, Oxford University Press, Melbourne 2007, p.100

²⁰ Bruce Hoffman, *Inside Terrorism*, Victor Gollancz, New York 1998, p.133

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