

**MULRC** *Media Law Resource Center*  
**MEDIA LAW LETTER**

Associate Member Edition

2008:2

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## New York State Enacts Libel Terrorism Protection Act

### *Foreign Libel Judgments Must Meet First Amendment Standards to be Enforced in New York*

By Jason P. Criss

On May 1, New York Governor David Patterson signed into law the “[Libel Terrorism Protection Act](#),” a set of amendments to New York’s long-arm statute and the New York Civil Practice Law and Rules (“CPLR”) provision governing the enforcement of foreign judgments. *See* N.Y. C.P.L.R. § 5304 (Apr. 28, 2008).

New York is now the first state to have a law expressly addressing “libel tourism,” the practice of plaintiffs suing authors or publishers for defamation in foreign jurisdictions that have no legitimate connection to the challenged publication and that provide weaker free speech protections.

The Act passed both houses of the State Legislature unanimously, and its sponsors credited the legal, journalism and publishing communities’ broad support for the Act for its rapid (for Albany) passage through the Legislature in less than four months. The New York City Bar, New York State Bar, Authors Guild, Association of American Publishers, New York Newspaper Publishers Association, and PEN all issued statements in support of the bill, and supporting editorials and op-eds were published in the *Albany Times-Union*, *Newsday*, *New York Post*, and *Wall Street Journal*.

The Act was prompted by the decision in *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. Dec 20, 2007) (J. Ciparick) in which the New York Court of Appeals held that the long-arm statute then in effect did not support the exercise of jurisdiction over a Saudi plaintiff who had sued a New York author for libel in the United Kingdom, but who had not taken any actions to enforce the judgment in New York. *See Id.*

The Act overruled the *Ehrenfeld* decision by amending two separate provisions of the CPLR. These amendments took effect immediately. First, the Act added to CPLR § 5304’s list of grounds pursuant to which a court has the discretion to not recognize a foreign judgment that “the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court’s adjudication provided at least as much protection

for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.” Libel Terrorism Protection Act § 2; N.Y. C.P.L.R. § 5304(b)(8).

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

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

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## New York State Enacts Libel Terrorism Protection Act

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### Libel Terrorism Protection Act § 3; N.Y. C.P.L.R. § 302 (d).

These CPLR amendments filled significant gaps in the protections for libel defendants under prior New York law. Previously, if a foreign defamation plaintiff tried to enforce a foreign defamation judgment, a New York court likely would have refused to enforce it. *See, e.g., Bachanan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (J. Fingerhood) (declining to enforce an English defamation judgment because it would be repugnant to public policy to enforce a judgment imposed without First Amendment protections). But the author or publisher sued for defamation abroad had to wait for the foreign libel plaintiff to take action. Now, the author or pub-

lisher can take the initiative by filing a declaratory action and obtaining an order stating that that foreign judgment is unenforceable. These New York declaratory judgment actions could prove to be a powerful check against libel tourists' attempts to chill criticism by United States authors and publishers.

Time will tell how many authors and publishers avail themselves of the Act's protections, and whether other states will follow New York's lead and enact similar legislation.

*Jason P. Criss, Special Counsel to Covington & Burling LLP in New York, represented a group of press freedom organizations and media companies as amici in Ehrenfeld. He also was one of the authors of the New York City Bar's position paper in support of the Act.*

## Another Bill Introduced to Limit Enforcement of Foreign Defamation Judgments

Congressman Steve Cohen (R-TN) introduced [H.R. 6146](#) to prohibit recognition and enforcement of foreign defamation judgments that do not comport with First Amendment protections.

The bill is co-sponsored by Representatives Darrell Issa, Jerrold Nadler, John Conyers, Howard Berman, Howard Coble, Zoe Lofgren, Sheila Jackson-Lee, Robert Wexler, Hank Johnson, Luis Gutierrez, Mark Udall, and John Yarmuth. Illinois Senator Dick Durban may introduce a similar bill in the Senate.

The bill provides that: "Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States."

The bill defines defamation as " libel, slander, or any other cause of action primarily based on a published communication."

According to Congressman Cohen's office the Congressional Research Service ("CRS") has concluded that Congress has two or three different sources of power under the Constitution to regulate the enforcement of foreign judgments even though historically this has been a matter of state law. This includes Congress's power over foreign affairs, and its 14th Amendment Section 5 power to uphold the First Amendment . The CRS concluded that there was sufficient state action when a domestic court enforces a foreign judgment.

## Legislative Update: Libel Tourism Visits Capitol Hill, While Media Ownership Gets Its Day in the Senate

By Kathleen Kirby & Shawn A. Bone

The issue of libel tourism – one that has flummoxed courts for years – has finally reached Capitol Hill with the introduction of the “Free Speech Protection Act of 2008” (S. 2977, H.R. 5814) by Senator Arlen Specter (R-PA) and Representative Peter King (R-NY). Both Members introduced identical legislation to address the enforceability of foreign defamation judgments in the U.S. Specifically, the legislation would authorize the following:

A United States “person” (namely a U.S. citizen, a resident alien, and a business incorporated in or with its primary location in the U.S.) who is the subject of foreign defamation litigation precipitated by writings, utterances, or other speech published, uttered, or disseminated in the U.S. could bring a federal suit against the person who has sued the U.S. person in foreign court, if the writings, utterances, or other speech that are the subject of the suit would not constitute defamation under United States law. S. 2977/H.R. 5814 § 3(a).

The federal court where this suit is filed would be entitled to enter a judgment in favor of the U.S. person barring enforcement of any foreign defamation judgment concerning the writings, utterances, or other speech that is found to be not defamatory under U.S.

law. The court may also order the foreign litigant to pay in damages the amount of any foreign judgment obtained by the litigant, as well as the costs incurred by the U.S. person in the foreign litigation and the value of any harm caused to their opportunity to publish, conduct research, or generate funding. *Id.* § 3 (c).

A jury may also award the U.S. person treble damages if it determines that the foreign litigant “intentionally engaged in a scheme to suppress rights under the [First Amendment].” *Id.* § 3(d).

A federal court may exert jurisdiction over a foreign litigant in a suit under the Act by virtue of the fact that the foreign litigant filed a defamation suit in a foreign jurisdiction concerning the U.S. person. *Id.* § 3(b).

The Act’s provisions apply retroactively to suits filed before its passage. *Id.* § 4. The Act also provides that a foreign litigant may maintain a foreign defamation action provided that the suit is brought in good faith and the U.S. person being sued “failed to adhere to standards of professionalism by publishing false information maliciously or recklessly.” *Id.* § 5.

As the nickname suggests, libel tourism refers to litigants shopping for the best place to sue for, and recover damages for, defamation (including both libel and slander). Libel tourism is not the only problem with defamation in an age where speech is disseminated worldwide, whether through print publications or online. See Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co.*, 62 Wash. & Lee L. Rev. 279 (2004) for a discussion of choice of law questions in foreign defamation actions premised on statements made online by U.S. defendants.

In recent years, many litigants have chosen to sue for defamation in foreign courts, ostensibly based on the reputational

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**A jury may also award the U.S. person treble damages if it determines that the foreign litigant “intentionally engaged in a scheme to suppress rights under the [First Amendment].”**

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harm suffered by the litigant in that foreign country. According to Senator Specter, in his statement introducing the Free Speech Protection Act of 2008, English courts have become the courts of choice for defamation action because English law does not require a litigant to prove falsity or actual malice. See [Statement of Senator Specter on Introduction of S. 2977](#) (May 7, 2008).

An added advantage of suing in a foreign court, however, is the ability of the litigant to avoid the strictures the First Amendment places on defamation actions in the United States. Once a

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## Legislative Update: Libel Tourism Visits Capitol Hill, While Media Ownership Gets Its Day in the Senate

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judgment has been obtained in that foreign tribunal, litigants then come to the United States to enforce the foreign judgment against the U.S. property of the alleged defamer. *See, e.g., Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

The instant legislation was prompted by a federal court action in New York. In *Ehrenfeld v. Mahfouz*, a litigant from Saudi Arabia had sued a U.S. citizen in English court, claiming that a book written by the U.S. citizen indicated that Mr. Mahfouz financially supported terrorism. English jurisdiction was premised on the fact that the book was distributed in the country and 23 copies of this book had been purchased there.

*See* [www.binmahfouz.info/news\\_20050503\\_full.html](http://www.binmahfouz.info/news_20050503_full.html)

for a copy of the English judgment in the case. The English court notes that 23 copies had been sold in England at the time judgment was rendered. The court also states that portions of the book were had been made available online, and could be accessed by English citizens.

Ms. Ehrenfeld refused to make an appearance in or reply to the suit, and the English court entered a default judgment against her that included money damages as well as an injunction to bar Ms. Ehrenfeld from publishing, or causing or authorizing the further publication, of the allegedly defamatory statements in England. Ms. Ehrenfeld then filed a declaratory judgment action in New York federal court to render the English judgment unenforceable, and Mr. Mahfouz filed a dismissal for lack of personal jurisdiction.

The U.S. Court of Appeals for the Second Circuit held that such actions, at least under New York law, are impermissible for lack of personal jurisdiction over the foreign litigant, where jurisdiction is asserted based solely on the fact that the foreign litigant has obtained a foreign defamation judgment against the federal court plaintiff. *See Ehrenfeld v. Mahfouz*, No. 06-2228CV (Mar. 3, 2008), *affirming Ehrenfeld v. Mahfouz*, 2006 WL 1096816 (S.D.N.Y. Apr. 16, 2006).

This decision was informed by an answer to a certified question, issued by New York Court of Appeals, which stated that New York state law would not permit personal jurisdiction in a case such as this. *See Herzfeld v. Mahfouz*, 2007 WL 4438940 (N.Y. Dec. 20, 2007). (The New York legislature has now amended New York law to establish personal jurisdiction in such lawsuits. *See N.Y. Senate Bill No. 6687* (signed by the Governor of New York on Apr. 28, 2008).

Senator Specter has called for swift action on the "Free Speech Protection Act of 2008" as a means of protecting the

ability of U.S. citizens to address important matters like terrorism funding. Both he and Representative King have argued that the Act is essential to the protection of the First Amendment in foreign courts, though neither the House nor the Senate Judiciary Committees have scheduled a hearing on this issue. It is unclear whether the legislation will be debated by either Chamber before the end of the current session.

### Media Ownership Update

Both the House and the Senate have explored legislative options in the wake of the FCC's media ownership decision last December, with Members of both Houses deciding to introduce Resolutions of Disapproval concerning the new rules. The Resolution of Disapproval is a relatively underutilized Congressional tool that allows Congress to adopt a resolution which renders null and void a particular agency rulemaking. *See* 5 U.S.C. § 801 et seq. for the rules concerning the form of a Resolution of Disapproval and procedural rules for passage of the same. Such resolutions require the signature of the President to be valid, per the Presentment clause of the Constitution. U.S. Const. Art. I, § 7.

The Senate has been more active on the question of the validity of the media ownership rules under the direction of Senator Byron Dorgan (D-ND). His Resolution of Disapproval, Senate Joint Resolution 28, was introduced on March 5, 2008, and adopted by the Senate's Committee on Commerce, Science, and Transportation in early May with the support of the Chairman and Vice-Chairman of that Committee, Senator Daniel Inouye (D-HI) and Senator Ted Stevens (R-AK). On May 15, the full Senate approved the Resolution by voice vote, although several Senators came to the floor to note their support for the new rules and opposition to the Resolution.

The House has been less keen to address its pending Resolution of Disapproval, House Joint Resolution 79, introduced by Representative Jay Inslee (D-WA). In fact, it is currently unclear whether either the Senate or the House Resolution will receive a vote in the House. Should passage of the Resolution occur, however, President Bush has indicated that he will veto the measure. The House and the Senate will have an opportunity to override this veto.

*Kathleen Kirby and Shawn A. Bone are with Wiley Rein LLP in Washington, D.C.*

## MLRC – Stanford Conference Explores Digital Publishing and Distribution Issues

### *Legal Frontiers in Digital Media*

Over 120 participants recently convened at Stanford University for a conference organized by MLRC, Stanford Publishing Courses and Stanford Law School's Center for Internet & Society.

The event held May 15-16 explored emerging legal issues surrounding digital content in today's multi-platform world. Conference sessions explored:

- liability of site owners for third-party content
- digital content licensing, copyright and fair use
- behavioral targeting, geo-targeting and related privacy issues
- legal issues surrounding online advertising and keyword buying
- ethics of geo-filtering, data-scraping and user-profiling
- emerging issues in mobile content distribution

The conference was presented with the additional support of MLRC members Davis Wright Tremaine LLP, Dow Lohnes PLLC, Hiscox and Microsoft.



*(From left to Right) Judge Anthony Kline, Nicole Wong, and Patrick Carome*



*Matt Cohen, OneSpot.com*

## New York Times and International Herald Tribune Win Dismissal of Libel Suits in England

### *“Abuse of Process” for Libel Suits to Go Forward in England*

By David McCraw

A trial court master in England has dismissed defamation suits brought against *The New York Times* and *The International Herald Tribune* (IHT) by a former associate of the Beatles who complained about the way he was portrayed in a commentary about the death of the Beatles' one-time guru, Maharishi Mahesh Yogi. *Mardas v. New York Times Company*, No. HQ08X00875 (Q.B. 2008).

Special Master Leslie of the High Court of Justice, Queen's Bench Division, concluded that it would be an “abuse of process” to permit the two lawsuits, based on the same article, to go forward because the plaintiff's alleged reputational harm was limited and the costs of preparing and trying the case would be “monumental.” The court took special note of the limited circulation of the articles in England and the difficulties the court and the parties would face in presenting evidence about events that were more than 40 years old.

The claimant, Alex Mardas, was known as “Magic Alex” in the 1960s when he struck up a friendship with John Lennon. Mardas became a Beatles insider known for his extravagant claims about the magical inventions he was working on and was later hired to create a recording studio for Apple Records. Mardas was mentioned in passing in the opinion piece that *The Times* and the IHT published in February 2008 exploring the Maharishi's influence on the Beatles. The article referred to Mardas as a “supposed inventor and charlatan.” It then recounted how he had spread rumors that the Maharishi had made improper sexual advances toward a female follower during the Beatles' visit to the Maharishi's ashram in India in 1968. According to several published histories of the Beatles, those rumors played a role in the Beatles' disillusionment with the Maharishi and in the decision by George Harrison and John Lennon to leave the ashram.

The information about Mardas contained in the piece repeated widely known bits of Beatles lore. Several memoirs have explored Mardas's role in the Beatles' falling out with the Maharishi, and articles and books about the Beatles regularly discuss Mardas's failed attempt to create the Apple studio and his pronouncements that he could create such amazing things as electric paint and force fields that would make buildings invisible.

Mardas now lives in Greece. He commenced the two lawsuits in London in March. Justice Leslie dismissed the cases in a written judgment on June 10, 2008.

While there was clearly publication in England sufficient to establish jurisdiction under U.K. law, Master Leslie noted that the article had limited readership in England. It did not appear in the print edition of the IHT, and only 177 copies of *The Times* circulated in England. The court found that there were four hits on the on-line version of *The Times* story and 27 hits on the IHT's on-line version, although on both websites the article remained available to readers after the initial publication. Master Leslie then addressed the exorbitant costs of trial, which he predicted would last four weeks, involve testimony from the surviving Beatles and many others, and engender argument over the admissibility of prior publications about the events. He envisioned that, under the circumstances, the “primary motivation of both parties would become the recovery of their costs” under English law, which requires the loser to pay.

In finding that the cost and effort far outstripped any recovery that Mardas might win, Master Leslie quoted Justice Eady: “The game is not worth the candle.” Then, after citing a Court of Appeal decision from a Dow Jones case on the same theme (“[these cases] are not even worth the wick”), he took the analogy one step further, saying that in the action against *The Times*, the phrase “not even worth the match” was deserved.

Master Leslie based his decision in part on the court's traditional duty of “dealing with a case proportionately, and allotting to it an appropriate share of the court's resources.” He noted that Mardas was not without a remedy: he was free to bring suit against *The Times* in the United States and against the IHT in Paris, where it is published – jurisdictions where the papers had substantially larger circulations.

Mardas has initiated an appeal to a judge of the High Court.

Both *The Times* and the IHT are owned by The New York Times Company.

*The newspapers were represented by Mark Stephens and Pia Sarma of Finers Stephens Innocent, Geoffrey Robertson of Doughty Street Chambers, and David Sherborne of 5 Raymond Buildings. Mardas was represented by the law firm of Stockler Brunton.*



## Across the Pond: English Court of Appeal Upholds JK Rowling's Son's Breach of Privacy Claim

By David Hooper

Last year I described how Mr Justice Patten had struck out the claim brought on behalf of JK Rowling's son David for breach of privacy in respect of unauthorised press agency photos published in the press. See "*The Other Side of the Pond*" *MediaLawLetter* Oct. 2007 at 40.

The salient facts were that a press agency took long lens photos surreptitiously of J K Rowling's then 19-month-old son David. The agency's role in life is revealed by its boast to be "The World's Biggest and Best Celebrity Picture Agency" with a revelatory website [www.mrppaparazzi.com](http://www.mrppaparazzi.com). The photos were fairly mundane pictures of the Murray (Rowling) family going from their apartment to a local café.

They knew J K would not have consented to the photos. They showed David's face and there was no attempt to pixelate the photos. There was no evidence of any distress being caused by the photos being taken nor of harassment there was no reason to suppose that David was aware of the fact that the pictures had been taken.

### *Court of Appeals Decision*

The case was heard before a strong Court of Appeal presided over by its senior judge Sir Anthony Clarke, Master of the Rolls, and the decision was handed down on 7 May 2008. *Murray v Big Pictures (UK) Ltd* (2008) EWCA 446

The case had to navigate between the *Campbell*

*v MGN* (2004) 2 AC 457 where Baroness Hale had indicated that the law of privacy was not likely to be engaged by taking a picture of someone popping out for a pint of milk and the *Hannover v. Germany* case (2005) 40 EHRR 1, where pictures of Princess Caroline in and around a restaurant were held by the European Court of Human Rights to engage the law of privacy.

The underlying principles for resolving such apparent conflicts if there is a dispute between a House of Lords decision and an ECHR ruling is that the Court of Appeal should follow the House of Lords decision. This was not the trial of David's claim, although it is likely that the case

will be settled beforehand on the basis of the Court of Appeal's ruling. The issue was simply whether, on the assumed facts, there was a triable case to be heard.

David was entitled to have his case heard unless on the assumed facts, the defendant was bound to succeed. In a nutshell, the Court of Appeal's ruling was that the law of privacy should protect a child from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photos in a public place for publication which the person who took the photo knew would not be consented to on behalf of the child.

There was also a claim under the Data Protection Act 1998 on the basis that David's personal data as revealed by the photos had been processed unlawfully and unfairly. On the basis of the Court of Appeal's ruling that claim is also likely to be successful. It is a statutory variant on the law of privacy.

The test for privacy is that the essential touchstone of private life is whether or not in respect of the disclosed facts the person in question had a reasonable expectation of privacy. Lord Nicholls in the *Campbell* case had indicated that the publication of the material must be highly offensive to be actionable. That, the Court of Appeal felt, related to the balancing exercise between the Article 8 right of privacy and the Article 10 right of freedom of speech rather than to whether the law of privacy was engaged.

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### **the Court of Appeal's ruling was that the law of privacy should protect a child from intrusive media attention**

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The fence for the engagement of the law of privacy itself is set rather lower. Lord Hoffmann produced a helpful definition of privacy in that the law focuses on the protection of human autonomy and dignity and the right to control the dissemination of information about a person's private life and the right to the esteem and respect of other people. With this right of privacy goes a reasonable expectation of privacy, the test for which is objective. What would a person of ordinary sensibility feel if placed in the same position as the claimant and faced with the same publicity?

*(Continued on page 10)*

**Across the Pond: English Court of Appeal Upholds JK Rowling's Son's Breach of Privacy Claim**

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The test of reasonable expectation of privacy is a broad one. One looks at all the circumstances of the case, the attributes of the claimant, the nature of the activity in which the claimant is engaged, the place at which the event happened, the nature and purpose of the intrusion, the absence of any consent (whether known or inferred), the effect on the claimant and the purposes for which the information came into the hands of the publishers.

The Court of Appeal felt that Mr Justice Patten had paid insufficient attention in this case to the fact that the claimant was a child. The test he should have applied was did the child have a reasonable expectation of privacy in the sense that a reasonable person in his position would feel that the photograph should not be published. It was, the Court of Appeal felt, at least arguable that David had a reasonable expectation of privacy and the case should go for trial.

In reaching this conclusion, the Court of Appeal borrowed from Clause 6 of the Press Complaints Commission Editorial Code of Practice:

*“Editors must not use the fame, notoriety or position of a parent or guardian as the sole justification for publishing details of a child’s life. The acid test in writing about the child of a public figure who is not famous in his own right is whether the newspaper would write such a story if it were about an ordinary person.”*

The *Murray* decision is another significant expansion of the English law of privacy and one that is important for publishers and their advisers to study. The likelihood is that the case will not go to the House of Lords. Accordingly there will be greater protection for the children of celebrities and probably greater protection for celebrities themselves in respect of unauthorised photographs, which are not obviously intrusive.

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



The image shows the front cover of a book. At the top left is the MLRC logo (Media Law Resource Center). Below it, the text reads '50-State Survey' and 'Employment Libel and Privacy Law 2008'. At the bottom, it says 'REPORTS FROM ALL FIFTY STATES, THE DISTRICT OF COLUMBIA AND PUERTO RICO' and 'Edited by the Media Law Resource Center, Inc.'

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## Keyword Advertising in France: Supreme Court Refers Issue to the Court of Justice of the European Communities

By Jean-Frédéric Gaultier and Marie Jourdain

Since 2003, French courts have been witnessing ever-increasing litigation surrounding keyword advertising, pitting trademark owners against advertising-link providers and/or advertisers.

The scenario at issue is the following: an advertising-link provider (e.g. Google AdWords, Overture Services) offers to sell to an advertiser a link to the latter's website, which is displayed as soon as a keyword, previously chosen by the advertiser, is entered by an internet user in the course of a internet search. The advertising link is usually displayed next to the natural search results under the heading "commercial links" or "sponsored links". In addition to being paid, the advertising-link provider plays a role through (i) providing a key-word suggestion tool, (ii) which suggests a list of the most frequently entered search-related key words, and (iii) activating the advertising-link.

The keyword constitutes the cornerstone of the success of the advertising link in that it triggers the advertisers' website display. When said key word is identical or similar to the trademark of a third party, which has not authorised such use, the resulting referencing is called "*position squatting*" in France.

Considering the numerous decisions issued by French courts in respect of position squatting (more than 30 decisions over the last five years), a general trend in favour of trademark owners, whose actions have been successful in almost all cases, appears to be emerging. Nevertheless, French case law is still muddled as regards the legal grounds on which position squatting is sanctionable and, in particular, as to whether (i) advertising-link providers and advertisers may be held liable for trademark infringement and, (ii) the legal status of advertising-link provider, i.e. advertising agency or internet service provider. This uncertain situation also extends to the rest of the European Union, many contradictory decisions having been rendered by other national courts.

This issue might be settled in the coming years since the French Supreme Court has issued on May 20, 2008 three decisions in which it has posed interlocutory questions to the Court of Justice of the European Communities (ECJ).

*See* French Supreme Court, commercial division, 20 May 2008: decision n°06-20.230, *Google France, Google Inc vs. Louis Vuitton Malletier*; decision n°06-15.136 CNRRH, *Mr. Thonet, Mr Raboin and Tiger vs. Google France* and decision n°05-14.331 *Viaticum and Luteciel vs. Google France*.

The ECJ is asked to construe the Directive of 21 December 1988 relating to trademarks (Directive n° 89/104/EEC of the Council, of 21 December 1988, to reconcile the Laws of the Member States relating to trademarks) and the Council Regulation of 20 December 1993 on the Community trademark (Council Regulation n°40/941 of 20 December 1993 on the Community trademark) by answering the following questions:

### As regards advertising-link providers' liability:

- when making available to advertisers key words reproducing or imitating third parties' trademarks and organising, through a positioning agreement, the creation and the preferred display of advertising links that redirect internet users to advertisers' websites promoting and offering for sale either (i) identical and/or similar goods to those designated by the trademarks or, (ii) goods infringing the trademarks, does the advertising-link provider make use of a trademark in a manner susceptible to justify prohibition by the owner of such trademarks?
- Assuming that the above-mentioned use does not constitute a trademark use that may be prohibited by its owner, may the advertising-link provider be considered as providing a data company service consisting in the storage of information provided by a recipient of the service within the meaning of the Directive 8 June 2000 on Electronic Commerce such that the liability of the advertising-link's provider may only be incurred if previously notified by the trademark's owner of the fact that the adver-

(Continued on page 12)

**Keyword Advertising in France:  
Supreme Court Refers Issue to the Court of Justice of the European Communities**

*(Continued from page 11)*

tiser is making an non-authorized use of the trademark?

As regards advertisers' liability:

- When reserving key words, reproducing or imitating third parties' trademarks, that redirect internet users to its internet website in order to promote and offer for sale identical and/or similar goods to those designated by the trademarks, does the advertiser make use of a trademark in such a manner as to justify prohibition by the owner of such trademark?

No doubt all entities involved in position-squatting matters will be eagerly awaiting the decision of the ECJ and, when it is known, to subject it to thorough analysis:

- advertising-link providers since, whatever the decision issued by the Court, it will probably have significant consequences, as this advertising system is a critical component of the business models of internet search engines as well as of shopping sites;
- advertisers, who are the first to derive benefit from position squatting; and
- trademark owners, who may suffer damageable consequences in the event of position squatting, including goodwill diversion, trademark devaluation and/or erosion, loss of profits, etc.

*Jean-Frédéric Gaultier and Marie Jourdain are Avocats à la Cour at Clifford Chance Europe LLP.*

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## Journalist Wins Case Before Inter-American Court on Human Rights

### *Argentina Ordered to Amend its Criminal Defamation Laws*

By Eduardo Bertoni

In 1989 Eduardo Kimel, an Argentinean journalist and writer published the book “The Massacre of San Patrick.” The book tells the story of the killing of five monks in 1976 during the last dictatorship in Argentina. In relation to the judicial investigation of the killings, Kimel expressed in one paragraph his opinion about the attitude of the judges during the dictatorship and criticized the judge who was in charge of the case.

Kimel wrote that, in general, the judges were accomplice with the repression during the dictatorship and that a lot of evidence related to the killings was not considered. He added that when it was clear that the order for the killings had been made by the core of the military power, the investigation was paralyzed.

In 1989, the judge in charge of the case initiated a criminal prosecution against the journalist alleging that the book had damaged his honor. The journalist was convicted, sentenced to one year in prison and ordered to pay 20,000 US dollars. After a very long domestic litigation process, Kimel brought his case to the Inter-American Commission on Human Rights, which sent the case to the Inter-American Court on Human Rights in 2007.

The American Convention on Human Rights and the American Declaration of the Rights and Duties of Man are the principal instruments through which the inter-American system provides for the protection of human rights. The organs responsible for enforcing these international obligations are the

Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. A brief description of these two organs is available at <http://www.cidh.org/Basicos/basic1.htm>

After almost two decades of an unjust conviction, Kimel found relief on May 2, 2008, when the Inter-American Court established that criminal defamation laws in Argentina are against the American Convention on Human Rights. *Kimel v. Argentina* (May 2, 2008). The complete decision of the Court is available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_177\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_esp.pdf) (only in Spanish).

#### *Criminal Defamation in Latin America*

Libel, slander, and defamation laws continue to be used in Latin America. Criminal legislation to defend the honor of govern-

ment officials has been used as a tool to put psychological pressure on journalists. Just to cite few examples, in August 2006 the Supreme Court of Justice of Uruguay issued a five-month prison sentence for journalist Carlos Dogliani for the crime of defamation. Another example took place in May 2006 when the Fourth Chamber (Constitutional branch) of the Supreme Court of Justice of Costa Rica rejected a constitutional challenge against Article 7 of the 1902 Press Law, which punishes crimes of libel and slander committed by the press with up to 120 days in jail.

However, it is important to highlight that some countries have started to change. For instance, in April 2007 criminal defamation laws were repealed at the federal level in Mexico. Previously, in May 2006, the “Law of Civil Responsibility for the Defense of Honor, Private Life, and Self Image,” had eliminated “honor crimes” from the Federal District Penal Code.

#### *Inter-American Court Decision*

The Inter-American Court in the *Kimel* case analyzed the criminal defamation legislation in Argentina’s Penal Code and concluded that it is contrary to Articles 9 (principle of legality) and 13.1 (freedom of expression), in relation to Articles 1.1 (duty of the States to respect human rights) and 2 (duty of the States to adopt means to adapt internal legal system) of the American Convention.

For these reasons, the Inter-American Court ordered Argentina to adjust its domestic laws to be in accordance with the American Convention on Human Rights. In other words, the Court ordered Argentina to repeal or change its current criminal defamation laws. The Inter-American Court also ordered the State to annul the effects of Kimel’s criminal and civil sentences and to pay damages.

The Court expressed that “Criminal Law is the most restrictive and severe means for establishing responsibilities with respect to illicit conduct” and that, therefore, “the broad definition of crimes that protect the honor of people can run against the Criminal Law principles of minimum intervention and of last resort.”

Furthermore, the Court understood that the possibility of codifying the elements of these crimes “must be analyzed with special caution, weighing the extreme gravity of the conduct displayed by

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**the Court ordered Argentina to repeal or change its current criminal defamation laws.**

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## Journalist Wins Case Before Inter-American Court on Human Rights

(Continued from page 13)

the alleged offender, his/her intention, the characteristics of the damage unjustly caused and other information tending to show the absolute necessity of resorting, in a truly exceptional way, to measures under criminal law.”

Moreover, the Court noted that an “opinion cannot be subject to legal penalties, especially when it involves a value judgment regarding an official act by a public official discharging his duties.” Unofficial translations of paragraphs of the decision in CELS, *A new Decision in Favor of Free Expression: the Inter-American Court of Human Rights Compels the Argentine State to Reform its Laws Against Slander and Libel*, press release issued on May 23<sup>rd</sup>, 2008.

### Other Recent Cases

The *Kimel* case follows others in which the Inter-American Court decided against criminal defamation laws.

One previous case was the one about Mauricio Herrera Ulloa, a journalist in *La Nación* newspaper who published a series of articles in 1995 in which he partially reproduced information that appeared in the Belgian media on alleged wrongdoings by a Costa Rican honorary diplomat to the International Atomic Energy Organization in Austria. The official sued the journalist for the crime of defamation, libel and publication of offensive material. On July 2, 2004, the Inter-American Court issued a judgment finding that Costa Rica had violated the right to freedom of expression of Mauricio Herrera Ulloa, and ordered the nullification of the judgment that convicted the journalist. Case of *Herrera Ulloa v. Costa Rica* at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf)

Another case was about statements by presidential candidate Ricardo Canese, made to the Paraguayan media, in which he criticized his rival, Juan Carlos Wasmosy, to whom he attributed alleged irregularities in connection with the construction of the Itaipu binational hydroelectric plant and his alleged links to the family of former dictator Alfredo Stroessner. Canese’s statements of August 1992 were done in the framework of the political campaign for the 1993 presidential elections. Part of the construction of the plant was entrusted to the company CONEMPA, whose board of directors Wasmosy had chaired. On October 23, 1992, the directors of CONEMPA filed suit against Canese for the crimes of defamation and slander. On August 31, 2004, the Inter-American Court of Human Rights issued a judgment in which it found that Paraguay had violated the right to freedom of thought and expression of Ricardo Canese, and ordered the payment of reparations to Mr.

Canese. Case of *Ricardo Canese Case v. Paraguay* at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf)

### Conclusion

The difference between *Kimel* and its predecessors is that in *Kimel* the Inter-American Court ordered the state to modify its criminal defamation legislation. Since many of the criminal defamation laws in Latin America have a wording similar to the one in the Argentinean law, it is expected that the Inter-American Court’s decision will have an impact not only on Argentina, but also on the rest of the region.

The decision, though, reveals a split among the judges about the continued viability of criminal libel laws even under more protective standards. In obiter dictum found in paragraph 78, the Court noted that the use of criminal law against some expressions and opinions is not contrary to the American Convention on Human Rights. The Court mentioned some safeguards to limit the possibility of such use, such as the introduction of the “actual malice” doctrine related to who has the burden of the proof during the trial. However, this “obiter dictum” is unfortunate because it could be read as a contradiction with the rest of the decision.

We could interpret the obiter and put it under the best possible light saying that the Court wanted to leave open the possibility that criminal law could be used against certain expressions related to hate speech and the incitement of violence, for example.

The obiter also shows there has been tension between different judges. Judge Garcia Sayan, in a concurring opinion, emphasized that it is possible to use criminal law against certain expressions that could damage the honor of public officials. Judge Garcia Sayan’s opinion should not be read as Court’s opinion, but rather as his own, which contradicts that of other judges. The former president of the Court, Judge Garcia Ramirez clearly endorsed the opinion that the Court had started to develop in its previous decisions, which is that the state should not apply criminal law in those cases.

*Eduardo Bertoni, the Executive Director of the Due Process of Law Foundation, a non-governmental organization based in Washington DC, was formerly the Special Rapporteur for Freedom of Expression at the Organization of American States (2002-2005). He represented Kimel in his Inter-American Commission on Human Rights petition together with the Center for Legal and Social Studies (CELS for its Spanish acronym), the Center for Justice and International Law (CEJIL), and Alberto Bovino and Santiago Felgueras.*

## Washington Court of Appeals Strikes Down State's Criminal Libel Statute

### *State Law Failed to Require Actual Malice; Was Vague and Overbroad*

By Eric M. Stahl and Kristina Silja Bennard

The Washington Court of Appeals has struck down the state's criminal libel law in its entirety, holding that the statute violates the First Amendment and is facially unconstitutional. The 3-0 decision, *Parmelee v. O'Neel*, No. 35652-0-II (Wash. Ct. App. June 19, 2008), is the state's first published opinion to address the constitutionality of the criminal libel law.

Washington's criminal libel statute pre-dates statehood, but has rarely been invoked. The most recent reported prosecution was in 1925, in a case in which the state Supreme Court reversed dismissal of libel charges against an individual for signing a recall petition for a public official that allegedly contained untrue and malicious accusations. *State v. Wilson*, 241 P. 970 (1925).

Prosecutors have let the statute fall into virtual disuse, and for good reason. The Washington statute is similar to the Louisiana criminal libel law that the U.S. Supreme Court held, over 40 years ago, violated the First Amendment because it permitted liability for speech that was true, and for false statements made without actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 74, 78, (1964). In fact, *Garrison* cites Washington's criminal libel law as an example of the type of statute that failed constitutional scrutiny. *Id.* at 70 n.7

The libel statute has remained on the books, however, and officials at the Washington State Department of Corrections invoked it in 2005, when they were looking for a way to punish inmate Allan Parmelee for a scathing letter

violation of the state criminal libel law, RCW 9.58.010.

The statute makes it a crime – punishable by up to one year in jail and a \$5,000 fine – to utter words that tend (1) “[t]o expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse”; (2) “[t]o expose the memory of one deceased to hatred, contempt, ridicule or obloquy”; or (3) “[t]o injure any person, corporation or association of persons in his or their business or occupation.” RCW 9.58.010.

Speech falling within these three categories is prima facie “malicious,” and thus subject to prosecution, “unless justified or excused.” RCW 9.58.020. To be “justified,” a statement must not only be true, but also “fair” and “published with good motives and for justifiable ends.” *Id.* To be “excused,” the speaker must have had reasonable grounds to believe the statement's “truth” and “fairness” “after a fair and impartial investigation.” *Id.*

In his lawsuit, inmate Parmelee claimed that the disciplinary action against him violated his First Amendment rights and was based on an unconstitutional statute. The Court of Appeals agreed. Interestingly, the Court addressed the constitutional issues even though it questioned whether Parmelee raised the issue before the trial court. The Court held that it could do so under its authority to consider “manifest constitutional errors for the first time on appeal.” Perhaps underscoring the extent of the state's constitutional error in relying on the statute, the Court also noted that the state's attorneys “refus[ed] to address the constitutionality of the statute in either their briefing or at oral argument.”

The Court found, first, that “Washington's criminal libel statutory scheme does not meet minimum constitu-

tional standards under *Garrison*.” The statute failed because it contains precisely the features that *Garrison* held to be unconstitutional: it allows prosecution for “(1) false statements made without actual malice or (2) true statements made without good motive or intent.” The Court concluded that these features made the statute facially un-

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### **The statute failed because it contains precisely the features that *Garrison* held to be unconstitutional**

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he wrote complaining about prison conditions. In addition to substantive criticisms, the letter labeled the prison superintendent a “man-hater lesbian.” Parmelee was cited under a catch-all prison regulation that permitted discipline for “[c]ommitting any act that is a misdemeanor under local, state, or federal law that is not otherwise included in these rules.” The “misdemeanor” alleged was

**Washington Court of Appeals Strikes Down State's Criminal Libel Statute**

*(Continued from page 15)*

constitutional such that it could not be applied in any circumstances.

*Parmelee* also found the statute unconstitutional for two additional, alternative reasons. The Court found the statute overbroad for essentially the same reasons that it was facially unconstitutional – namely, that it “prohibits true speech and false speech made without actual malice.” And the Court held that the statute was void for vagueness “because it includes the term ‘malicious’ without reference to ‘actual malice’ as required under *New York Times* [*v. Sullivan*]. A person of common intelligence may guess that ‘malicious’ in RCW 9.58.020 refers to the common law meaning of malice as opposed to the *New York Times* ‘actual malice’ standard.”

The Court declined to determine whether the statute was unconstitutional as applied to *Parmelee* because the record was inconclusive and because the statute’s facial invalidity made such a determination unnecessary.

*Eric Stahl is a partner and Kristina Silja Bennard is an associate with Davis Wright Tremaine LLP in Seattle, Wash. They appeared in the Parmelee case on behalf of amicus curiae ACLU of Washington, which urged the Court of Appeals to find the Washington criminal libel statute unconstitutional.*

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## Second Circuit Affirms Dismissal of Lawsuit Over Diet Book

### *Diet Advice and Ideas Fully Protected by First Amendment*

The Second Circuit affirmed dismissal of a lawsuit over the popular diet book *Dr. Atkins' New Diet Revolution*, holding that the book's "advice and ideas are non-commercial speech, fully protected by the First Amendment." *Gorran v. Atkins Nutritionals, Inc.*, No. 07-0120, 2008 WL 2164656 (May 22, 2008) (Sotomayor, Wesley, Wallace, JJ.).

#### **Background**

The plaintiff, a 54-year old Florida businessman, sued Atkins Nutritionals, Inc., and the estate of its founder Dr. Atkins, for products liability, negligent misrepresentation and deceptive trade practices under Florida law. Plaintiff claimed that he followed the Atkins Diet's high-fat, high-protein, low-carbohydrate regimen for two years until he had to have an angioplasty to unclog one of his coronary arteries. The gist of plaintiff's claim was that the diet book, a related website and the company's food products were "defective and unreasonably dangerous."

In December 2006, U.S. District Court Judge Denny Chin granted the defendants' motion to dismiss for failure to state a claim. *See* 464 F. Supp. 2d 315 (S.D.N.Y. 2006). The claims failed, the court explained, because the diet book is noncommercial speech entitled to full First Amendment protection even though it recommends the company's own food products. The book discusses, among other things, how the diet works, why weight loss occurs, general nutritional guidelines, and disease prevention. The court stated:

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

advice and ideas. The concepts may be controversial and the subject of criticism, but they are protected by the First Amendment.

*Id.* at 326-29. In a footnote, Judge Chin shared his own simple diet advice: "Run more, eat less."

The plaintiff solely appealed the dismissal of his claim under the Florida Deceptive and Unfair Trade Practices Act. *See* Fla. Stat. ' 501.204(1) ("FDUTPA"). Plaintiff contended that the defendants violated FDUTPA by (1) promoting the low-carbohydrate Atkins diet and related products as "safe for all customers"; (2) "failing to give adequate warnings about the adverse health consequences of a high-fat diet"; and (3) "claiming that the diet was 'fool-proof' and a guaranteed success when they well knew that there would be people for whom the diet would not be safe." Plaintiff sought minimal money damages (\$40 for the cost of two editions of the book and \$25 for food products), but sought an injunction requiring health warnings on all Atkins-related books, websites and products.

#### **Second Circuit Decision**

In a summary order, the Second Circuit affirmed dismissal, holding that the defendants' advice and ideas were noncommercial speech, fully protected by the First Amendment. The book and website are not "expressions related solely to the economic interests of the speaker and its audience, but instead seek to communicate a particular view on health, diet, and nutrition, with an offer to purchase the message."

*Plaintiff was represented by Daniel Kinburn, Physicians Committee for Responsible Medicine.*

*Defendants were represented by Thomas Leghorn, Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York; and Alan Mansfield, Greenberg Traurig, LLP NY.*

## Fifth Circuit Affirms Dismissal of MySpace “Sexual Predator” Suit

### *Website Not Liable For Third Party Content*

By Christopher Popov

*Appellate Court Decision*

On May 16, 2008, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal of a highly publicized case arising from the statutory rape of a 14 year-old girl by a man she allegedly met on MySpace.com. *Doe v. MySpace, Inc.*, No. 07-50345, 2008 WL 2068064 (5th Cir. May 16, 2008) (Garwood, Clement, Elrod, JJ.). The court held that the plaintiff’s negligence and gross negligence claims against MySpace, Inc. and its parent company, News Corporation, were barred by the Communications Decency Act (“CDA”), 47 U.S.C. § 230, which immunizes interactive computer services from claims that treat them as publishers of user-generated content.

The court began by noting that, in enacting the CDA, Congress recognized the cultural benefits of a robust Internet and sought to ensure its continued growth, free from government intervention. *Id.* at \*4. The court also observed that several of its sister circuits have “construed § 230 broadly in all cases arising from the publication of third party content.” *Id.* (citing *Green v. Am. Online* (AOL), 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984–86 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997)).

#### *Issues on Appeal*

The plaintiff raised three main arguments on appeal. First, she argued that the district court erred in applying CDA immunity, as she was not suing because MySpace published any particular content, but rather because it failed to implement reasonable safety measures to prevent minors from communicating with sexual predators. Second, she argued in the alternative that, to the extent her claims were based on MySpace’s publication of any particular content, MySpace was partially responsible for the creation of that content because its search and formatting features make it possible to browse for a user’s profile using standard search criteria, including age, body type, and geographic location. Third, the plaintiff argued that the district court erred in holding that MySpace had no common law duty to protect her daughter by arguing that MySpace, like a “brick and mortar” business, has an affirmative duty to protect its users or invitees from foreseeable injuries.

### ***Doe is significant, because it is the first case to hold that the CDA bars claims based on offline conduct that resulted from seemingly innocuous online communications***

argument—that the CDA did not apply in this case because she was suing over MySpace’s failure to implement reasonable safety measures, and not because it published any particular content. Like the district court, the Fifth Circuit found this argument to be disingenuous. To demonstrate the point, the court relied upon *Green v. America Online* (AOL), 318 F.3d 465 (3d Cir. 2003), a case in which the plaintiff sued AOL after he received derogatory comments and a computer virus in an AOL “chat room.”

After acknowledging these precedents, the court considered Doe’s first



In attempting to plead around the CDA’s immunity provisions, Green argued that he was suing not because AOL published the virus or the derogatory comments, but because it failed to honor its “community guidelines,” which pledged to protect AOL users from harassment. Despite the plaintiff’s characterizations of his claims, the Third Circuit recognized that there was “no real dispute that Green’s fun-

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### Fifth Circuit Affirms Dismissal of MySpace “Sexual Predator” Suit

(Continued from page 18)

damental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network.” *Id.* at 471. The court further held that “decisions relating to the monitoring, screening, and deletion of content” are “actions quintessentially related to a publisher’s role” and were therefore protected under § 230 of the CDA. *Id.*

Drawing upon the analysis in *Green*, the Fifth Circuit similarly concluded that Doe’s allegations were “merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace’s role as a publisher of third party content.” *Doe*, 2008 WL 2068064, at \*6. Accordingly, the court held that Doe’s claims were barred under the CDA.

The court did not, however, address the merits of Doe’s argument that CDA immunity ought not to apply because MySpace was an alleged co-creator of the content at issue—an argument that sought to exploit the Ninth Circuit’s *en banc* decision in *Fair Housing Council v. Roommates.com*, No. 04-56916, 521 F.3d 1157 (9th Cir. 2008) (*en banc*). After reviewing the record and quoting extensively from the hearing on MySpace’s Motion to Dismiss, the court held that *Doe* waived this argument by failing to raise it in the district court. *Doe*, 2008 WL 2068064, at \*8. The court also declined to consider Doe’s argument that MySpace had a duty under Texas common law to protect its users from foreseeable injuries, similar to the duty that “brick and mortar” businesses owe to their customers. Having determined that MySpace was immune from Doe’s

claims, the court saw “no need ... to assess the viability of Doe’s claims under Texas common law in the absence of the CDA.” *Id.*

### Conclusion

With the *Doe* opinion, the Fifth Circuit joins several other circuits in broadly interpreting CDA immunity to bar all “claims against Web-based interactive computer services based on their publication of third-party content” *Doe*, 2008 WL 2068064, at \*8. *Doe* is significant, because it is the first case to hold that the CDA bars claims based on offline conduct that resulted from seemingly innocuous online communications; in prior cases, the plaintiffs’ injuries were based at least in part on the published content. It is also the first case to extend CDA immunity to claims that were purportedly based on a website’s failure to protect minors, as opposed to its publication of any particular content. These holdings provide some assurance that courts will not tolerate artful pleadings designed to avoid CDA immunity, especially where the interactive computer service’s only role was to publish content that ultimately lead to the plaintiff’s injuries.

*MySpace was represented by Harry M. Reasoner, Thomas S. Leatherbury, Cliff Thau, Michael D. Marin, Christopher V. Popov, and Matthew B. Ploeger of Vinson & Elkins L.L.P., and by Ellen S. Agress and Eugenie C. Gavenchak of News Corporation, Michael J. Angus of Fox Interactive Media, Inc., and Jill H. Ratner of Fox Group.*

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## State Right of Publicity Claims Are Not Barred by Section 230

### *Court Holds All Intellectual Property Claims Outside the Scope of Statute*

In an interesting ruling the New Hampshire federal district court recently held that a website was not protected by Section 230 of the Communications Decency Act for a third party posting that allegedly violated plaintiff's right of publicity. *Doe v. Friendfinder Network, Inc., et al.*, 540 F.Supp.2d 288 (D.N.H. 2008) (Laplante, J.).

The plaintiff sued over a false profile on an adult website. While the court dismissed the bulk of plaintiff's claims under Section 230, it found that a state right of publicity claim was not barred by Section 230. The court relied on what it deemed the "plain language" of § 230(e)(2) which provides that the statute "shall [not] be construed to limit or expand any law pertaining to intellectual property."

#### **Background**

The "Jane Doe" plaintiff sued over a false profile posted to AdultFriendFinder.com, an online sex personals website operated by defendants Friendfinder Network, Inc. and Various, Inc.

In June 2005, an unknown person created a profile for a women with the screen name "petra03755." The profile stated that "petra03755 was a recently separated 40-year old woman in the Upper Valley region of New Hampshire seeking "Men or Women for Erotic Chat/E-mail/Phone Fantasies and Discreet Relationship." The profile was created by using an online form which queried users about their biographical data and sexual interests. The person who posted the profile also uploaded a nude photo of a women.

Plaintiff complained about the profile and the defendants removed it from the website, but a "teaser profile" still appeared as advertising on third party websites. Although the plaintiff was not identified by name and claimed the photo was not of her, she alleged that several friends believed the profile was hers. Plaintiff filed an eight count complaint against the defendants alleging "Invasion of Property/Intellectual Property Rights" (Count I); Defamation (Count II); "Intentional/Negligent/Reckless Con-

duct" (Count III); "Dangerous Instrumentality/Product" (Count IV); Intentional infliction of emotional distress (Count V); Violation of the New Hampshire Consumer Protection Act, N.H.Rev.Stat. Ann. § 358-A (Count VI); False designations in violation of the Lanham Act, (Count VII); and "Willful and Wanton Conduct" (Count VIII).

The district court granted a defense motion to dismiss all the claims under Section 230, except plaintiff's state right of publicity and federal Lanham Act claims.

#### **Defamation & Related Claims**

The court first held that plaintiff's defamation, emotional distress and related claims were all clearly barred by Section 230. The court relied primarily on the reasoning of the First Circuit's decision in *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

In *Universal*, the First Circuit interpreted Section 230 for the first time, affirming dismissal of claims against Lycos for third party postings on an investors message board. The First Circuit specifically rejected plaintiff's argument that the website provided "culpable assistance" in creating the postings "through the construct and operation of its website."

The New Hampshire district court relied on this rationale to rule that "Section 230 bars the plaintiff's claims that the defendants acted wrongfully by encouraging the anonymous submission of profiles or by failing to verify that a profile corresponded to the submitter's true identity." This was so even where the false profile was created by using defendant's online questionnaire. To lose immunity the website would have to engage in "clear expression or other affirmative steps taken to foster unlawful activity" and here plaintiff

"has not alleged anything even approaching it."

The district court's decision was issued one week before the Ninth Circuit's en banc decision in *Fair Housing Council v. Roommates.com*, Nos. 04-56916, 04-57173; 2008 WL 879293 (9th Cir. Apr. 3, 2008), which analyzed this issue in detail. In addressing the issue of liability for user content created through online prompts and questionnaires, Judge Kozinski affirmed the

*(Continued on page 21)*



## State Right of Publicity Claims Are Not Barred by Section 230

(Continued from page 20)

broad scope of protection afforded by Section 230, but carved out a narrow exception for online questionnaires that compel users to submit information that is itself illegal. The New Hampshire district court decision appears consistent with this approach.

The New Hampshire district court also held that that the “teaser profiles” used as online advertising for the website were protected by Section 230.

Section 230 depends on the source of the information in the allegedly tortious statement, not on the source of the statement itself. Because “petra03755” was the source of the allegedly injurious matter in the profile, then, the defendants cannot be held liable for “reposting” the profile elsewhere .... *Friendfinder* at 296.

### Right of Publicity & Section 230

The court next considered whether plaintiff’s state right of publicity claim was barred by Section 230.

The Ninth Circuit Court of Appeals had considered this issue last year and held that Section 230 immunizes interactive computer service providers from state law right of publicity claims relating to third-party created content. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir.), cert. denied, 2007 WL 2455134 (U.S. 2007).

The plaintiff in *Perfect 10*, the publisher of print and online adult magazines, sued a credit card processing company and web, hosting company for, among other things, violating plaintiff’s right of publicity under California law. On that issue, the Ninth Circuit held that § 230 provided the defendants with immunity. Only federal intellectual property claims are outside the scope of § 230 immunity. The Ninth Circuit noted that while federal intellectual property law is relatively well-established, state laws are not uniform, bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Thus “[b]ecause material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.” *Perfect 10* at 1118-1119.

The New Hampshire district court disagreed, arguing that the relevant portion of Section 230 makes no distinction between

state and federal intellectual property. And the court criticized the Ninth Circuit for relying on the “intent” rather than the express language of the statute

Here, the language of § 230(e) (2) itself does not suggest a limitation to federal intellectual property law, but states simply that “[n]othing in this section shall be construed to limit or expand any law relating to intellectual property.” *Friendfinder* at 300.

Moreover, the court also noted that other portions of Section 230 specifically identify federal and state law. See § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of [named federal criminal statutes] or any other Federal criminal statute”), § 230(e)(3) (“Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section”). Thus “where Congress wished to distinguish between state and federal law in § 230 it knew how to do so.”

The court disagreed with the Ninth Circuit’s assessment that the state intellectual property laws differ significantly from each other or from federal law so as to unduly burden interactive computer service providers and users.

This court has no reason to believe that reading § 230(e) (2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law—an obligation that persists under even *Perfect 10*’s construction of the CDA. That court’s view that “inclusion of rights protected by state law within the ‘intellectual property’ exemption would fatally undermine the broad grant of immunity provided by the CDA,” 488 F.3d at 1119 n. 7, is simply unsupported.

In conclusion the court ruled that plaintiff had sufficiently pled the elements of a right of publicity claim by alleging she had an enforceable right in her persona and that the defendants used an aspect of her persona without permission and causing her damage.

*The plaintiff is represented by W.E. Whittington, Whittington Law Associates PLLC, Hanover, NH. Defendants are represented by Ira Rothken and Jared Smith, Rothken Law Firm LLP, Novato, CA; and James Bassett and Jeffrey Spear, Orr & Reno PA, Concord, NH.*

## Women Indicted in MySpace Suicide Case

### *Criminal Charges Hinge on Violating Website's Terms of Use*

A Missouri woman who allegedly created a fake MySpace profile to cyberbully a 13 year old neighbor was indicted in mid-May by a federal grand jury in California for violating the Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 et seq. *United States v. Drew*, Crim. No. 08-00582 (C.D. Cal. indictment filed May 15, 2008).

The controversial criminal charges are based on allegedly accessing the MySpace computer network in violation of its terms of service. These terms prohibit false profiles and abusive conduct online. The charges have been described as a dangerous use of the federal statute. As one newspaper editorial pointed out, "Under this theory, millions of Americans who post inaccurate yet flattering profiles of themselves online or post angry responses in cyber-spats with friends are committing fraud on an hourly basis and could be prosecuted." *Falsehoods on MySpace*, *Washington Post*, May 26, 2008, at A16.

#### **Background**

In a highly publicized incident, the defendant Lori Drew of Dardenne Prairie, Missouri, is accused of acting together with several co-conspirators to create a false profile on MySpace, and pretending to be a 16-year-old boy named "Josh Evans." In 2006, "Josh" contacted Megan through MySpace and engaged in an e-mail correspondence over the following weeks. According to the indictment, after five weeks of flirtatious e-mails back and forth, on October 7, 2006 "Josh" sent an e-mail to Megan telling her that he was moving away. She responded by writing "I love you so much."

On October 15, 2006, "Josh" and Megan exchanged a flurry of e-mails, including messages from "Josh" saying that "I don't know if I want to be friends with you anymore because I've heard you are not very nice to your friends" and "The world would be a better place without you." After the exchange of these messages, Megan hung herself in her bedroom closet.

According to the indictment, Drew and her co-conspirators deleted the "Josh" account when they found out about Megan's suicide.

The federal indictment in California came after state prosecutors in Missouri concluded that there was insufficient evidence to file harassment, stalking or child endangerment charges against Drew, and federal prosecutors in Missouri concluded that there was no basis for prosecution.

Although the defendant, and all other individuals involved in the case reside in Missouri, the California court's jurisdiction is based on the alleged illegal use of the MySpace computer system. MySpace's corporate offices and servers are located in Los Angeles County, California.

#### **Computer Fraud and Abuse Act**

The **Computer Fraud and Abuse Act** was originally enacted in 1984 and Congress has followed with a series of amendments, most recently in 2002. Among other things, the statute makes it a federal crime to access government and private computers without authorization. Lori Drew was charged with violating 18 U.S.C. Section 1030 (a)(2)(C) which makes it a crime if a person:

intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer if the conduct involved an interstate or foreign communication.

The term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.

No reported cases consider whether using a website in violation of its terms of service agreement constitutes unauthorized access within the meaning of the statute.

#### **Internet Harassment Bills**

Legislators in Missouri and Illinois, and in Congress, moved to pass laws making Internet harassment a specific crime. The Missouri legislature passed its measure on May 19, and Missouri Gov. **Matt Blunt** was expected to sign it. *See* Mo. S.B. 818 (2008). The Illinois legislature passed a similar measure on May 22 and sent it to Illinois Gov. Rod Blagojevich. *See* Ill. S.B. 2426 (2008).

In Congress, Rep. Linda Sánchez of California and Rep. Kenny Hulshof – who is running for governor of Missouri – announced plans to introduce a bill to make "cyber-bullying" a federal offense. The bill is to be called the "Megan Meier Cyberbullying Prevention Act."

*Lori Drew is represented by H. Dean Steward of San Clemente, California.*

## Hawai'i Enacts Reporters' Shield Law

### *New Law Protects Confidential Sources and Unpublished Information*

By Jeffrey Portnoy and Gerald Kato

Hawai'i, the 50<sup>th</sup> state admitted to the Union is poised to become the 36<sup>th</sup> with a shield law for journalists—and the first to endorse a measure specifically extending protections to non-traditional news disseminators such as bloggers.

On April 29, 2008, the Hawai'i Legislature unanimously passed a bill that will allow journalists to protect confidential sources and unpublished information. Governor Linda Lingle, who earlier in her career was editor of a newspaper on the island of Molokai, is expected to sign [House Bill 2557](#), "Relating to Evidence," into law and it will take effect upon approval.

The landmark legislation enhances the public's right to know, and it provides a balance between information which reporters may have to disclose for the greater good, and the information which needs to remain protected to have a free and independent media.

Hawai'i journalists have long faced a worst-case scenario for protecting confidential sources: No statutory protection exists, and the only relevant case to reach the Hawai'i Supreme Court (In Re Goodfader's Appeal) held in 1961 that journalists had no constitutional right to conceal a source's identity. Reporters have faced the threat of going to jail for refusing to name sources, and the legal terrain in Hawai'i remained uncertain.

The impetus to provide certainty came after high-profile national stories emerged about journalists being jailed or facing the threat of jail because they declined to identify sources, such as in the Valerie Plame case. State Rep. Blake Oshiro, a Democrat, and state Rep. Gene Ward, a Republican, initiated discussions late last year on a shield law bill with news media representatives, asking them to review drafts for introduction in 2008 legislative session. The Honolulu Community-Media Council sponsored a panel discussion on journalist-source privilege in November 2007, highlighting the importance of the issue.

Oshiro, vice chair of the House Judiciary Committee, introduced a shield bill (HB 2557) as part of legislative package backed by the Democratic majority in the House. The proposal became the vehicle for discussion of a number of critical issues, including protection for non-traditional journalists, the scope of the privilege in criminal and civil

cases, and whether there should be exceptions to the privilege.

The state Attorney General's office and Honolulu Prosecutor's office stated their objections at a February committee hearing, insisting the bill was too broad and did not adequately address law enforcement concerns about serious crimes and public safety. For their part, supporters backed the bill's intent but were wary about a provision that extended the privilege to anyone who met "applicable standards of journalism ethics." That language was a red flag to the Society of Professional Journalists, which said its ethics code is voluntary and not intended to acquire the force of law.

By this time, a coalition of news media organizations was formed and a smaller task force took on the job of trying to get a bill passed. The task force included the authors of this article Jeffrey Portnoy (a media attorney with the firm of Cades Schutte), and Gerald Kato (a journalism professor at the University of Hawai'i), and Chris Conybeare (president of the Honolulu Community-Media Council) and Mark Platte (editor of The Honolulu Advertiser).

It became apparent serious differences remained during a Senate Judiciary Committee hearing March 20 where law-enforcement officials, including the Honolulu Police Department, were either opposed to the bill or demanded changes that effectively made the privilege useless. The coalition, meanwhile, supported a broad privilege for traditional and nontraditional reporters. An interesting departure came from the Big Island Press Club, composed of journalists on the island of Hawaii, which said a shield law was not needed since the First Amendment already provided adequate protections.

Senators urged the various sides to work out a compromise, and a week later Portnoy, representing the news media, met with Attorney General Mark Bennett and representatives of Honolulu Prosecutor Peter Carlisle. Bennett drafted a new bill which included law-enforcement provisions the news media found unacceptable, prompting us to submit our own draft on behalf of the coalition. The Senate committee eventually moved the news coalition's version, with the understanding negotiations would go on.

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## Hawai'i Enacts Reporters' Shield Law

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Talks, in fact continued until the last possible day for consideration by a House and Senate conference committee. On April 22, we—Portnoy and Kato—met with Bennett, and with the help of Rep. Oshiro, finally worked out a compromise. But just before the compromise bill was sent out of the conference committee, legislators opted to add three-year sunset provision in the law for reasons that were not clearly explained. We think it is to give prosecutors time to see how the law impacts actual criminal cases in Hawai'i and it proved to be a necessary concession to gain unanimous bi-partisan support from the House and Senate, which unanimously passed HB2557 on April 29 and sent it to the governor to sign into law. Despite the sunset provision, we believe this is a strong and durable piece of legislation.

This shield law bill is “journalist friendly” in several significant ways. It protects news gatherers from being forced to reveal confidential sources, or information that could lead to identifying sources. It protects unpublished information such as notes, outtakes, photographs and videos, even if it is not confidential. It provides an absolute privilege for all civil cases, except defamation, as well as a complete privilege for all non-felony criminal cases.

Hawai'i is one of the first states to take into account changing times and technologies by being the nation's first to

explicitly include bloggers and others not part of the mainstream media, through application of a function test. Non-traditional journalists will be protected if they regularly disseminate news of significant public interest and engage in activities similar to their traditional counterparts.

We're satisfied that the exceptions involving eyewitness testimony and information sought for criminal investigation and prosecution are few and narrow and that the burden of proof for overcoming the privilege are sufficiently high so as not to be easily breached.

Hawaii is expected to be the third state to enact a shield this year. The Utah Supreme Court adopted a shield law rule in January and Maine enacted a shield law in April. The states' protection of reporters clearly adds support for recognition of a federal common-law privilege and adds momentum to enactment of a federal shield law now pending in the Congress.

The Hawai'i shield law, we believe, recognizes the important role journalists play in gathering and reporting information critical to a well-functioning democracy and advances the cause of a free press across the country.

*Jeff Portnoy is a partner at Cades Schutte LLP in Hawai'i. Gerald Kato is a journalism professor at the University of Hawai'i.*



## 50-STATE SURVEYS

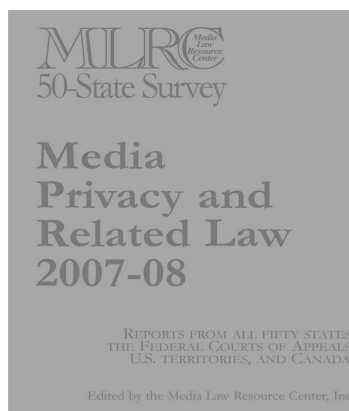
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## Maine Enacts Shield Law to Protect Journalists' Confidential Sources

By Daniel W. Walker, Sigmund D. Schutz, and Jonathan S. Piper

This past spring, Maine joined the ranks of 33 other states and enacted a journalist shield law. LD 2047, An Act to Shield Journalists' Confidential Sources, will go into effect on July 18, 2008.

Maine's version of the shield law provides a qualified privilege against compelled disclosure of confidential sources of information, information that identifies confidential sources, and confidential information obtained from a source. Unfortunately, the final version of the bill did not include any protection to the journalist for non-confidential information.

A number of interested parties supported and effectively lobbied for LD 2047. Testifying in support of the bill were the Maine Press Association, the Maine Society of Professional Journalists, the Maine Association of Broadcasters, and the Maine Civil Liberties Union. No one testified against the bill. However, the Maine Attorney General's Office participated in the work sessions on the bill and succeeded in limiting the bill to only confidential information.

The lobbying and committee work proved to be so effective that the bill received a unanimous vote from the Judiciary Committee and sailed through both chambers of the Maine Legislature without debate. On April 18, 2008, Governor Baldacci signed the bill, which is now codified as Public Law 2007, Chapter 654.

### *The Legislative Process*

Representative Jon Hinck, a first-term Democrat from Portland, sponsored LD 2047. The original draft of the bill was based almost entirely on the Media Law Resource Center model bill. In developing his original draft, Hinck also reviewed the shield laws of many states but turned back to the MLRC version of the bill, as he felt that the versions from other states had been adversely affected by the various political processes.

Rep. Hinck sought to fill a void in Maine law, as there has never been a journalist shield statute. Rep. Hinck sought much needed protection for confidential sources and whistle blowers. The original draft provided for a qualified privilege, not only for confidential sources, but for non-confidential information gathered by journalists in a journalistic capacity.

The Maine press community supported Hinck's effort, as a codification of a journalist shield law in statute would finally bring clarity and stability to an area of the law that has been unstable and unpredictable.

Before the public hearing on LD 2047, members of the journal-

ist community in Maine came to a consensus regarding the language of the bill. The only sticky issue was the definition of "journalist." However, the various groups finally agreed on the following definition and proposed it to the Judiciary Committee during the public hearing:

Any person or entity professionally or regularly engaged, in any news medium now known or hereafter devised, in gathering, preparing, collecting, writing, editing, filming, taping, photographing or disseminating written, oral, pictorial, photographic or electronically recorded information or data concerning events or matters of public concern or interest or affecting the public welfare or a person supervising or assisting that person or entity.

The Judiciary Committee held the public hearing for LD 2047 on January 24, 2008. Testifying in support of the bill were Irwin Gratz, Maine Public Broadcasting and former national President of the Society of Professional Journalists; Tony Ronzio, Editorial Director of the *Sun Journal*, representing the Maine Press Association; Daniel Walker; an attorney with Preti Flaherty, serving as legal counsel to the Maine Press Association; Jeff Inglis, Editor of the Portland Phoenix and President of the Maine Society of Professional Journalists; and Suzanne Goucher, Executive Director of the Maine Association of Broadcasters. Also, providing support but not testifying was the Maine Civil Liberties Union. No one testified in opposition.

During the public hearing, some legislators quickly demonstrated an uneasiness that this bill sought to protect non-confidential, as well as confidential, information obtained by a journalist. The supporters of the bill urged the Committee to retain the part of the bill providing a qualified privilege for non-confidential information obtained by a journalist, citing to several recent cases in Maine where subpoenas were issued to media entities to provide information as part of a civil lawsuit and an insurance investigation. The press argued that these "fishing expeditions" harm the free flow of information to the public that is constitutionally protected and that the media should not be forced to serve as a party's private investigator.

Other questions arose from the committee members as to who should be considered a journalist. Some committee members were uncomfortable that the definition of journalist in the bill went beyond what is a traditional journalist and would likely cover bloggers and other nontraditional journalists. Other committee members

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## Maine Enacts Shield Law to Protect Journalists' Confidential Sources

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were quite comfortable including a broad definition of journalist in the bill. Interestingly, the committee decided to not include a definition of "journalist" in the bill and to leave the task to the courts on a case-by-case basis.

Several legislators on the committee also questioned whether existing case law in Maine was insufficient to protect journalists and thus, whether a shield bill was needed at all in Maine. Supporters replied that the "best" case protecting journalists' sources and information obtained as part of a journalistic investigation is *In re Letellier*, 578 A.2d 722 (Me. 1990), and this case provides insufficient protections for journalists.

*Letellier* applies a case-by-case balancing test, merely weighing the potential impairment of the protected news gathering and editorial processes on the facts of a particular case in litigation against the demonstrated need in that particular case for evidence possessed by the reporter. Supporters argued to the committee that a more stable, clear, and concise method of protecting the first amendment rights of the press codified in statute was critical in Maine.

Throughout the legislative session, the Judiciary Committee held a number of work sessions on LD 2047. On February 26, 2008, the committee invited the head of the Attorney General's criminal division, William Stokes, to share his concerns that the bill would improperly protect non-confidential information obtained by journalists. The committee was swayed by his arguments and limited the bill to protecting confidential sources, information identifying the confidential source, and information obtained from the confidential source.

The committee initially voted the bill 9-4 "ought to pass as amended." However, after a series of negotiations with dissenting members of the committee, the committee reconsidered its original vote and voted the bill "ought to pass as amended" unanimously. In order to achieve this unanimous vote, the legal standard of the balancing test set forth in the bill was lowered from "clear and convincing" to "preponderance of the evidence." Additionally, a provision of the bill declaring that the source of any information obtained in violation of this law would be inadmissible was struck from the bill. The committee felt that existing Maine law was sufficient to declare inadmissible information obtained in violation of the law.

As a result of the unanimous Committee vote, the bill was placed on the "consent calendar" of both chambers of the Maine Legislature, which allows bills to pass back and forth between the bodies without debate. No roll call was ever requested for LD 2047, and the bill was enacted in both the House and the Senate "under the hammer" on April 15, 2008. Three days later, the Governor signed the shield bill into law.

### *The Legislation*

As stated before, LD 2047 creates a qualified privilege against compelling a journalist to disclose the identity of a confidential source, any information used to identify a confidential source, or any information obtained from the confidential source by the journalist while acting in a journalistic capacity. The law does not define which journalists will be covered by this privilege, leaving it to the court to determine on a case-by-case basis.

The balancing test set forth in LD 2047 is much like the tests in other shield laws around the country. In order to compel a court to disclose the identity of a source or information, the party seeking the identity of the confidential source or the confidential information must establish by a "preponderance of the evidence" all of the following:

- 1) The identity of the source or the information is material and relevant;
- 2) The identity of the source or the information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material to the claim or defense;
- 3) The identity of the source or the information is not obtainable from any alternative source or cannot be obtained by alternative means or remedies less destructive of First Amendment rights; and
- 4) There is an overriding public interest in the disclosure.

Additionally, the party must establish based on information obtained from a source other than the journalist that in a criminal case, there are reasonable grounds to believe that a crime has occurred, or in a civil case, there is a prima facie cause of action.

Maine's shield law also extends the privilege to third parties with respect to subpoenas issued to the third party that seek information relating to business records between the third party and the journalist for the purpose of discovering the identity of the confidential source or obtaining confidential information.

Finally, Maine's shield law provides a waiver of the privilege if the journalist voluntarily discloses or consents to disclosure of the identity of the confidential source and any information that could be used to identify the confidential source.

*Daniel W. Walker, Sigmund D. Schutz, and Jonathan S. Piper are lawyers with Preti Flaherty in Portland, Maine.*

## Arizona Court Upholds Reporter's Privilege in Confidential Source Case

### *News Broadcast About Tire Safety Problems*

By David J. Bodney and Peter S. Kozinets

#### *Introduction*

In a decision that both fortified the journalist's privilege and ended a tire manufacturer's three-year battle to restrain the further dissemination of a news broadcast about the safety risks of its tires, Arizona's intermediate appellate court recently affirmed the lifting of a prior restraint on the basis of a trial court's *in camera* review of a journalist's declaration regarding the source of internal documents featured in the broadcast.

In *Flores v. Cooper Tire & Rubber Co.*, 526 Ariz. Adv. Rep. 25, 178 P.3d 1176 (Ariz. Ct. App. Mar. 25, 2008), the Arizona Court of Appeals rejected the final efforts of Cooper Tire & Rubber Company ("Cooper") to challenge the procedure that the trial court had used to determine that the Cooper documents used in the broadcast had come from a source independent of the state court litigation. In a 2-1 decision, the Court reaffirmed the strong First Amendment foundations of the reporter's privilege, and recognized that alleged trade secret property interests in the documents must give way to the more fundamental protections for gathering and reporting the news.

#### *Factual Background*

In 2002, Juan Flores, on his own behalf and as a representative of his parents' estate, sued Cooper in state court, alleging that a Cooper tire's tread separation had caused his parents' car to roll over, leading to their deaths. In September 2005, Abbie Boudreau, then a reporter for KNXV-TV, a Scripps-Howard Broadcasting Co. television station in Phoenix, attended portions of the *Flores* trial. The trial court informed her about her about a confidentiality order, which mandated that all "[t]rial exhibits that contain confidential information will not become part of the public file and will not be accessible to the public." The trial court gave Ms. Boudreau the choice of being bound by the order or excluded from the courtroom. She agreed to comply with the order, though she was not shown a copy of it. When she

asked the trial court if she could report on things she learned in the courtroom, the trial court responded, in part, by saying "that the answer is probably no." The court instructed her to direct any questions to defense counsel:

There are things you can obviously report and talk about, but when it comes to the specific documents that are the subject of these confidentiality orders, you cannot disclose their content to the public. [¶] If you need to find out which specific ones there are, I invite you after the proceedings to talk to defense counsel . . . and they will be able to advise you.

Outside the courtroom, Ms. Boudreau spoke to Cooper's counsel, who told her to direct her questions to Pat Brown, Cooper's Vice President of Global Branding and Communications.

Weeks after the trial ended in settlement, a confidential source gave Ms. Boudreau documents related to the safety and durability of Cooper's tires. The documents appeared to be copies of internal memoranda prepared by Cooper employees six to ten years ago (the "Documents"). They had no confidentiality markings or Bates numbers.

KNXV used two of the documents in preparing a news broadcast concerning the safety of Cooper's tires. Before airing the broadcast, KNXV contacted Ms. Brown to request an interview for the story. As part of the request, Ms. Boudreau informed Ms. Brown that KNXV had documents to support the following statements:

Cooper knew it had tread separation problems dating back to 1996;

Cooper was aware of a significant increase of separation problems in the south and southwest region of the United States; and

Cooper's engineers made recommendations to make the tires more durable, but Cooper did not implement those changes due to cost considerations.

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## Arizona Court Upholds Reporter's Privilege in Confidential Source Case

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Cooper declined the interview request and did not indicate that the Documents described in the email were confidential or possibly subject to the confidentiality order

On November 3, 2005, KNXV aired the broadcast to tens of thousands of viewers. The Broadcast reported that litigants have filed hundreds of lawsuits against Cooper linking more than 200 deaths and 200 serious injuries to Cooper products. KNXV identified a pattern of increased tread separation claims in hot-weather states, including Arizona, and showed portions of two of the Documents. The broadcast was then made available for viewing and download on KNXV's website until November 9, 2005. In 2006, it won an Edward R. Murrow Award from the Radio and Television News Directors Association and a First Amendment Award from the Society of Professional Journalists.

Several days after the broadcast, Cooper's lawyer contacted counsel for KNXV and asserted that the Documents shown in the broadcast were confidential and subject to the trial court's confidentiality order. Cooper demanded that KNXV immediately (1) reveal its confidential source for the Documents, (2) return all copies of the documents, (3) agree not to disseminate the Documents and any of their contents further, including a prohibition on future dissemination of the broadcast, and (4) admit that KNXV had violated the confidentiality order.

To defend itself from Cooper's allegations and demands, KNXV filed an Application to Intervene in *Flores* and sought a judicial declaration that it had honored the confidentiality order and could continue to exercise its constitutional right to disseminate the broadcast and Documents. Cooper responded by filing a "Cross-Motion for Affirmative Relief as to [KNXV]," seeking, among other things, an order enjoining the broadcast and requiring KNXV to disclose the identity of its confidential source.

Cooper also filed a "Motion for Entry of an Order Directing All Counsel of Record and Others Subject to Protective Order to Answer Questions Regarding Disclosure of Confidential Documents." Forty-one trial participants responded, under oath, that they had not disclosed Cooper

documents to KNXV.

In March 2006, the trial court heard the cross-motions and denied Cooper's request to compel KNXV to reveal its confidential source. However, it granted Cooper's request to enjoin further broadcasts of the Documents.

KNXV promptly filed a petition for special action (an emergency interlocutory appeal) challenging the trial court's order as an unconstitutional prior restraint. In June 2006, the Arizona Court of Appeals held that the constitutionality of the trial court's order depended on whether "the documents came from a source outside [this state court] litigation." If KNXV and Ms. Boudreau "merely published information they received from others," the court wrote, "any prohibition on petitioners republishing the information would constitute an impermissible prior restraint." Accordingly, the appellate court directed the trial court to "conduct[ ] an *in camera* review of the underlying facts as to how the subject documents were obtained," and it ordered KNXV to provide "further factual information sufficient to allow the trial court to make an informed determination as to whether the source of the three documents in question was independent of this litigation."

Within days of the entry of the appellate court order, KNXV asked the trial court to conduct the required *in camera* review. Cooper responded by again arguing the KNXV had waived the reporter's privilege by seeking affirmative relief from the court.

KNXV asked for leave to submit a detailed declaration about the provenance of the Documents from Ms. Boudreau, *in camera* and for the trial court's eyes' only, and requested that the trial court review her declaration and the sworn statements of the 41 trial participants who denied providing the Documents to KNXV. Cooper argued that "*in camera*" did not mean *ex parte*, and insisted on having the right to cross-examine the reporter about how she came into possession of the Documents.

The trial court rejected Cooper's waiver argument, and adopted a two-stop procedure

for conducting the *in camera* review ordered by the Court of Appeals. First, the trial court would review the Boudreau Declaration *in camera*, outside the presence of counsel. The trial court invited Cooper to submit a checklist of ques-

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**Cooper's lawyer asserted that the Documents shown in the broadcast were confidential and subject to the trial court's confidentiality order**

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## Arizona Court Upholds Reporter's Privilege in Confidential Source Case

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tions, additional evidence or other information to inform the court's review. If the trial court were to conclude that additional information was necessary, it would then proceed to the second step – an *in camera* evidentiary hearing. Cooper declined to submit any further information, and objected to entire procedure being impermissible under the terms of the appellate court's order.

The trial court then reviewed the Boudreau Declaration and found, on August 22, 2006, that “the source of the documents was independent from and outside this litigation.” Accordingly, the trial court vacated the prior restraint.

Cooper then filed a series of unsuccessful emergency petitions to stay the trial court's order lifting the prior restraint. The trial court, the Arizona Court of Appeals and the Arizona Supreme Court rejected Cooper's requests. Cooper also filed a special action with the Arizona Supreme Court, which that Court construed as a Petition for Review – and which it denied. Cooper then filed an Application to the United States Supreme Court for Stay or Injunction Pending Disposition of Petition for Writ of Certiorari. Justice Kennedy, sitting as Circuit Justice for the Ninth Circuit, denied the Application, and the high court denied Cooper's certiorari petition.

Lastly, Cooper filed a state court appeal from the final order of the trial court lifting the prior restraint. In its appeal, Cooper challenged the trial court's denial of Cooper's request for a finding that KNXV had “waived” the journalist's privilege by seeking declaratory relief from the trial court. Cooper also challenged, on due process grounds, the procedure used to determine whether Ms. Boudreau's source was independent from the state court litigation.

### The Decision

The Court of Appeals affirmed the trial court's finding of non-waiver of the reporter's privilege, and rejected Cooper's due process challenge to the trial court's determination that KNXV had obtained the Documents from a source outside of the state court litigation.

Addressing the waiver argument first, the Court rejected the notion that KNXV had waived the reporter's privilege by using it as both a “sword” and a “shield,” as Cooper had argued. Specifically, Cooper contended, *inter alia*, that KNXV had waived the privilege by intervening in the *Flo-*

*res* litigation, seeking a declaratory judgment that it had not violated the confidentiality order and by making selective disclosures about its confidential informant.

The Court found that KNXV's use of judicial process had been entirely defensive from the outset, and that it did not reflect an effort to obtain “affirmative” relief or to use the privilege as both a sword and a shield. The Court recognized that the reporter's privilege is codified in Arizona's “Press Shield Law,” which states:

A person engaged in . . . television or reportorial work, or connected with or employed by a . . . television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere the source of information procured or obtained by him . . . for broadcasting over a . . . television station.

A.R.S. § 12-2237.

The Court ruled that the statutory privilege “belongs to the reporter” and is not easily waived. *Flores*, 178 P.3d at 1182. In support, the Court acknowledged the strong First Amendment foundations of the privilege and its importance in the reporting of news of acute public interest and concern:

Unlike the other evidentiary privileges, which are premised upon a prior, although tacit, agreement of confidentiality, the reporter-source privilege is rooted in the “public purpose to allow journalists to collect the news from sources who would not otherwise disclose information if they were identified.” *Ulrich v. Coast Dental Servs., Inc.*, 739 So.2d 142, 143-44 (Fla. Dist. Ct. App. 1999) (distinguishing between the journalist's privilege and other privileges that are based on confidential communications, such as the husband-wife, attorney-client, and patient-physician privileges). See generally Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 Wm. & Mary Bill Rts. J. 1063, 1072 (2006) (explaining that while other

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privileges protect the right to safeguard a client's or patient's private statements from disclosure, a journalist's privilege protects the right to publish or broadcast information while keeping the source's identity secret; the primary aim "is to protect the journalist's First Amendment right to publish the news without government interference"). Accordingly, allowing disclosure of partial information to waive the privilege as to all information gathered on the same subject matter "would chill the free flow of information to the public." *In re Paul*, 270 Ga. 680, 513 S.E.2d 219, 224 (1999) (citations omitted).

*Flores*, 178 P.3d at 1183. Based on these authorities, the Court held that "we construe the scope of waiver narrowly." *Id.* Thus, a reporter's disclosures of some information about the source, such as information about who the source was not, is insufficient to waive the privilege. *Id.* In support, the Court cited *J.J.C. v. Fridell*, 165 F.R.D. 513, 516-17 (D.Minn.1995) (revealing that defendant was not the source of a story about plaintiff's claim did not waive the privilege), *In re Venezia*, 191 N.J. 259, 922 A.2d 1263, 1276 (2007) (refusing to hold that a waiver of privilege extended beyond the specific information actually imparted), and Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L.Rev. 1, 60 (1986) ("[W]hile revelation of confidential information may appropriately be said to constitute a waiver of some privileges, it should not be treated as a waiver of the reporter's privilege.").

The Court then turned to the second basis of Cooper's appeal – the procedural due process challenge to the trial court's order lifting the prior restraint. While KNXV argued that this portion of the appeal was an untimely and improper attempt to appeal the Court of Appeals' earlier order regarding *in camera* review, the Court held that the implementation of its prior order was properly at issue.

Addressing the merits of Cooper's challenge, the Court

applied the balancing test that the U.S. Supreme Court has developed for analyzing due process claims in civil cases, and it approved of the trial court's process. The Court rec-

ognized that even in the criminal context, "[t]he right to confront witnesses is not absolute and

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### the interest in protecting the informant's confidentiality is substantial.

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may, in appropriate cases, give way to other legitimate interests in the criminal process." *Flores*, 178 P.3d at 1184 (quoting *State v. Quinn*, 121 Ariz. 582, 585, 592 P.2d 778, 781 (Ct. App. 1978)). In civil cases, the "the United States Supreme Court has consistently recognized that procedural due process protections must vary depending on the situation, requiring courts to balance the nature of the private and governmental interests involved, the burdens of alternative processes, and the risk of erroneous deprivation." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

The Court then found that the trial court had struck the right balance between the private interests involved, recognizing that "the interest in protecting the informant's confidentiality is substantial." *Id.* In particular, the Court noted that A.R.S. § 12-2237 expressly "applies to all proceedings 'whatever' and thus precludes disclosure of the confidential source to Cooper and its counsel." *Id.* at 1184-85. The statute "fosters the news media's 'function as a vital source of information,'" *id.* at 1185 (quoting *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C.Cir.1981)), and it "furthers the public policy of enabling news organizations to meet their ethical and legal obligations." *Id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

The Court also found that the trial court's two-step procedure mirrored a nearly-identical two-stage *in camera* examination of a reporter – outside the presence of the parties and counsel – approved by the Fifth Circuit in *In re Selcraig*, 705 F.2d 789 (5th Cir.1983). *Flores*, 178 P.3d at 1185. In that case, the district court needed to determine if a reporter's confidential sources were independent of the defendant, a school district that had been sued for allegedly publicizing defamatory statements about the plaintiff. To protect the reporter's privilege "as far as possible," the district court proposed the following *in camera* "order of inquiry" about the reporters' sources:

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## Arizona Court Upholds Reporter's Privilege in Confidential Source Case

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The court would first ask Selcraig [the reporter] whether his confidential sources occupied such positions that their publication of the charges against [the plaintiff] could be attributed to [the school district]. If Selcraig answered that the sources were not connected with [the school district], the inquiry would stop there.

*In re Selcraig*, 705 F.2d at 795. If, however, the reporter answered that his sources were connected with the district, then the district court would follow up with additional questions. *Id.* The Fifth Circuit lauded “the district court’s carefully structured request for information,” stating that it “might well serve as a model” for other inquires. *Id.* at 799.

The *Flores* Court also recognized that “similar procedures have been upheld in the criminal context, where the interest supporting disclosure of the information—the defendant’s liberty interest—is fundamental.” 178 P.3d at 1185. Specifically, it discussed *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367, 371 (1983), a case where a criminal defendant sought to compel two reporters to disclose their sources to obtain potentially exculpatory evidence. To protect “the societal interest ... [in] the free flow of information” protected by the journalist’s privilege, the court held

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**where both cannot be accommodated, it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information.**

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that if the defendant could establish that the reporters’ sources could lead to exculpatory evidence, then the

trial judge would conduct an *ex parte*, *in camera* hearing to confirm that the evidence was necessary to the defense. *Green Bay Newspaper*, 335 N.W.2d at 373-74. If the trial judge made such a finding, then – and only then – “would the source be disclosed to the defendant.” *Flores*, 178 P.3d at 1185.

Rejecting Cooper’s argument that the trial court’s procedure gave short shrift to its trade secret property interests, the Court cited *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), as “instructive.” *Flores*, 178 P.3d at 1185. In that case, a computer company sued website publishers for publishing allegedly confidential information, and sought to discover

the source. In discussing the parties’ relative interests, the decision stated that “where both cannot be accommodated, it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information.” *Id.* (quoting *O’Grady*, 44 Cal. Rptr. at 113). Moreover, if “the alleged trade secret is of great public interest, the balance also tips against private property interests.” *Id.*

The *Flores* Court also rejected Cooper’s argument that the Boudreau Declaration should have been shared with Cooper on an “attorneys’ eyes only” basis. The Court wrote that the Arizona Press Shield Law’s plain language, which extends the privilege to “any” proceeding whatsoever, “including civil, criminal, and grand jury proceedings, bars such a result.” *Flores*, 178 P.3d at 1186 (citing A.R.S. § 12-2237). If such information cannot be disclosure to a grand jury – especially where Arizona law provides that disclosing any “matter attending a grand jury” is a crime – “then it surely cannot be shared with opposing counsel in a civil suit under an attorney’s-eyes only order.” *Flores*, 178 P.3d at 1186 (quoting A.R.S. § 13-2812(A)). Moreover, “[c]reating the requested exception would seriously damage the public policies underpinning the shield law ‘because of the inevitable uncertainty to which the exception would lead. Parties could not be certain that their conversations

and tips would be confidential and protected, and the stream of informa-

tion flowing to reporters and then to the public might be severely diminished.” *Id.* (quoting *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 780 F.2d 340, 352 (3d Cir.1985) (Becker, J., concurring)).

Judge Snow dissented from the *Flores* majority’s decision, writing separately that he would have reversed on due process grounds.

*David J. Bodney and Peter S. Kozinets practice media and constitutional law in the Phoenix office of Steptoe & Johnson LLP. Along with Karen Hartman-Tellez, also of the Phoenix office of Steptoe & Johnson LLP, they represented Scripps-Howard Broadcasting Co. and Abbie Boudreau in the Flores litigation.*

## Georgia Federal Court Orders CNN to Disclose Unaired Footage *Court Rejects In Camera Review on Request for Reconsideration*

A Georgia federal court recently denied CNN's motion for reconsideration of its order that it produce unaired news footage to a defendant in a large multiparty personal injury action., No. 1:06-CV-1809-TWT, Case No. 1:07-MD-1804 (N.D. Ga. Mar. 24, 2008) (Thrash, J.).

### **Background**

In October 2007, CNN's *Anderson Cooper 360°* show aired a segment about safety issues surrounding the product Tile Perfect Stand 'n Seal Spray-On Grout Sealer. An on air source, Dr. Walter Friedel, discussed how he was severely injured using the product. Friedel is one of hundreds of plaintiffs who have filed personal injury and liability lawsuits against the manufacturer, retailer and other parties.

One of the defendants, Aerofil, issued a subpoena to CNN for the unaired footage of the interview with Dr. Friedel and any other individual associated with the product safety segment. CNN moved to quash the subpoena.

The court acknowledged, and Aerofil did not contest, that CNN was protected by a qualified reporter's privilege under Georgia's shield statute O.C.G.A. 24-9-30. The statute provides in relevant part:

Any person, company, or other entity engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant; (2) Cannot be reasonably obtained by alternative means; and (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

The shield statute does not distinguish between confidential and non-confidential information. However, the federal district

court stated that since the source was not confidential Aerofil could make a "lesser showing" to obtain the information.

Aerofil argued that the unaired footage of Dr. Friedel was relevant and necessary to "fill gaps in Dr. Friedel's deposition" and aid in a contributory negligence defense and provide probative evidence of Dr. Friedel's actual use of the product because the unaired footage shows Dr. Friedel using the spray.

Aerofil was also able to convince the court that it had no other way of obtaining the information and that it had a "compelling interest" in the footage. The court denied CNN's motion as to the unaired footage of Dr. Friedel, but granted the motion as to unaired footage not related to Dr. Friedel.

After the ruling CNN made an oral request for *in camera* review.

### **Motion for Reconsideration**

CNN filed a motion for reconsideration of its oral request for *in camera* review. In arguing for reconsideration, CNN provided an affidavit that stated most of the footage was irrelevant. However, the court viewed this as an attempt to reargue the issue of relevancy.

According to the court, although motions for reconsideration are not specifically authorized by the Federal Rules of Civil Procedure, they are common. Cases have established though that motions for reconsideration should not be used merely to raise new issues that could have been addressed at the motion stage. Instead, a motion for reconsideration should only be granted in narrow circumstances. These include when the controlling law has changed, new evidence is available or there is clear error to be corrected.

Stressing that the argument should have been at the motion stage, the court declined to perform an *in camera* review, having already found that Aerofil made a showing of necessity. Furthermore, the court noted that the Georgia shield statute does not address *in camera* review and there is no precedent requiring a court to perform an *in camera* review.

*CNN was represented by Eric Schroeder of Powell Goldstein LLP in Atlanta. Aerofil was represented on the motion by Patrick B. Moore, Weinberg, Wheeler, Hudgins, Gunn & Dial.*



## Fifteen Seconds of “Imagine” in Movie Permitted as Fair Use

### *Use of Song Clip in Movie Was Transformative*

A New York federal district court denied a request for a preliminary injunction prohibiting further distribution and requiring a recall of existing copies of the feature-length film, “EXPELLED: No Intelligence Allowed.” *Lennon v. Premise Media Corp.*, 2008 WL 2262631 (S.D.N.Y. June 2, 2008) (Stein, J.). The request was made by the widow and children of John Lennon in response to the film’s unlicensed use of 15 seconds from the song “Imagine,” to which the Lennons own the copyright.

The decision turned on the court’s analysis of the fair use doctrine. The court emphasized the transformative purpose and character of the use, noting that the inclusion of the excerpt serves “to criticize what the filmmakers see as the naïveté of John Lennon’s views.” The brevity of the excerpt in relation to the rest of the song and the rest of the movie also weighed in favor of finding fair use.

#### **Background**

Yoko Ono Lennon, Sean Lennon, and Julian Lennon, the widow and sons of John Lennon, who composed the song “Imagine,” filed a complaint alleging copyright and trademark infringement. At issue was the unauthorized use of a 15-second portion of the song accompanied by a display of the lyrics during the film, “EXPELLED: No Intelligence Allowed.”

The movie, narrated by actor and writer Ben Stein, is intended as a critique of the teaching of Darwinian evolution over the theory of “intelligent design.” The film features interviews with proponents of secularism; following one such interview, Stein suggests that the song “Imagine” advocates the same idea. The movie then plays a 15-second

excerpt of the song with the corresponding lyrics displayed on the screen: “Nothing to kill or die for/ And no religion too.”

Although the defendants had obtained permission to use every other well-known song included in the movie, they had not done so for “Imagine.” The film was released in theaters on April 18, 2008 and the Lennons, along with the song’s publishing administrator, EMI Blackwood Music, filed their complaint soon after. They subsequently brought the motion for a preliminary injunction on April 30, 2008.

The court entered a temporary restraining order preventing further distribution of the film.

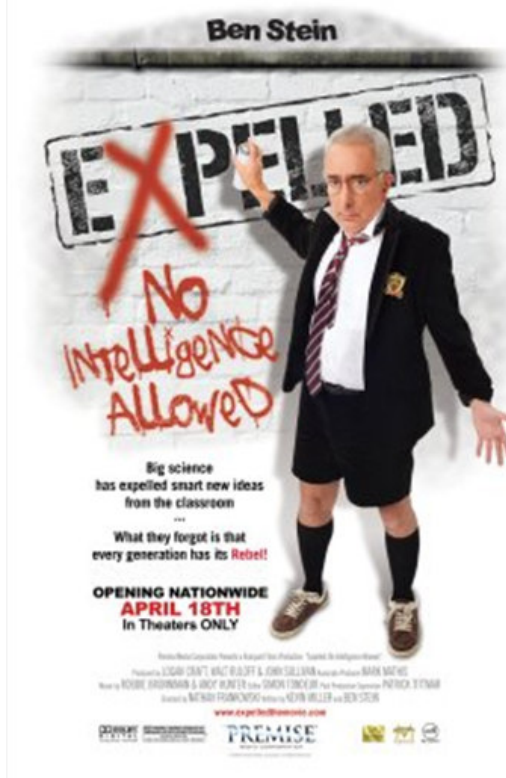
#### ***Irreparable Harm Can be Presumed***

In considering whether a preliminary injunction would be appropriate, the court first looked to whether the plaintiff had demonstrated there would be irreparable harm in the absence of an injunction. The court found that the plaintiff had met this requirement due to the presumption of irreparable harm where the plaintiff makes out a prima facie showing of infringement. In a footnote, the court rejected defendants’ claim that this presumption was abrogated in the recent Supreme Court decision, *eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388 (2007). In *eBay*, the Court declined to apply a general rule of issuing permanent injunctions in patent infringement cases absent exceptional circumstances, finding the rule to violate the Patent Act. The *Lennon* court distinguished the presumption applied in this case because it did not require an imposition of an injunction upon finding of infringement. The court also noted the injunction in *eBay* was permanent whereas the one sought by the Lennons was preliminary.

#### ***Likelihood of Success on the Merits***

The court then looked to the plaintiff’s likelihood of succeeding on the merits, noting that the motion was subject

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## Fifteen Seconds of “Imagine” in Movie Permitted as Fair Use

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to the more stringent standard of “clear” or “substantial” likelihood of success because the recall requested would qualify as a “mandatory injunction” that would alter the status quo. Although the court found that plaintiffs were likely to succeed in establishing a prima facie case of copyright infringement, the court also found that the defendants were likely to successfully make out an affirmative defense of fair use.

### *Defendants Fair Use Defense*

The court next considered whether the defendants’ use of the song was protected by the fair use doctrine and concluded that the defense was available. Key to the court’s determination was finding that the purpose and character of the use was transformative rather than simply commercial. Although the movie itself is commercial in that it seeks to profit overall, the use of “Imagine” served as social commentary, leading the court to place less weight on the commercial nature of the film in its fair use analysis.

Defendants’ use is nonetheless transformative because they put the song to a different purpose, selected an excerpt containing the ideas they wished to critique, paired the music and lyrics with images that contract with the song’s utopian expression, and placed the excerpt in the context of a debate regarding the role of religion in public life. *Lennon* at 15.

The use of the song clip in the movie was compared to the use of a copyrighted photograph in an art work in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). In *Blanch*,

the Second Circuit found the artist’s inclusion of a portion of the plaintiff’s photograph for purposes of social commentary in his work to be protected fair use under the Copyright Act. The trial court found the song excerpt in “EXPELLED” to be similarly protected. The court also emphasized that a finding of transformative use does not require that the original material be altered or that the use of the material be strictly necessary to the larger project.

A finding of fair use was also favored because the excerpt constituted only a very minor portion of the movie’s total running time. Citing *Blanch*, the court declined to view the defendants’ failure to seek permission for use of the clip as evidence of bad faith.

With respect to the amount and sustainability of the excerpt used as compared to the copyrighted work as a whole, both quantitatively and qualitatively, the court found the 15-

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**transformative use does not require that the original material be altered or that the use of the material be strictly necessary to the larger project.**

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second song clip to be a reasonable amount in light of the purposes for defendants’ use. The portion excerpted represents

only a small percentage of the three-minute song. The specific portion may be a highly recognizable section of the song, but the court emphasized that the song was so repetitive that virtually any fifteen-second excerpt would be recognizable.

The balance of factors led the court to confidently expect that the defendants would prevail on their fair use defense. Because the plaintiffs were not likely to succeed on the merits and the balance of hardships did not tip decidedly in their favor, the preliminary injunction was denied.

*Plaintiffs were represented by Peter S. Shukat and Dorothy M Weber, Shukat Arrow Hafer & Weber, LLP in New York. Defendants were represented by Anthony T. Falzone of the Stanford Law School Center for Internet & Society and Lord, Bissell & Brook, LLP in New York.*

## News Groups Successfully Challenge South Dakota Restrictions on Exit Polling

### *State Will Allow Exit Polling Near Voting Sites*

By Dave Tomlin

South Dakota Secretary of State Chris Nelson reversed himself and agreed to allow exit polling within 100 feet of voting sites just days after the five broadcast news networks and The Associated Press filed a federal lawsuit to overturn Nelson's order that there would be no exceptions to the state's restriction on activity near precinct locations.

The May 19 announcement was the fourth time the news organizations have successfully challenged such distance restrictions in the current election cycle. In the other three cases, courts in Ohio, Florida and Nevada ruled that such distance restrictions violate the First Amendment when applied to exit polling.

The rulings are important to the news organizations, because keeping exit pollsters at a distance seriously disrupts the process of randomly selecting interview subjects as they leave polling places. As distance from the poll exit rises above ap-

proximately 50 feet, comparisons of exit poll results with actual vote totals have shown that accuracy is increasingly compromised.

Secretary Nelson and other election officials have argued that exit polling near voting locations is similar to electioneering and other non-official activities that states have an interest in controlling because it can be annoying and distracting to voters, possibly deterring some from casting their ballots.

The news organizations argued that the states presented no credible evidence of any impact on voting by professional exit polling and that restricting the distance within which it can be conducted deprives the public of accurate information concerning how various segments of the electorate voted.

The agreement ending the South Dakota lawsuit applies to both the June 3 state primary and to the general election in November.

*Dave Tomlin is Associate General Counsel at Associated Press.*

## MLRC Calendar

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
31 DEC.	1	2	3	4	5	6
PLEASE VISIT <b>WWW.MEDIALAW.ORG</b> FOR MORE INFORMATION						
14	15	16	17	18	19	20
<b>September 17-19, 2008</b> NAA/NAB/MLRC Media Law Conference <i>Chantilly, VA</i>						
21	22	23	24	25	26	27
28	29	30	31	1	2	3
<b>November 12, 2008</b> MLRC ANNUAL DINNER <i>New York City</i>						
notes:						

**November 13, 2008**

\*MLRC Defense Counsel Section Annual Meeting and LUNCH

## A Few Federal Courts Allow Cameras In

While efforts to pass a law allowing cameras into federal courtrooms continue, a company which webcasts court proceedings recently convinced two federal judges in New York to allow it to cover trial proceedings.

Courtroom View Network (“CVN”), webcasts court proceedings, for a fee, at [www.courtroomlive.com](http://www.courtroomlive.com). CVN was permitted to webcast a November 28, 2007 hearing in *GVA Market Neutral Master Limited v. Veras Capital Partners*, Civil No. 07-0519 (S.D.N.Y.) (securities litigation), as well as a status conference on March 20 and motion hearings on March 27 and 28 in *In re: Zyprexa Products Liability Litigation*, No. 04-MD-1596 (E.D.N.Y.). See 2008 WL 441896 (E.D.N.Y. Feb. 11, 2008) (allowing coverage of March 20 hearing).

The *GVA* and *American Equities* cases were both before Judge Robert W. Sweet of the Southern District of New York, while the *Zyprexa* case is before Senior Judge Jack B. Weinstein of the Eastern District of New York. Sweet and

Weinstein both previously allowed camera coverage of proceedings in separate cases in 1996.

In a short order granting CVN permission to cover the *Zyprexa* proceedings, Judge Weinstein wrote “In view of the fact that tens of thousands of individuals, organizations and governmental entities all over the United States are affected by the instant litigation, approval of the application may be in the public interest.”

CVN had also obtained court approval to webcast the January trial in *In Re: American Equities, et. al., v. American Equities, et. al.*, Civil No. 01-5207 (S.D.N.Y.), but the parties settled before trial. Since 2004, the site has webcast more than 100 proceedings; most of these were in state courts, but this also included oral argument in a civil appeal before the Second Circuit, *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, Civil No. 05-1953 (argued: June 18, 2007).

## Status of Cameras in the Courts: State and Federal

According to a [May 2007 compilation](#) by the RTNDA, most states allow for some form of cameras in courts. Five states (Delaware, Illinois, Louisiana, New York and South Dakota) prohibit all camera coverage of trials, and 10 other states have strong limitations on cameras in courts.

In the federal courts, camera coverage of federal criminal trials is generally prohibited, see Fed. R. Crim. Pro. 53; see also *United States v. Hastings*, 695 F.2d 1278, 1279, n. 5, 8 Media L. Rep. 2617 (11th Cir. 1983), *reh’g den.*, 704 F.2d 559, 9 Media L. Rep. 1582 (11th Cir. 1983), *cert. denied sub. nom. Post-Newsweek Stations, Florida, Inc. v. United States*, 461 U.S. 931 (1983), except to allow remote viewing by victims in criminal cases. See 42 U.S.C. § 10608.

The federal courts concluded a limited test of camera coverage of civil trials in 1994 with the conclusion that “the intimidating effects of cameras on some witnesses and jurors was a cause for serious concern.” (For an overview of cameras in federal courts, see *LDRC LibelLetter*, Oct. 2000 at 31.)

Despite this conclusion, in 1996 some judges of the Southern and Eastern districts of New York allowed camera coverage of particular cases under the courts’ local rule allowing such coverage at the court’s discretion. See *Marisol A. v. Giuliani*, 929 F. Supp. 660, 24 Media L. Rep. 2150 (S.D.N.Y. 1996) (Judge Robert J. Ward) (see *LDRC LibelLetter*, March 1996 at 23); *Katzman v. Victoria’s Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996)

(Judge Sweet); *Sigmon v. Parker Chapin Flanau & Kimpl*, 937 F. Supp. 335 (S.D.N.Y. 1996) (Judge Peter K. Leisure); *Hamilton v. Accu-Tek*, 942 F. Supp. 136, 137 (E.D.N.Y. 1996) (Judge Weinstein).

These courts share a common set of local rules, including one (formerly Local Civil Rule 7, now Local Civil Rule 1.8) allowing camera coverage of civil trials with the presiding judge’s written consent. (The rule is actually written in the negative, prohibiting coverage without such consent.)

In the New York cases, the judges held that the local rule was not superceded by a policy adopted in 1994 by the Judicial Conference of the United States opposing cameras in federal civil proceedings. The Judicial Conference policy rejected an unambiguous recommendation in favor of televised proceedings by its committee that had examined the issue after a three-year experiment in several federal district courts, including the Southern District of New York. In March 1996, the Conference passed a resolution allowing each circuit court to decide the issue for itself, while strongly urging the circuits to follow the Conference’s 1994 policy and to “abrogate any local rules of court that conflict with this decision.”

But the Second Circuit Judicial Council took no action to repeal the local rule. This was despite the Second Circuit ruling 12

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## Status of Cameras in the Courts: State and Federal

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years earlier that “There is a long leap ... between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take.” *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 11 Media L. Rep. 1013 (2d Cir. 1984), *cert. denied sub. nom. Cable News Network, Inc. v. United States District Court for Southern District of New York*, 472 U.S. 1017 (1985).

The judges in the televised 1996 cases all concluded, as expressed by Judge Leisure in *Sigmon*, that “although the position of the Judicial Conference is persuasive, it is not controlling, and that the Court, pursuant to Rule 7, has full discretion regarding this issue.” *Sigmon* at 336. Despite these rulings, the U.S. Judicial Conference’s “Journalist’s Guide to the Federal Courts,” incorrectly states that no federal district court has allowed broadcasting of a trial. See [http://www.uscourts.gov/journalistguide/district\\_source.html](http://www.uscourts.gov/journalistguide/district_source.html).

Other district courts within the Second Circuit have various policies: rules in the Connecticut district court (D. Conn. Local Civ. R. 83.11) and the Western District of New York (W.D.N.Y. Local Civ. R. 83.5) ban all cameras from court proceedings, while the Vermont district court prohibits cameras without “permission of the court.” D. Vt. Local Civ. Rule 83.5(a)(2). The Northern District of New York has no rule on the subject, although it has cited precedent disallowing such access with approval. See *Legi-Tech, Inc. v. Keiper*, 601 F. Supp. 371, 375 (N.D.N.Y. Dec. 4, 1984) (citing *Westmoreland, supra.*).

The Ninth Circuit has also refused to abrogate local rules allowing camera coverage of civil proceedings. But almost all the

district courts within the Ninth Circuit have adopted bans, with a few exceptions:

- the Oregon district court local rules prohibit such coverage except “as authorized by a judge in a particular proceeding,” D. Or. Local Civ. R. 83.14(a) (1);
- the Arizona district court rules, while generally banning cameras, allow for coverage of “historic proceedings,” D. Ariz. Local Civ. R. (2)(B); and
- the Nevada district court has no local rule on the issue.

In addition to allowing their district courts to adopt local rules permitting or prohibiting camera coverage of civil trials, the Second and Ninth Circuits have also allowed coverage of appellate arguments in their courts. From 1991 through 2005, Ninth Circuit panels received 205 requests for camera coverage of arguments, and allowed coverage of 133. See, e.g., *LDRC LibelLetter*, Oct. 2000 at 31.

According to counsel, CVN will continue to seek to cover trials in federal district courts where it is permitted, and advocate that other circuits adopt rules giving district court judges discretion to permit proceedings to be filmed.

*Jonathan Sherman and Nick Jabbour of Boies, Schiller & Flexner in Washington, D.C., represented CVN in its motions to webcast the New York trial proceedings.*

### ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

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