

MULRC Media Law Resource Center

MEDIA LAW LETTER

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THE OTHER SIDE OF THE POND

Developments in UK and European Law: Part 1

Justice Eady Reinstates Libel Action Against New York Times and IHT

By David Hooper

Online publication, Abuse of Process and Libel Tourism

On December 17, 2008 in [Mardas v New York Times and International Herald Tribune](#) (2008) EWHC 3135, Mr Justice Eady permitted an action brought by John Alexis Mardas, known as Magic Alex, to proceed, reversing the decision of Master Leslie to strike the case out as an abuse of process. The case shows that the courts are not willing to give a liberal interpretation of the abuse of process argument which succeeded in *Jameel v Dow Jones* (2005) EWCA Civ 75, where only five online hits could be proved.

Mardas, who had worked for the Beatles' Apple Company, complained that the article accused him of being a charlatan and a liar and having caused a rift between the guru Maharishi Yogi and the Beatles back in 1968. The Master had been horrified at the prospect of a libel action relating to the events of 40 years ago where there had been only very limited publication. Precisely what that publication amounted to was disputed by the claimant and Eady J indicated that it was very difficult for the court on such

the USA and France, Eady J made it clear that this was not in his view "*libel tourism*." Mardas had lived in the UK from 1963 to 1996 and he had two children with UK nationality and had a reputation in the UK.

Eady J did, however, comment on the unsatisfactory nature of the law pointing out that "*it may well be that in due course international agreement will be reached as to the appropriate way of resolving claims out of internet publication.*" That, he said, is plainly desirable but for the time being the courts must apply the law as it is. His view was that this was not a trivial libel even though it related to the events of 40 years ago. He felt it was plainly desirable for the parties to reach an accommodation to avoid a time-consuming and expensive trial but he was not prepared to hold that this was an abuse of process. In short, libel plaintiffs will be encouraged by this decision.

Changes Afoot

The UK Justice Secretary, Jack Straw, plans to allow journalists into family courts from April 2009 subject to there being safeguards for the protection of children and the

privacy of families. The anonymity of the professionals involved in the cases is likely to be removed. Interestingly, 100% of the media organisations con-

Depressingly for foreign publishers Eady did indicate that "a few dozen hits could be enough to found a cause of action in England although damages would be likely to be modest".

strike-out applications to determine such disputes.

The NYT admitted 177 hard copies and 4 online hits; the IHT, 27 online hits and no hard copy. However, Eady J was not willing to lay down a minimum number of hits before publication could be substantial and he declined to get involved in what he termed "*the numbers game*."

Depressingly for foreign publishers he did indicate that "*a few dozen hits could be enough to found a cause of action in England although damages would be likely to be modest.*" Although Mardas now lived in Greece and had declined to sue in respect of the much larger publication in

sulted by the Ministry of Justice *supported* the changes whereas 73% of the judges and 78% of the lawyers consulted *opposed* it.

On December 17, 2008 there was an adjournment debate in the House of Commons organised by the Select Committee on Culture, Media and Sport. Notorious plaintiffs such as Khalid bin Mahfouz and Nadhmi Auchi received a predictable amount of flack, as did the well-known law firm of Carter Ruck. Most significantly the Justice Minister Bridget Prentice said that the government would announce a

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consultation process on libel and the Internet and the disproportionate costs of defamation proceedings. There was considerable criticism of the working of conditional fee arrangements.

More controversial is proposed government legislation to prevent criminals making money from their memoirs, which was announced in the Queen's Speech in November. It sounds good on paper, but the concerns of the Publishers' Association is that these measures are disproportionate and unnecessary.

Pen and the Index on Censorship recently announced a proposed round-table discussion on the restrictive effect of libel laws on freedom of speech, which should take place in Spring 2009.

Privacy Damages

On November 25, 2008 there was an interesting decision in the European Court of Human Rights in the case of *Armonas v Lithuania* (applic no 36919/02). The largest Lithuanian newspaper had written about the complainant that he had contracted AIDS and it published his address. This had affected his health and his family. Under Lithuanian law there was a ceiling of 2,896 Euros for non-pecuniary damages. The European Court felt there had been an outrageous breach of privacy and stressed the need for *detering* the press from publishing such articles in breach of privacy. However, the Court only awarded 6,500 Euros, but the writing is on the wall for the European press.

Madonna has popped up in this context claiming £5 million damages for publication of eleven private photographs of her otherwise much-publicized wedding at Skibo Castle. It is alleged that these photos had been surreptitiously copied by an interior designer doing work on her Beverly Hills home. It was said in Court that the *Mail on Sunday*, which published the pictures on the front page and a double inside spread, paid the provider of the photos £5,000. How Madonna arrived at the staggering sum of £5 million remains to be discovered at the full hearing in 2009.

Legal Costs

On December 5, 2008 there was an interesting ruling by Mr Justice Arnold in a Blackberry patent dispute, *Research*

in Motion v. Visto. The background was that in an earlier case between the parties heard by Mr Justice Floyd in September 2008 the claimants' costs incurred by Allen & Overy on behalf of RIM clocked in at a tasty £5.18 million, which the judge perhaps not wholly surprisingly described as unnecessary for a five day hearing. The defense costs had only been £1 million and the judge had found the attempts by the lawyers to control costs to be inadequate and unsatisfactory. What was to happen in the new case was that both sets of lawyers, Allen & Overy and McDermott, Will & Emery were ordered to file estimates of the costs of the trial. The likelihood is that the court will expect those estimates to be complied with and this is yet another illustration which applies increasingly to all types of litigation of a more interventionist approach by the courts. That case comes up for trial in September 2009.

Significant Claimant Losses

For a wonderful musician Sir Elton John libels awful easy. The case of *Sir Elton John v. Guardian News & Media Ltd* (2008) EWHC3066 (QB) was a libel case too far and another triumph for the *Guardian*. As is well known, Elton John has raised millions of pounds through his Elton John AIDS Foundation. He is, however, extremely sensitive to any form of criticism and when Marina Hyde wrote a mock diary of Elton's White Tie & Tiara Ball in the *Guardian* weekend supplement entitled *Tantrums & Tiaras* Sir Elton reached for Carter Ruck.

He had, by this time, already recovered over £100,000 from two newspapers for suggesting somewhat arrogant behaviour on his behalf. "*Naturally everyone could afford just to hand over money if they gave a toss about his AIDS Foundation as could the organisers. We like to give guests a preposterously lavish evening because they are the kind of people who won't turn up for less*" Ms Hyde mocked by putting these words into Sir Elton's mouth. By the time his libel lawyers had got to work this had become an allegation that he was racked by insincerity and had seized the opportunity purely for self-promotion.

What Sir Elton seemed particularly unhappy about was the mocking suggestion that "*Once we've subtracted all these costs*" (seemingly his dresses and diamonds) "*the leftovers will go to my foundation.*" Mr Justice Tugendhat was

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not having any of this. This was a form of teasing which would not be taken seriously and it was a spoof diary in a weekend supplement rather than an expose and he struck the case out.

The same happened in a case brought by Tiscali against BT Broadband (2008) EWHC2927 (QB) and heard by Mr Justice Eady. BT had sent out opportunistic marketing material to try to attract Tiscali customers to BT. Tiscali's lawyers suggested that this had imputed a lack of honesty and candour on their part. Mr Justice Eady however struck this allegation out saying that it would be perverse for a jury to construe the material as suggesting that Tiscali was being dishonest or in breach of some duty to its customers. On these strike-out applications the claimants will get the benefit of any doubt, as it is an exercise in generosity rather than parsimony (*see Berezovsky v. Forbes* (2001) EMLR 1030). However the courts are willing to strike out over-ingenious pleadings.

Damien Green MP

Opposition Members of Parliament have traditionally relied on information about misconduct about the government being leaked to them so that the government may be held to account. Damien Green is the Shadow Home Secretary and a Conservative Member of Parliament and he seemingly had been receiving information about general incompetence in the Home Secretary's department about matters such as failing to implement and supervise immigration policies and on the futile attempts by the government to frighten the potential Labour MP rebels who – as it turned out – successfully voted down the extremely unwise attempt to permit 42 days detention without trial against terrorist suspects into supporting their government.

Nothing Mr Green did threatened national security, but it had everything to do with causing embarrassment to a political party that has the arrogance of a party that has been in power for too long. In 1989 Parliament had limited the operation of the Official Secrets Act to four specific types of information which damaged the national interest, including intelligence, criminal and defence issues. The information Mr Green had received clearly fell outside the Official Secrets Act 1989.

A dubious common law offence of aiding and abetting an official in public misconduct in their office was crafted to render this parliamentary activity allegedly criminal. Exactly who in the Watergate sense knew what and when still remains to be established. The claims by the relevant ministers to have been in total ignorance about what was happening in their departments has been met with widespread incredulity. Anyhow, Mr Green's home was raided by anti-terrorist officers in the early hours and a group of police officers illegally searched his parliamentary office without even obtaining a warrant. The buffoonish Speaker of the House of Commons failed to prevent this outrage and sought to place the blame on his female Serjeant at Arms, a Ms Jill Pay.

Mr Green was detained in a cell for nine hours and it seems that nothing of particular significance, certainly in terms of National Security and public interest was found. A spokesman for the Liberal Party described this as "*the most worrying development for many years*". Listening to government spokespersons trying to justify the unjustifiable makes one worry for civil liberties in this country.

France

Things are, however, worse in France. The former Editor in Chief of the newspaper *Liberation*, Vittorio de Filippis, had found himself on the receiving end of a number of criminal libel complaints from a businessman with Internet interests. The businessman had lost two previous libel claims against *Liberation*, but imagine his joy when the investigating magistrate took the view that Mr de Filippis had ignored a Court summons and ordered his arrest. In fact Mr de Filippis seems to have done nothing worse than forward it, in accordance with his practice, to his lawyers. He too had the police on his doorstep, but with the Gallic extras of handcuffing him in front of his children and later detaining him, strip searching him twice and conducting two rectal searches. The police apparently thought he had behaved arrogantly.

His treatment provoked general outrage and it appears that President Sarkozy has called for legal reform to consider decriminalizing defamation and a commission is to be chaired by Philippe Leger, Advocate General at the ECJ.

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Leger is charged with redefining criminal procedures in a way “*more respectful of peoples’ rights and dignities*”.

Readers of this column may also want an update on Mr Sarkozy’s voodoo doll litigation. It has now been settled. The dolls can be sold provided that they have a conspicuous warning that sticking pins into any part of Mr Sarkozy’s wax anatomy is an affront to his dignity. Mr Sarkozy’s attempt to block sales was rejected, but he *was* awarded one euro damages. All 20,000 dolls sold out within one day of the judgement.

Meanwhile his wife Carla Bruni was more successful in that she recovered 40,000 Euros damages against the distributors of bags which had a nude picture of her.

A freedom of expression convention called in December 2008 in France to mark the 60th anniversary of the Universal Declaration of Human Rights did highlight the pressure that was being brought to bear by the French government on the press resulting in journalists being sacked for upsetting the government and intriguingly in a newspaper (*Le Figaro*) airbrushing a 15,000 euros diamond ring from the hand of the Justice Minister as being inappropriate in these times of austerity.

Polanski

In England it is now possible, thanks to Roman Polanski, for fugitives from justice to bring libel actions. Flushed by this success, Polanski is reportedly making an application in California based on “*judicial and prosecutorial misconduct*” to have his conviction set aside. One hopes that the court hearing this application will have the opportunity of reading precisely what Polanski did to the 13 year old girl in the Grand Jury testimony helpfully posted on the *Smoking Gun* website and will recollect that the judge did offer to recuse himself before the sentencing.

Monica Lewinski

A ruling in Italy in the Court of Cassation has ruled on appeal that saying of a woman that she had a Lewinskian nature is capable of being defamatory and the matter should go for trial. This no doubt will be a case which law students will study with interest, just as English students were

taught that there was a defamatory innuendo in saying that a person was no George Washington, i.e., that he was in fact a liar.

Misery Memoirs – *Briscoe-Mitchell v. Briscoe*

Stories about success in the face of domestic adversity have proved popular and now also productive for libel lawyers. Hodder and Stoughton part of the Hachette Group, the publishers who had sold 400,000 copies of a book called *Ugly* (the taunt of the mother to her daughter) by a successful barrister and part-time judge, succeeded in having the claim by the author’s 74 year-old mother dismissed. She had complained about the accounts of her alleged abuse of her daughter in the book.

The publishers however settled a case by a father again alleging abuse of a daughter and damages were paid to charity in a well-crafted settlement where the father succeeded in his claim but the daughter stuck to her guns (*Sanders v Hodder & Stoughton*).

Contempt of Court

Attorney General v ITV Central Ltd (2008) EWHC 1984 was an interesting example of how the penalty could be relatively low where things had gone badly wrong. At the beginning of the trial, a regional news broadcast had prejudicially revealed that one of the defendants in a murder trial was already in prison for another murder. ITV admitted it was “*a serious aberrational error*” and that it was “*blindingly obvious that it should not have been broadcast*”. The producer had been away ill and no-one had thought about the implications. There was an immediate apology. The fine was £25,000 and ITV had also to pay the cost of the trial being adjourned (£37,000).

Online Libel

The case of *Brady v Norman* (2008) EWHC 2481 reinforced the ruling in *Amoudi v Brisard* (2007) 1 WLR 1113 that there was insufficient evidence to assume that anyone read the online version of the offending article who did not have a legitimate interest in doing so. In other words readership of the online publication has to be proved and will not necessarily be assumed.

THE OTHER SIDE OF THE POND

Developments in UK and European Law: Part 2

The BBC and a Case of Booky Wooky Nooky

The BBC has had a dire few weeks following the broadcast on radio of some intrusive telephone calls by two highly paid presenters, the comedian Russell Brand and amongst other things author of his best-selling memoirs “*My Booky Wooky*” and the talk show host Jonathan Ross, who, to the disgust of most licence payers, the BBC has seen fit to pay £6 million a year.

In a moment of questionable sanity they decided it would be hilarious to call one of our many national treasures, Andrew Sachs, the 78 year-old actor best known for playing the hapless Spanish waiter Manuel in the comedy series *Fawlty Towers*. In a series of messages left on Mr. Sachs’ answer phone Ross and Brand joked in graphic language which would have made the FCC blush, about Brand having had sex with Sachs’ granddaughter hitherto best known for being part of a group unfortunately known as the Satanic Sluts.

This humor was supplemented by further jokes that Sachs might perhaps commit suicide when he heard this – and by a spoof apology for the graphic language. The only surprising fact was that only two people, one of who was Sachs, complained about the original broadcast. However, once the matter had been taken up by the *Daily Mail* 42,000 complained and the BBC’s conduct was the subject of strong criticism in Parliament.

Bearing in mind that the programme had been pre-recorded, that it was intrusive, that it had unacceptable sexual content and there had been a failure to obtain informed consent from Sachs, it was little surprise that heads at the BBC rolled with the head of that particular channel (Radio 2) resigning, followed by the relevant Head of Compliance. Everything that could have gone wrong did so. An inexperienced producer was in charge of the program and appeared to be in serious conflict of interest in that he was taking instructions from Brand’s production company.

The hapless Head of Compliance simply decided that the program was “very funny” and his boss, to whom he referred the program, rather unwisely did not listen to the program properly, if at all, and scarcely distinguished herself by approving it by simply sending a message back “yes” on her Blackberry. The BBC Trust condemned the program as “a deplorable intrusion with no editorial justification.”

The BBC faces a further regulatory inquiry from Ofcom, the independent regulatory authority for UK communications companies, all previous inquiries having been in the nature of self-

flagellation. Brand left the program and Ross was suspended for three months without pay, seemingly a saving to the long-suffering licence payers of £1.5 million.

The upshot may well be stricter penalties for such breaches of the Broadcasting Codes and tougher controls at the BBC to prevent such non-compliance. We shall have to see what Ofcom has to say about the matter but the whole sorry story seems a classic on what can go wrong when the proverbial tail of popular and powerful entertainers wags the regulatory dog. What was also interesting about the controversy was the generational divide. If you were under 30, you tended to think the programs were indeed harmless fun and that all the moaners should get a life. Whereas for the over-30s, no penalty for Brand and Ross was too severe.

Mr Justice Eady and the Law of Privacy

At the Society of Editors conference, Paul Dacre, Editor-in-Chief at Associated Newspapers, launched another controversy. He attacked Mr. Justice Eady on the basis that he had a near virtual monopoly over privacy cases, that he was inexorably and insidiously imposing a privacy law in this country and that his judgments were arrogant and amoral.

As with the BBC controversy, this produced predictable divisions. The trenchant views of the *Daily Mail*, the voice of middle England, are anathema to many including readers of the Guardian. The controversy therefore soon turned into an opportunity to express equally trenchant views about Paul Dacre. The peg upon which Dacre had hung his criticism was the fact that in his view Mr. Justice Eady was to be criticised for having simply described the “*perverted and depraved*” conduct of Max Mosley as simply “*unconventional*.”

Predictably the legal profession – or at any rate that part which regularly appears before Mr. Justice Eady – rallied to his defense pointing out that the law of privacy has its base in the Human Rights Act 1998 and that the Court of Appeal has upheld his judgments and that Dacre was being disingenuous when he argued that the whole question of privacy should be referred to Parliament. Parliament, the lawyers claimed, had spoken when the Human Rights Act was passed and it is judges who have to decide cases rather than Parliament.

However, it is striking that the cases deciding the important balance between the right to privacy and freedom of speech are for

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the most part being decided by one man and that cases are now being decided differently to the way they were decided a few years ago. There are grounds for arguing that the pendulum may have swung too far. Privacy in mainland Europe is not just a civil matter but also a criminal offence carrying substantial jail sentences. The English courts do need to decide where there is to be clear blue water between the English law of privacy and that enforced in Europe.

The problem in this country is that the tabloid press are considered for too long to have been grossly intrusive and the serious press are paying the penalty for it. When the debate is stripped of its strong feeling about either Mr. Justice Eady or Paul Dacre, the issue is well put by Hugh Tomlinson QC that we are gradually moving from a position where previously anything could be published *unless it was forbidden*, to the opposite where nothing can be published *unless it was justified*.

What the courts do not perhaps appreciate is the very real danger of worthwhile investigative journalism being inhibited by the very considerable legal expense now likely to have to be incurred whenever information may be said to be private. This is not just about celebrity culture but also about the exposing of crooks like Robert Maxwell. The debate will doubtless continue, but people should be under little doubt that in the balancing exercise between Articles 8 (Privacy) and 10 (Freedom of Speech) privacy is coming out on top by some distance with the level of public interest necessary to justify publication of private information being set to a very high level.

we are gradually moving from a position where previously anything could be published unless it was forbidden, to the opposite where nothing can be published unless it was justified

Whether Mr. Dacre is correct to hope that Parliament would provide a safeguard against this development of the law is open to question. The House of Commons Culture, Media and Sport Select Committee is now looking into media issues including privacy, freedom of speech and conditional fees. Written submissions are required by January 14, 2009 but the terms in which they request such information do not encourage optimism about the protection of the freedom of press.

JK Rowling – Murray v. Big Pictures (UK) Limited

The House of Lords has refused permission to the photographic agency to appeal the decision permitting the author JK Rowling to bring privacy proceedings in respect of unauthorised photographs of her child in a public place. The thinking of the House of Lords appears to have been that as this was a preliminary ruling on the facts, namely that the case should not be struck out and should proceed to trial, the case did not raise sufficient points of general importance to merit the hearing in the House of Lords.

The extent therefore to which the law of privacy can engage the taking of unauthorised photographs in a public place and the potential conflict between *Campbell –v- MGN Limited* [2005] UKHL 61 and the *Princess Caroline of Hannover* [2004] EMLR 21 case remains to be clarified. A legal challenge which is, however, proceeding, is that being made to the European Court of Human Rights by Max Mosley notwithstanding his success in obtaining an award of £60,000 against News Group Newspapers. Max Mosley – a man now best known to us for the ruling that his Germanic S&M orgy was not Nazi-themed - complains that the newspaper should have approached him for comment prior to publishing this story.

This would have given him an opportunity of seeking an injunction in the courts which he would probably have obtained from Mr. Justice Eady who in fact declined subsequently to make such an order simply because by that stage the allegations have been so widely broadcast in the press and on the internet and that it was too late to put that particular genie back into the bottle. If Mosley is successful in this claim, it will become that much more difficult for the media to publish exposés and the number of applications for prior restraint made to judges at their homes on Saturday afternoon to prevent publication of private information in the Sunday newspapers will increase considerably.

Sienna Miller – Increasing Level of Privacy Damages

The actress, Sienna Miller, has successfully brought a number of actions against the publishers of syndicated photos which were said to chronicle an alleged relationship with American actor Balthazar Getty. She also brought a claim in harassment. Photographs which were said to be pursuit photos, were taken in Lon-

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don, Los Angeles and Ibiza and included pictures of her topless on a boat in Italy. By agreement she was awarded £35,000 damages against News Group in November 2008 and a total of £53,000 against the photographic agency Big Pictures (UK) Limited in July and November 2008 as well as £15,000 from the *Daily Star*.

She also secured an agreement from News Group and the picture agency about the taking of and publication of photographs on her doorstep or in buildings which were not open to the public. The cases show the increasing level of damages in privacy cases with the court no doubt having in mind the value of such unauthorised intrusive pictures of celebrities.

Interestingly, one of the matters in the terms of reference of the House of Commons Culture Committee (see above) is whether damages in privacy cases should be merely compensatory or whether they should take into account the profit being made by the media. What is unfortunate is that this type of intrusive behavior is muddying the water for the media which do have a legitimate reason for publishing private information.

Production of Journalist's Notes

There has been an interesting decision by Mr. Justice Tugendhat on November 21, 2008 (*Mitchell – v- Briscoe* [2008] EWHC 2852) in a libel action being brought by a mother against her daughter, a part-time judge and an author in respect of her book called “Ugly” which alleges child abuse.

The defense wanted the notes of the *Daily Mail* journalist who had interviewed other members of the family about the allegations of abuse. The application failed primarily on the basis that the judge took the view that these notes were wanted principally as ammunition to attack the credibility of various witnesses at the trial. In order for such notes to be disclosed, cogent evidence is required to show that they would be likely to support the case of the applicant and that they were necessary to assist in disposing fairly of the claim.

The judge also underlined the need for caution before making an order for the production of such journalists notes, because of the element of confidentiality that exists in respect of what is said to a journalist. Such notes could have been ordered to be produced on different facts and in such circumstances the probability would be that the judge would permit the notes to be redacted to protect sources where appropriate.

Libel Statistics

In their annual survey, the legal publishers Sweet & Maxwell published figures suggesting a fall in the number of defamation cases which they say recently peaked at 74 in 2005-6 but fell to 59 in 2007-8. Their statistics relate to libel claims which resulted in the issue of proceedings. Many libel claims are now settled at an early stage without the need for proceedings because of the legal costs involved. In terms of percentage, celebrities seem to be bringing more cases. They accounted for 11 (17%) of the 66 cases in 2004-5. That has now risen to 19 (32%) of the 59 cases in 2007-8.

Claims Against The Guardian

The Guardian has continued to show itself willing to stand firm against claims which it considers unjustified. The Guardian's reputation in this field was cemented by its successes against the MPs Jonathan Aitken, who ended up in jail for perjury, and Neil Hamilton. Matthias Rath has recently dropped his libel action against the

Guardian and has been made the subject of an initial order

to pay £200,000 costs with more to come. He had been unhappy with The Guardian's criticism of the claims that he was making about his nutritional supplements as a means of combating Aids.

The Guardian also enjoyed a measure of success in the defense of the claim brought by Tesco Stores Limited concerning their tax avoidance schemes. The paper secured a helpful ruling on the operation of the offer of amends defense in that that store was required to reach a prompt decision as to whether or not it would accept the offer of amends, which ultimately it did. The case was settled for what appeared to be a modest payment of a sum by way of damages to the charity of Tesco's choice.

More alarming, however, was the size of Tesco's legal bill, a copy of which appears to have found its way into the hands *Private Eye* magazine. The bill which includes Carter-Ruck's fees and also those of Tesco's tax lawyers and accountants as well as their barristers clocked in at £800,000 plus VAT. It was fortunate that the case was settled at an early stage. The bill does not appear to include a Conditional Fee Agreement. If the report in *Private Eye* is correct and that senior partners were charging £500 and junior partners £400, it does underscore the fact that claimant's libel litigation is not inexpensive in this country.

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In terms of percentage, celebrities seem to be bringing more cases

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Baby P

A case which has recently ended at London's Central Criminal Court (where John Mortimer's Rumpole of the Bailey practised) has brought into very sharp focus how strict English contempt of court laws interact with the Internet. The case concerned the most horrific torture of a toddler involving acts of breathtaking cruelty by a mother and her partner. The case caused a particular scandal because police and welfare agencies had visited the family on 60 occasions and had failed to note the shocking injuries to the child. Mother and partner were convicted of causing the death of the child.

However, there are no less than three court orders prohibiting the naming or description of the convicted defendants or the child or indeed any other young person involved in that or related cases nor can one give the dead child's name. So strict are the gagging orders that it would be unwise to say more than that it is believed these orders are in place to prevent prejudice to an upcoming abuse trial. However, the case has become a political issue particularly in view of the track record of the North London Haringey Council responsible for the welfare of the child. A few years back they were similarly neglectful regarding a murdered 8 year old. The frontline media have obeyed the orders but a little judicious Googling soon turns up the name in a minute or so, plus photograph and address of the perpetrators.

Not only do countless blogs and a hitherto unknown online newspaper breach the court orders but there is a militant lynch mob out there exposing the perpetrators by Internet and text and encouraging prisoners to kill them. The Attorney General is struggling to enforce compliance with the court orders by the mainstream media, but this case will, when all the related proceedings are concluded, doubtless lead to a reexamination of how effective contempt of court laws can be in the face of a concerted Internet campaign.

It is unlikely in the extreme that we will adopt the anything-goes-approach that seems to prevail in the United States which we feel puts a fair trial at risk and we are not comfortable with sequestered juries or detailed voir dire. Watch this space.

ECHR Decision on Police Libel Claim

In this country it is not unusual for police officers who are criticised to bring actions assisted by the Police Federation. On occasions those officers are not in fact named, but are identifiable as

members of a particular squad attached to a particular inquiry. It would be interesting therefore to see if the recent decision of the European Court of Human Rights in *Godlevskiy -v- Russia* [application 14888/03] makes bringing such actions more difficult.

There the activities of a local narcotics unit had been criticised in the *Orlovskiy Meridian* as being too cozy with those they were meant to be investigating. Thirteen members of the unit were awarded damages, but this was held by the European Court to be a violation of Article 10, concerning legitimate comment on a matter of public interest and that it was not accusing individuals of criminal conduct but rather promoting an ongoing debate.

While in Europe

The prize for the most bizarre piece of threatened litigation must undoubtedly go to French President Sarkozy. He was reported by Reuters on October 21st as having threatened a claim through his lawyer Thierry Herzog against the French publishers K&B unless they withdrew its Sarkozy doll with a voodoo manual giving instructions as to how one stuck pins into the model of Sarkozy. Had the claim been brought in England, one might have been unable to resist the observation that he would have only have felt a small prick, but perhaps the Gallic sense of humour is different.

D Notices

The history of D Notices is, according to an article which appeared in *The Times* of October 24, 2008, to be described in a book entitled *Secrecy and the Media* by a former secretary to the D Notice Committee, who, members of the MLRC may recollect, addressed the 2003 MLRC London Conference, the admirable Rear-Admiral Nick Wilkinson. D Notices are part of an agreed self-regulating procedure to prevent damage to national or military security by the inadvertent publication of details of security operations or military secrets (see www.dnotice.org.uk.)

Sad to relate, the no doubt brilliantly and cautiously written history has itself run foul of the D Notice Committee and its present incumbent as secretary and of the monolithic Ministry of Defence. The upshot is that Rear-Admiral Wilkinson's book has been delayed for some months and he has been required to end his narrative at 1997 rather than 2004, thereby removing the last 5 chapters and any need to discuss the mendacity of the Blair years.

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

Responsible Journalism Defense Applied in Canada *Large Jury Award Against Toronto Star is Overturned*

By Paul Schabas

In the first appellate decision to apply the defence of responsible journalism in Canada, the Ontario Court of Appeal overturned a jury verdict against the *Toronto Star* that had awarded C\$1.475-million in damages to a northern Ontario businessman and his private corporation for libel. *Grant v. Toronto Star Newspapers*, 2008 ONCA 796 (Nov. 28, 2008).

Background

Peter Grant had sued the *Toronto Star* over an article written by investigative journalist Bill Schiller in June 2001, which detailed the concerns of Grant's neighbours regarding construction of his proposed personal private golf course on Crown land by a lake in northern Ontario. The article also discussed Grant's connections to the provincial Progressive Conservative Party and then premier Mike Harris.

Following a three-week jury trial in Grant's hometown, where he is also one of the largest employers, the judge refused to apply the *Reynolds* defence and sent the case to a jury which rejected the defences of truth and fair comment. Given the \$1,000,000 punitive damage award, the jury appeared to also find that there was malice in the publication.

Court of Appeal Decision

The Court of Appeal agreed with the *Toronto Star* that the trial judge erred in his analysis of the new defense of "public interest responsible journalism," as he had "improperly tried to combine the two defences of qualified privilege and responsible journalism, rather than treat the new defence as a separate evaluation where the emphasis is on allowing more free and open reports on matters of public interest, as long as the reports are researched and published in a fair and responsible manner."

On the facts of the case, the Court of Appeal was critical of the trial judge for taking a narrow view of "public interest," as he had limited it to those who lived in the area. This was wrong, as the article dealt with "the private acquisition of Crown lands by a person who had made large political contributions to the governing political party, as well as with cottagers' environmental concerns." The trial judge also overlooked many relevant facts showing that the journalist acted in a responsible and fair manner in preparing the story, such as his extensive research, interviews, documents obtained from many sources and reviewed by him, and his efforts to contact and obtain comment from Grant and his refusal to respond to Schiller's questions. As well, the trial judge failed to give any weight to the journalist's explanation of why some things were not included in the story.

However in an interesting development not argued at the appeal, instead of applying the *Reynolds* factors to dismiss the action the Court of Appeal directed a new trial. It did so on the basis that the meaning of the defamatory words needed to be resolved by a jury – a main issue of dispute in the case, as the plaintiffs alleged the article suggested improper influence while the defendants said it just outlined concerns people had.

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This, the Court said, is a question of fact for a jury, not a judge, and so a new trial was necessary. Although the new defense is a matter for the judge, the Court said that “without first having the jury decide whether the article had either of these meanings (or some other meaning), the trial judge was not in apposition to accurately and effectively weigh the factors for responsible journalism.”

This raises important questions about the role of a jury in determining factual issues that arise in responsible journalism cases. Of particular interest is the Court’s decision that prior to a judge determining the applicability of the defense, “the jury, having heard all the evidence, should have the opportunity to decide all relevant questions, regardless of the judge’s decision on the availability of the defence of public interest responsible journalism.” One wonders how this may affect the application of the defense where a jury might reject other defenses and even find malice and award large damages. Will a judge then have the courage to effectively overturn a jury verdict because in his or her view the responsible journalism defense should apply?

The Court also concluded that the trial judge erred in instructing the jury on a number of points. Most significantly, the judge incorrectly told the jury that the defense of fair comment turned on whether a “fair-minded” person could believe the comment. The judge’s charge misled the jury as the correct test is broader – whether a person could honestly hold the opinion on the facts proved. Although he stated it correctly at the outset, the trial judge went on to import a “fair mindedness” test, which he repeated several times.

In addition, the court held that a decades-old standard jury charge relied on by the trial judge regarding the issue of the meaning of allegedly defamatory words was wrong and misleading. As well, the trial judge made other errors, such as not making the test for malice clear, and failing to fairly summarize important evidence

The plaintiff is seeking leave to appeal to the Supreme Court of Canada. The defendants are seeking to cross-appeal on the issues relating to the role of the jury in order to have the action dismissed. As the Supreme Court is scheduled to consider the responsible journalism defense for the first time in February, in *Quan v. Cusson*, there is some hope that *Grant* may be heard and/or decided with it.

Paul Schabas, Simon Heeney and Erin Hault of Blake, Cassels & Graydon LLP in Toronto represented The Toronto Star. Plaintiffs were represented by Peter Downard and Catherine Wiley of Fasken Martineau DuMoulin LLP.

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Canadian Human Rights Tribunal Dismisses Complaints Against *Maclean's* Magazine *Magazine Accused of Insulting Muslims*

By Roger D. McConchie

On October 10, after deliberating four months, the British Columbia Human Rights Tribunal [dismissed complaints](#) brought by the Canadian Islamic Congress against *Maclean's*, a national news magazine, alleging that a cover story by Mark Steyn entitled "The Future Belongs to Islam" had exposed Muslims to hatred and contempt because of their religion, in violation of s. 7(1)(b) of the BC Human Rights Code. The Steyn article had been excerpted by *Maclean's* from Steyn's international bestselling book, "*America Alone*."

The Vancouver hearing of the Canadian Islamic Congress complaints in June marked the first time in the history of British Columbia that a national news media organization was compelled to appear before a government-appointed administrative tribunal to defend "hate speech" allegations.

Background

Maclean's also had the distinction of being the first publication to be targeted by a hate speech complaint which sought a Tribunal order that a national publication print a cover story of equivalent length and prominence in order to offset the alleged harm caused by the so-called hate speech.

There were other unusual aspects to the Tribunal hearings which took place under high security in the Provincial Courthouse in downtown Vancouver. The evidence supporting the complaints by the Islamic Congress (instigated and managed from beginning to end by three Ontario Muslim law students) included testimony about the allegedly injurious effects of the article in Ontario, and evidence about blogs and postings on blogs in Belgium, California, Texas, Ontario and Alberta.

The Tribunal, which normally occupies its times adjudicating landlord-tenant disputes, labor disputes, and complaints of sexual harassment in the work-place, was unmoved by *Maclean's* submissions that evidence of activities and events beyond its territorial jurisdiction were inadmissible.

Another unusual facet of the hearings involved live-blogging by spectators from the well of the court. A number of bloggers sitting in the public gallery tapping away at lap-top computers exposed the minute-by-minute workings of the Tribunal on the Internet in a way no ordinary news report could. This immediate, online reporting created significant reverberations in the blogosphere: the volume, reach and intensity of the Internet commentary about this Canadian legal proceeding was probably unprecedented.

The Canadian Islamic Congress ("CIC") argued at the conclusion of the hearing that the main message of the Steyn article was that "Muslims in the West are engaged in an underground conspiracy to take over the world by virtue of the authority of their religion." In the same vein, the CIC submitted that the article promoted "an image of Western Muslims as unwilling or unable to integrate into Western society, therefore creating a sense of Muslims as a population which does not belong" and "a view of Islam as having a global, uniform population that was unable to form an identity outside of its religious affiliation."

Faisal Joseph, the Ontario lawyer who represented the Islamic Congress at the hearing, alleged in his closing submission to the Tribunal on June 6 that the *Maclean's* article expressed hatred and contempt in a "polished tone" and with "great sophistication" and constituted "venom clothed in the language of reason."

The Steyn article began: "The Muslim world has youth, numbers and global ambitions. The West is growing old and enfeebled, and more and more lacks the will to rebuff those who would supplant it. It's the end of the world as we've known it."

Witnesses called by the Canadian Islamic Congress testified they were upset by passages such as the following: "Time for the obligatory "of courses": *of course*, not all Muslims are terrorists – though enough are hot for jihad to provide an impressive support network of mosques from Vienna to Stockholm to Toronto to Seattle. *Of course*, not all Muslims support terrorists – though enough of them share their basic objectives (the wish to live under Islamic law in Europe and North America) to function unwittingly

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Canadian Human Rights Tribunal Dismisses Complaints Against *Maclean's* Magazine

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or otherwise as the 'good cop' end of an Islamic good cop/bad cop routine. But, at the very minimum, this fast-moving demographic transformation provides a huge comfort zone for the jihad to move around in."

The Magazine's Defense

Maclean's took a narrowly-focused approach to the conduct of its defense.

When the five day hearing began in Vancouver on June 2, *Maclean's* informed the Tribunal in its opening statement that the magazine would not attempt to defend the content of its article on journalistic grounds.

Maclean's stated that it did not accept that the Tribunal or any similar tribunal at the federal level or in other Canadian provinces was entitled to monitor, inquire into, or assess its editorial decision about what should or should not be published.

Accordingly, *Maclean's* called no evidence from its editorial staff or from the author, Mark Steyn, to explain how the article was written, why certain graphics were chosen, or the editorial decisions taken in arriving at the article's final content, layout and positioning in the magazine's October 23, 2006 issue.

The Canadian Charter of Rights and Freedoms guarantees "freedom of expression, including freedom of the press and other media of communication" subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Although *Maclean's* took the position that s. 7(1)(b) of the BC *Human Rights Code* and the proceedings before the Human Rights Tribunal constituted an illegal infringement of *Maclean's* free speech rights, it was not entitled to mount a constitutional challenge to the legislation before the Tribunal. The BC *Administrative Tribunals Act* specifically deprived the Tribunal of any jurisdiction over Constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

In this connection, it should be noted that the Human Rights Tribunal members are appointees of the Provincial Cabinet, who do not enjoy the constitutional independence and tenure prescribed for superior court judges by the Constitution Act (formerly the British North America Act). The BC *Human Rights Code* specifically provides that the ordinary rules of evidence observed by a court do not apply. Further, because the Tribunal is administrative in nature, its decisions have no precedential value. They are not even binding on the Tribunal itself.

Maclean's noted in its opening submission to the Tribunal that s. 7(1) of the *Human Rights Code* imposes a form of strict liability on the target of a hate speech complaint. Under s. 7(1)(b), innocent intent, truth, fair comment on true facts, publication in the public interest and for the public benefit, and responsible journalism (recognized defenses

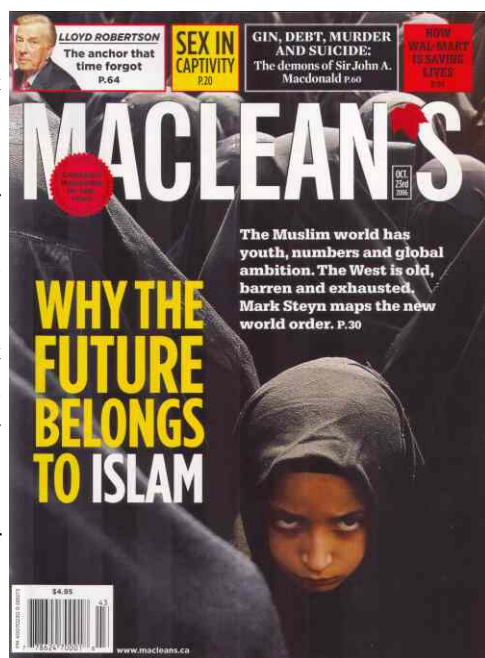
in defamation litigation) are not available. It is worth noting that although the federal *Criminal Code*, which applies uniformly across Canada, contains offences of advocating genocide, public incitement of hatred, and willful promotion of hatred, a guilty mind (*mens rea*) is a prerequisite to liability under the Criminal Code. Further, truth is a defense to a criminal charge of willful promotion of hatred, as is fair comment, publication in the public interest, and opinion expressed in good faith on a religious subject.

In its closing submission on June 6, *Maclean's* argued (successfully as it turned out) that the expression "*hatred and contempt*" in s. 7(1)(b) of the Human Rights Code must be restrictively interpreted to apply only to "*extreme ill-will and an emotion which allows for no redeeming qualities in the person at who it is directed.*"

On the basis of prior authorities, "*contempt*" must be limited to "unusually strong and deep-felt emotions of detestation, calumny and vilification."

In the context of those restricted means, the test for determining whether a given publication violates s. 7(1)(b) of the Code must be objective: whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the expression in question would be

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Canadian Human Rights Tribunal Dismisses Complaints Against *Maclean's* Magazine

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understood as exposing or tending to expose the member of the target group to hatred or contempt.

The Tribunal's Decision

Although the Tribunal's Reasons for Decision spans 37 pages, the core reasoning underpinning its dismissal of the complaints appears to be expressed on one relatively short paragraph:

"The article expresses strong, polemical, and, at times, glib opinions about Muslims, as well as world demographics and democracies. It contains few scholarly trappings, at least in the form presented in the magazine. It is inaccurate in some respects and we accept that it was hurtful and distasteful ...However, read in its context, the Article is essentially an expression of opinion on political issues which, in light of recent historical events involving extremist Muslims and the problems facing the vast majority of the Muslim community that does not support extremism, are legitimate subjects for public discussion."

The CIC has 60 days to commence legal proceedings for a judicial review of this decision in the Supreme Court of British Columbia. This scenario appears unlikely. The CIC did not seek a judicial review of the decision of the federal Canadian Human Rights Commission earlier this year to reject a virtually identical complaint it filed against *Maclean's* over the electronic version of the Steyn article which was posted on the magazine's website. Nor did the Canadian Islamic Congress seek judicial relief concerning a decision by the Ontario Human Rights Commission earlier this year rejecting that complaint because the Ontario statute does not contain a "hate speech" prohibition.

Although *Maclean's* was exonerated by the BC Tribunal, that may be small comfort for free speech proponents.

It is reasonable to expect that other national media organizations will eventually face future prosecutions under s. 7(1)(b) of the BC *Human Rights Code*. In fact, the Tribunal told future complainants how to improve their evidence in future cases. In its Reasons, the Tribunal implied that that the Canadian Islamic Congress might have succeeded if it had called an expert witness qualified to identify a writer's use of words and their intended meaning or effect on the recipient of a communication, as well as a sociologist who could explain the nature of Islamophobia and how the themes and stereotypes in the article might increase its prevalence.

In short, the Tribunal seems to be saying that the secret to success is for the complainant to present a complete lineup of experts to explain why published expression is hateful and contemptuous of people on the grounds of religion, race, colour, ancestry, place of origin, marital status, family status, physical or mental disability, sex, sexual orientation or age (all prohibited grounds in s. 7(1)(b)).

Conclusion

Maclean's has publicly stated that it is continuing to investigate its legal options despite the dismissal of the Canadian Islamic Congress complaints by the BC Human Rights Tribunal. One obvious question is whether, despite the dismissal, the Courts would hear a Charter challenge to the validity of the speech restrictions contained in s. 7(1)(b)

It is reasonable to expect that other national media organizations will eventually face future prosecutions under s. 7(1)(b) of the BC

of the BC *Human Rights Code*. One thing is clear: the threat posed to the national

news media in Canada by the hate speech provisions in the BC statute will remain alive indefinitely until those provisions are struck down by the courts.

Roger D. McConchie, of the McConchie Law Corporation, Vancouver, Canada, represented Maclean's Magazine in this matter together with Julian Porter, Toronto, Canada.

LEGISLATIVE UPDATE:**House Passes Libel Tourism Bill; Chance of Senate Passage Slim**

By **Bruce D. Brown** and **Laurie A. Babinski**

The House of Representatives took an affirmative step toward combating the phenomenon known as “libel tourism” this year with the passage of a bill proposing to bar enforcement of foreign defamation judgments that are inconsistent with the First Amendment. While the bill has little chance of moving in the Senate before the 111th Congress is gavelled in this January, its passage signals Congress’ desire to finally address an issue that has taken on increasing urgency as geographic boundaries in publishing and broadcasting become largely irrelevant.

Rep. Steve Cohen (D-Tenn.) introduced the bill, H.R. 6146, on May 22 seeking to protect American authors and publishers who are hauled into court overseas by a foreign plaintiff for making allegedly defamatory statements. These plaintiffs, dubbed “libel tourists” because they are often not residents of the country in which they sue, bring their cases in plaintiff-friendly jurisdictions overseas to get around First Amendment-based constraints posed by American defamation law. In his introduction of the bill, Rep. Cohen emphasized that “[t]his phenomenon threatens to undermine our Nation’s core free speech principles. . . . American authors and publishers should not be forced to restrict their speech to comport with more limited foreign standards.”

The Cohen bill provides: “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.” On September 27, the House passed the bill on suspension. The bill currently sits on the Senate calendar awaiting consideration.

H.R. 6146 was not the only libel tourism bill to be introduced in the 110th Congress. Two nearly identical bills, both named the “Free Speech Protection Act of 2008,” were also introduced earlier this year. Both bills are more heavy-handed than the Cohen bill. Neither H.R. 5814, which was introduced by Rep. Peter King (R-N.Y.) on April 16, nor S. 2977, which was introduced by Sen. Arlen Specter (R-Pa.) on May 6, requires an American sued overseas to wait until successful foreign plaintiffs bring enforcement proceedings in the United States. Instead, the bills allow American authors to seek a declaratory judgment in a United States as soon as a libel suit is filed against them overseas. This preemptive mechanism is made possible by an explicit grant of jurisdiction in United States courts over foreign libel litigants based only on the

fact that the “libel tourist” has sued an American citizen.

In addition, the bills allow Americans to obtain substantial damages against foreign libel litigants. Not only can Americans seek an amount equal to any foreign defamation judgment entered overseas, they can also seek litigation costs and attorneys fees as well as damages “due to decreased opportunities to publish, conduct research, or generate funding.” The bill further provides for treble damages if Americans can prove by a preponderance of the evidence that foreign libel litigants “intentionally engaged in a scheme to suppress First Amendment rights.”

All three bills were introduced on the heels of the New York legislature’s April 28 passage of the “Libel Terrorism Protection Act,” N.Y. C.P.L.R. § 5304, aimed at protecting American authors against foreign defamation judgments. Inspired by author Rachel Ehrenfeld, who was sued for libel in England by Saudi Sheikh Khalid bin Mahfouz because of statements made in her book about terrorism financing, the Act gives New York courts jurisdiction over foreign litigants based on their defamation suits abroad regardless of whether enforcement of any resulting judgment is sought in the United States. It directs courts to bar enforcement of foreign defamation judgments if they do not measure up to the federal and New York state constitutions.

Sens. Specter and Joe Lieberman (I-Conn.) shone a spotlight on the need for a solution to libel tourism this summer with an op-ed in the *Wall Street Journal* drawing an analogy to the era of *New York Times v. Sullivan* when “opponents of civil rights were filing libel suits to silence news organizations that exposed state officials’ refusal to enforce federal civil rights laws.” The Senators continued: “Now we are engaged in another great struggle – this time against Islamist terror – and again the enemies of freedom seek to silence free speech. Our legislation will help ensure that they do not succeed.” See Arlen Specter and Joe Lieberman, Op-Ed., *Foreign Courts Take Aim at Our Free Speech*, *Wall St. J.*, July 14, 2008, at A15.

Despite the Senators’ appeal, neither of these two bills is likely to proceed any further during the 110th Congress either. H.R. 5814 remains in the House Judiciary Committee’s Subcommittee on Courts, the Internet, and Intellectual Property. S. 2977 is stalled in the Senate Judiciary Committee.

Bruce D. Brown is a partner and Laurie A. Babinski is an associate at Baker & Hostetler LLP in Washington, D.C.

The Accidental Libel Tourist

Illinois Enacts “Libel Terrorism Protection” Law

By Samuel Fifer

Though international comity is often a signal of goodwill between nations, there is an alarming trend of “libel tourism” on the rise that few in the media would find welcome. Libel tourism describes a situation where a plaintiff, typically a public person, such as an actor, brings a defamation (or privacy) suit outside the U.S. to avoid First Amendment protections conferred on U.S. broadcasters and publishers that would make the plaintiff’s litigation prospects poor if she were to bring suit in the U.S.

While there has been a smattering of case law in the past decade or so that has erected a post-judgment barrier to enforcement of such noxious imports, two states have enacted laws that would allow preemptive strikes against these libel tourists and create a category of protection more formidable than case law. Ironically, such statutes have as one of their features a less exacting standard for minimum contacts, sufficient to hale the defendant (but really, the complaining party) into court to defend against a declaratory action that the publication in question is not actionable under domestic law. Clearly, the unspoken understanding is that the suit must be brought in the U.S. and played by First Amendment rules.

This trend can be seen most recently in the unfortunately named “Libel Terrorism Protection Act,” signed into law by New York’s Governor David Paterson on March 31, 2008, which spawned an Illinois bill of the same name that was signed into law by Governor Rod Blagojevich August 19, 2008. Both the U.S. House and Senate have attempted to enact similar legislation, which would make the reduced personal jurisdiction requirements federal law, but would also allow the defendant to sue the plaintiff for damages to her reputation in the form of treble damages, with the merits of such a claim to be determined by a jury. However, it remains to be seen whether Congress will put this legislation back on the table in the coming term.

Case History

The courts have over the years loosened the requirements for “minimum contacts.” In *Calder v. Jones*, the U.S. Supreme Court held that the plaintiff, actress Shirley Jones, should have the ability to bring a defamation suit in California based on an article published in the *National Enquirer* that had been written

in Florida and circulated nationally. 465 U.S. 783 (1984). This case established that circulation of a publication would be sufficient for personal jurisdiction, extending domestic options for those bringing defamation suits without endangering the First Amendment protections of the press.

The same day as *Calder*, the Supreme Court also held in *Keeton v. Hustler Magazine, Inc.* that minimum contacts for personal jurisdiction would be satisfied when the party was not a resident of the state in which the suit was brought, where it was fair (under traditional due process notions) for the defendant to expect to be sued anywhere. 465 U.S. 770 (1984). Thus, the Court would allow a more lenient approach to minimum contacts if the injury occurred in a specific state, decisions which seem to have paved the way for the new Illinois law.

The concept of refusing to honor a foreign-procured defamation judgment in the U.S. is happily not new. In *Bachchan v. India Abroad Publications Incorporated*, 585 N.Y.S.2d 661 (1992), the New York Supreme Court refused to grant comity to the British court’s finding for £40,000 in damages against a New York news service that had reprinted an article appearing in *Dagens Nyheter*, a Swedish daily newspaper. Not surprisingly, the British jury did not apply the standard for defamation established in *New York Times Co. v. Sullivan* that requires that a plaintiff prove that an article about a public figure was published with “actual malice,” that is, with knowledge of falsity or reckless disregard for the truth of the matter. 376 U.S. 254 (1964).

The *India Abroad* case was an early example of how to beat back libel tourism. A much more recent case of libel tourism, and the one that spurred the creation of the New York law, started with *Funding Evil: How Terrorism is Financed-and How to Stop It*, a book in which Rachel Ehrenfeld, a noted counterterrorism expert, alleged that Saudi billionaire Khalid bin Mahfouz had financial ties to terrorist groups. Only 23 copies of the book were sold in Britain, enough to satisfy their minimum contacts requirement and ensure that the case would be tried in a forum notoriously sympathetic to defamation plaintiffs.

Ms. Ehrenfeld had attempted to preemptively countersue bin Mahfouz in the U.S., but New York courts, supported by the Second Circuit, dismissed her case for lack of personal jurisdiction over the defendant (i.e., the person complaining about the publication at issue), *Ehrenfeld v. Mahfouz*, 518 F.3d 102

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The Accidental Libel Tourist

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(2d Cir. 2008). In an attempt to protect American authors from defamation actions abroad, as well as pecuniary sanctions, the New York legislature responded with legislation a mere 28 days after the Second Circuit’s decision, and the Illinois legislature followed suit soon after by creating an amendment to the Illinois Code of Civil Procedure’s “long-arm” provisions.

The pertinent segments of the Illinois law, 735 ILCS 5/2-209, read as follows:

(b-5) Foreign defamation judgment. 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 Illinois or, if not a natural person, has its principal place of business in Illinois, for the purposes of rendering declaratory relief with respect to that resident’s liability for the judgment, or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to this Code, to the fullest extent permitted by the United States Constitution, provided:

(1) the publication at issue was published in Illinois, and

(2) that resident (i) has assets in Illinois which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in Illinois to comply with the foreign defamation judgment.

The provisions of this subsection (b-5) shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to, on, or after the effective date of this amendatory Act of the 95th General Assembly.

(7) the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the

foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions.

Illinois and New York have now opened the door to allow pre-emptive strikes against potentially defamatory libel suits abroad. However, the proposed federal legislation would go further, and to a potentially dangerous degree. House bill H.R. 6146, which was passed unanimously, prohibits domestic courts from granting comity to foreign judgments of defamation against a public figure or about a matter of public concern, unless the judgment was made in compliance with First Amendment safeguards. However, a more aggressive House bill, H.R. 5814, which bears a more striking resemblance to the Senate’s attempt in S2977, was never passed. S2977 likewise was introduced in May of 2008, read twice, but never made it

out of the Senate Judiciary Committee.

This version of the “Free

Speech Protection Act of 2008” would grant the ability to sue for treble damages and the low bar set for a jury to find these damages applicable, and could potentially trigger a cold war between different countries’ legal systems and standards for libel. This makes a clear statement that the U.S. will relax requirements so that a potential libel plaintiff can be sued – for purposes of obtaining a declaratory judgment – almost anywhere in the U.S., and that the standard for minimum contacts for this purpose is now greatly relaxed.

However, that is applicable only if the suit is brought within the borders of the U.S. This creates an odd paradox in which on one hand, the former jurisdictional requirements are greatly expanded, while at the same time strengthening the walls to keep foreign judgments out. This next Congressional term will see the question raised of whether the more internationally punitive federal legislation will make it through the halls of Congress, and if so, what the judicial response will be.

Samuel Fifer is a partner at Sonnenschein Nath & Rosenthal LLP in Chicago. Thanks to Sara Feinstein, University of Chicago Law School Class of 2008 and Sonnenschein Summer Associate, Class of 2007.

Illinois and New York have now opened the door to allow pre-emptive strikes against potentially defamatory libel suits abroad.

Expletive Deleted: High Court Considers FCC Indecency Rules

By Jerianne Timmerman

On election day, the Supreme Court heard oral argument in a case examining the Federal Communications Commission's rules restricting "indecent" material on broadcast television and radio. *FCC v. Fox Television Stations, Inc.*, No. 07-582 (argued Nov. 4, 2008).

As everyone is aware, the past few years have seen a significant crackdown on allegedly indecent broadcast programming, including programming containing expletives. The FCC's recent, stricter indecency enforcement policies – including finding the use of even fleeting expletives actionable indecent – have raised a myriad of administrative law and constitutional questions.

Given the focus of the oral argument, the Court appears unlikely to resolve in the *Fox* case the fundamental constitutional issues implicated by the FCC's indecency regulatory regime.

FCC's About-Face on Fleeting Expletives

Federal law prohibits the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464. Thirty years ago, the Supreme Court, by a slim 5-4 majority, upheld the differential treatment of indecency in the broadcast media in comparison to all other electronic and print media. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court based its decision on the supposed unique pervasiveness and accessibility (especially to children) of the broadcast media. However, the *Pacifica* Court stressed the narrowness of its decision and specifically stated that it was *not* ruling that an occasional expletive would justify any sanctions against broadcasters.

Consistent with *Pacifica*, the FCC for decades adhered to the position that fleeting expletives were not actionable under its indecency rules. However, in 2004 the FCC reversed course, concluding that even the fleeting use of certain expletives was actionable indecent and profane. See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 FCC Rcd 4975 (2004) (use of the phrase "fucking brilliant" by the singer Bono during a live broadcast).

The FCC applied its new policy on fleeting expletives in a number of subsequent cases, including two broadcasts on the Fox network of the Billboard Music Awards. In those two cases, the FCC found that the fleeting use of "fuck" and "shit" in live programming was indecent and profane. See *Complaints Regarding*

Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664, 2690-95 (2006). Fox appealed this order to the Second Circuit Court of Appeals.

Appeals Court Reverses FCC

In June 2007, the Second Circuit overturned the FCC's new indecency policy on the use of fleeting expletives. In a 2-1 decision, the appeals court found that the FCC had made a 180-degree turn regarding its treatment of fleeting expletives without providing a reasoned explanation justifying the about-face. Thus, the court concluded that the agency's fleeting expletive policy was arbitrary and capricious and invalid under federal administrative law.

The court refrained from deciding the constitutional challenges raised by broadcasters. However, the court engaged in a lengthy discussion of the constitutional issues raised by the FCC's indecency regulations, which had been fully briefed. The court strongly indicated its skepticism about the constitutionality of the fleeting expletive policy and, more broadly, about the FCC's current indecency regulatory regime.

Broadcasters' Arguments before Supreme Court

In its petition for certiorari, the FCC specifically dwelled on the Second Circuit's *dicta* as to the constitutionality of the fleeting expletive policy and the agency's broader authority to regulate indecency. But having sought Supreme Court review on the basis of these constitutional issues, the FCC in its brief asked the Court to essentially ignore the First Amendment and focus narrowly on whether the agency gave a reasoned explanation for its fleeting expletives policy.

The broadcast networks argued both that FCC had failed to give a reasoned explanation for its change in policy and that the policy itself violates the First Amendment. Numerous *amici* supported the network parties, including commercial and noncommercial broadcasters, former FCC Commissioners and officials, state broadcaster associations, members of the creative community and various free speech advocacy groups. Other advocacy groups, including the Parents Television Council and Morality in Media, the National Religious Broadcasters, and some members of the U.S. House of Representatives, filed amicus briefs supporting the FCC.

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Expletive Deleted: High Court Considers FCC Indecency Rules

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While the broadcast networks focused on the constitutional and administrative law aspects of the case, the National Association of Broadcasters and the Radio-Television News Directors Association filed an amicus brief stressing the practical effects on broadcasters of the FCC's indecency enforcement policies. NAB pointed out that the FCC's recent indecency decisions have been inconsistent and appear to be based on the agency's subjective view of the value of the program content. For example, the FCC found that an unedited broadcast of the Steven Spielberg film "Saving Private Ryan" containing repeated expletives was not actionably indecent. In contrast, however, the agency found that the expletives in a Martin Scorsese documentary about blues music aired by a community college's noncommercial television station were actionably indecent.

NAB explained to the Court that the FCC's inconsistent and arbitrary application of its stricter expletive policy has had and will continue to have a chilling effect on broadcast content that is not indecent. Broadcasters are understandably concerned about the potential for very high indecency fines that could financially cripple local stations. This chilling effect has only been compounded by Congress' ten-fold increase in the maximum forfeiture allowable for violating the FCC's indecency rules – which in June 2007 went from \$32,500 to \$325,000 per violation.

NAB's brief included numerous instances – which were cited by counsel during oral argument – of broadcasters engaging in self-censorship and declining to air even non-indecent content due to the lack of clear guidance from the FCC. For example, in 2006 a Vermont public radio station forbade a legislative candidate from participating in a broadcast debate because he had previously referred to two students as "shits" and the station wanted to avoid potential exposure to a fine. It is precisely small, local broadcasters such as these that can least afford fines or the cost of "delay" technologies to censor live programming.

Broadcasters have also been prejudiced by the manner in which the FCC has enforced its indecency policies. As discussed in detail in NAB's brief, the FCC has in some cases delayed issuing final decisions in indecency cases, thereby preventing judicial review. For instance, the FCC has failed to act on oppositions to the notice of apparent liability issued in March 2006 regarding the broadcast of the Scorsese documentary about the blues.

The FCC has also delayed the processing of stations' license renewal applications due to the existence of mere unproven indecency complaints against stations – a practice that greatly complicates the ability of owners to sell their licenses. The FCC has

further required licensees to toll the statute of limitations on pending indecency complaints as a condition for license renewal and assignment. In the case of some license assignments, the FCC has even gone so far as to require an escrow of the potential forfeiture amount for the as yet adjudicated complaints.

To avoid adverse indecency determinations and massive fines, certain broadcasters have additionally agreed to settle indecency complaints in "voluntary" agreements that mandate substantial self-censorship, even when there is only a preliminary suggestion that indecent material may have been broadcast. For instance, as part of a 2004 consent decree, one broadcaster was required to take steps to discipline employees "materially participating" in the broadcasting of allegedly indecent content if it receives a preliminary indecency finding such as a notice of apparent liability.

Finally, NAB argued that the FCC's arbitrary and standardless application of its indecency rules runs contrary to core First Amendment principles. The Supreme Court has repeatedly held that government officials with the power to suppress speech must have their discretion limited by meaningful standards.

Oral Argument Limited in Scope

During oral argument on November 4, all of the Justices focused almost exclusively on the administrative law aspects of the *Fox* case. Constitutional considerations mainly arose as they related to the administrative law standard of review; that is, when a decision of an agency has such constitutional implications, should a higher or more stringent standard of review be applied or should the "normal" administrative law standards apply?

Chief Justice Roberts and Justice Scalia asked the most questions; they seemed particularly inclined to defer to the FCC and find that the agency had given an adequate explanation for its change in policy. Justice Kennedy – the Court's most consistent First Amendment advocate – said very little throughout the argument.

Outcome Likely Limited – At Least for Now

In light of the oral argument, the outcome in *Fox* will most likely be a narrow decision focused on administrative law issues. If the Court were to find that the FCC did supply a sufficient explanation for its reversal of policy regarding fleeting expletives, then the parties will probably find themselves back at the Second

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Expletive Deleted: High Court Considers FCC Indecency Rules

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Circuit arguing about the constitutionality of the agency's policy. Certainly one panel of the Second Circuit, as discussed above, has already indicated its opinion about the constitutionality of the FCC's policy.

In any event, it seems likely that the constitutionality of the FCC's fleeting expletive policy – or indeed its entire indecency regulatory regime – will be back before the Supreme Court in a case where those issues must be considered. If the Court declines to address the constitutional issues in the current *Fox* case, that case may well return in the future following another detour to the Second Circuit. In addition, the government recently requested the Supreme Court to review the Third Circuit's reversal of the FCC's decision imposing liability on CBS for Janet Jackson's Superbowl wardrobe malfunction.

Given that the FCC has also cracked down on sexually explicit images, as well as language, there are additional indecency

cases currently working their way through the courts. Briefs have been filed in ABC's appeal to the Second Circuit of the FCC's decision finding indecent an episode of *NYPD Blue* briefly showing a woman's buttocks. The FCC is attempting to enforce indecency penalties against Fox in the federal district court for the

District of Columbia for the airing of an episode of the reality show *Married by America*, which involved sexually suggestive

content and pixilated nudity.

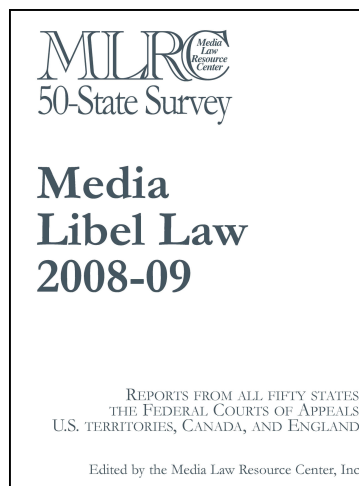
In sum, it appears likely that the fundamental First Amendment issues implicated by the FCC's regulation of allegedly indecent programming on broadcast radio and television will be receiving substantial judicial attention in the near future.

Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters.

Chief Justice Roberts and Justice Scalia asked the most questions; they seemed particularly inclined to defer to the FCC



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Supreme Court To Hear Appeal in Campaign Law Case

Is Anti-Clinton Documentary Electioneering Communication or Core Political Speech?

The Supreme Court indicated it will hear a case that raises the interesting question of whether a polemical political documentary can be regulated as an “electioneering communication” under the Bipartisan Campaign Reform Act of 2002 (BCRA). *Citizens United v. Federal Election Commission*, No. Civ A.07-2240, 2008 WL 2788753 (D.D.C. Jul 18, 2008), *probable jurisdiction noted by* 2008 WL 3849398 (U.S. Nov 14, 2008).

Citizens United, a conservative political advocacy group, and the producer of the documentary, had argued that the documentary was core political speech. A three-judge district court panel comprised of Judges Raymond Randolph, Royce Lamberth and Richard Roberts disagreed, finding the documentary to be “express advocacy” to vote against Hillary Clinton and therefore subject to BCRA’s campaign advertising regulations. *See* 530 F. Supp. 2d 274 (D.D.C. 2008) (denying motion for preliminary injunction), *appeal dismissed*, 128 S.Ct. 1732 (U.S. Mar 24, 2008).

Background

At issue is a political documentary entitled “Hillary: The Movie.” Citizens United describes the movie as follows: “If you want to hear about the Clinton scandals of the past and present, you have it here! Hillary The Movie is the first and last word in what the Clintons want America to forget!” The movie is sharply critical of Clinton and features commentary by more than 20 conservative journalists and commentators, including Dick Morris, Ann Coulter, Newt Gingrich, Tony Blankley, Dick Armey and Bay Buchanan. Among other things, Clinton is described as

“driven by power,” “steeped in sleaze,” “expert at not saying what she believes,” and “divisive.”

The movie was released in January 2008 when Hillary Clinton was the front runner for the Democratic Party’s presidential nomination. At the same time, Citizens United

brought a declaratory judgment action alleging that BCRA was unconstitutional on its face and as applied to the extent it would treat the documentary as “electioneering communications,” subject to the law’s campaign advertising restrictions and financial disclosure requirements.

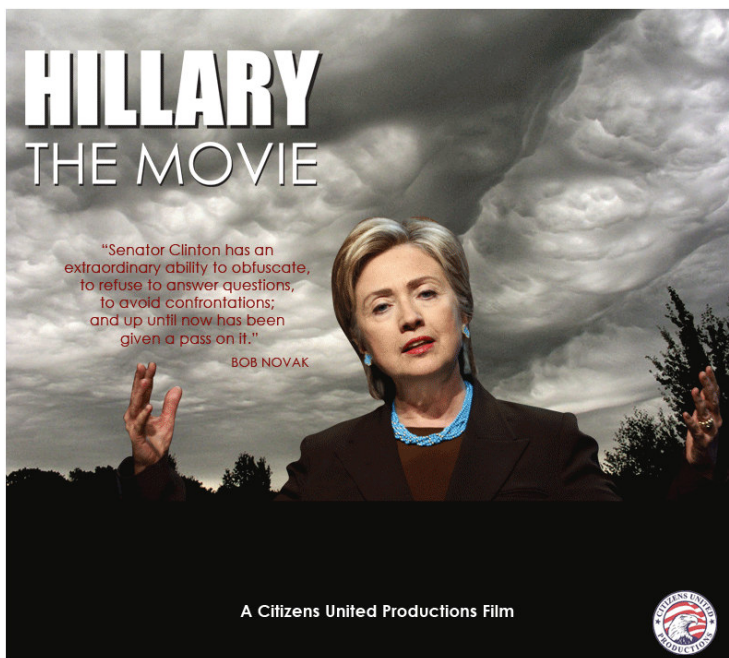
District Court Ruling

The three-judge district court panel first rejected Citizen United’s facial challenge to BCRA. The court noted that Citizen United was asking it to overrule the Supreme Court’s decision in *McConnell v. FEC*, 540 U.S. 93 (2003). “Only the Supreme Court may overrule its decisions,” the district court noted.

On the as applied challenge, the district held that the claim was subject to the test announced by the Supreme Court in last year’s decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007). In *Wisconsin Right to Life*, Chief Justice Roberts stated that a campaign advertisement could not be considered “express advocacy” under BCRA unless it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

After reviewing the movie and script in detail, the court concluded that the movie was “susceptible of no other interpretation than to inform the electorate that Senator Clin-

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Supreme Court To Hear Appeal in Campaign Law Case

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ton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her. The Movie is thus the functional equivalent of express advocacy.” *Citizens United*, 530 F. Supp. 2d at 279-80.

BCRA provides for a direct appeal to the Supreme Court. *Citizens United* appealed the denial of the preliminary injunction. In March 2008, the Supreme Court denied the appeal “for want of jurisdiction,” presumably because it was a non-final order. In July 2008, the district court granted summary judgment to the Federal Election Commission and *Citizens United* renewed its appeal. On November 14, the Supreme Court noted probable jurisdiction to hear the appeal.

Issues on Appeal

In its brief to the Supreme Court, *Citizens United* raises three questions for the Court:

(1) Given the First Amendment's liberty and privacy guarantees and the government's authority to regulate elections, where is the line at which the government may compel disclosure as to independent communications touching on elections?

(2) In determining whether a communication may only be “interpret[ed] ... as an appeal to vote for or against a specific candidate,” *WRTL II*, 127 S. Ct. at 2667, can a communication constitute this “appeal to vote” absent a clear plea for action that can only be understood as a call to vote for or against a candidate?

(3) May a feature-length movie be regulated as a campaign “ad,” or is it different in kind and protected from regulation by the First Amendment?

As to the third issue, *Citizens United*'s brief argues:

Feature-length documentary movies are different in kind from “ads.” The FEC has not shown that movies pose the same dangers as the ads targeted by Congress in passing BCRA, which ads were subsequently relied upon by this Court in *McConnell*. The FEC argues that “the *McConnell* record included evidence of broadcast advocacy longer than the traditional 30 or 60-second spot, such as paid, 30-minute ‘infomercials.’ ” In fact, however, the district court pointed out that such infomercials had not been included in the studies upon which the court relied. *McConnell v. FEC*, 251 F. Supp. 2d 176, 305-06, 316-17 (D.D.C. 2003) (op. of Henderson, J.). Moreover, even a thirty-minute infomercial is different in kind from a feature-length film that has a compendium book, is shown in theaters, and is sold on DVD.

Unlike “ads,” movies are not imposed unawares on a captive audience that has chosen to watch a different program. Rather, movies must be selected by a willing viewer. And unlike the ads in *McConnell*, the FEC has not shown that movies were an “electioneering” problem giving rise to a Congressional remedy, 540 U.S. at 127 n. 20, a showing the FEC is required to make. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Feature-length movies were nowhere at issue in *McConnell*. Whether they are subject to regulation as “electioneering communications” remains a substantial question that this Court should decide.

Citizens United is represented by James Bopp Jr. of Bopp, Coleson, and Bostrom in Terre Haute, Indiana.

New York Court Grants Permanent Injunction Against Harry Potter Companion Book

Defendant Appropriated too Much of Rowling's Creative Work

By Dale Cendali and Claudia Ray

On September 8, 2008, the United States District Court for the Southern District of New York issued a permanent injunction on behalf of plaintiffs Warner Bros. Entertainment Inc. and J.K. Rowling, barring defendant RDR Books from publishing its planned book entitled *The Lexicon*. *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (Patterson, J.).

The court held that plaintiffs had established a *prima facie* case of infringement as to the seven books in the *Harry Potter* series of novels and also as to two companion books authored by plaintiff Rowling, *Quidditch Through the Ages* and *Fantastic Beasts and Where to Find Them*. The court also held that defendant had failed to show that its use of plaintiffs' works was a fair use because it "appropriates too much of Rowling's creative work for its purposes as a reference guide."

Background

Plaintiff J.K. Rowling is the author of the *Potter* novels, which tell the story of a young boy named Harry Potter and his friends as they battle the evil Lord Voldemort while also attending the Hogwarts School of Witchcraft and Wizardry. Rowling's work is "filled with magical spells, fantastical creatures, and imaginary places and things." The seven-book series has achieved both popular and critical success, and has been credited with encouraging children to read books.

Rowling has also authored two short companion books (collectively, the "Companion Books"), *Quidditch Through the Age*, which tells the story of an imaginary sport, "quidditch," that Harry Potter and his friends play at Hogwarts, and *Fantastic Beasts and Where to Find Them*, an A-to-Z encyclopedia of the fantastical creatures in the *Harry Potter* universe. The proceeds from the Companion Books (more than \$30 million to date) have been donated to char-

ity. Rowling has stated on a number of occasions that once the *Harry Potter* series was completed (which occurred upon publication of the seventh book in July 2007), she intended to publish a "*Harry Potter* encyclopedia," the proceeds of which would also be donated to charity.

Plaintiff Warner Bros. Entertainment Inc. is the owner of the film rights to the *Harry Potter* series, and has released five films, with a sixth due out in November 2008.

Defendant RDR Books is a Michigan publisher. Authorship of the *Lexicon* is attributed to Steven Vander Ark, the

**Defendant "appropriates too much of Rowling's
creative work for its purposes as a reference
guide"**

owner of "The Harry Potter Lexicon" website (the "Website"), a

popular *Harry Potter* fan site that Vander Ark founded in 1999. As the court noted, the Website includes, among other things, indexed A-to-Z lists of the characters, creatures, places, spells and magical items from the *Harry Potter* works, fan art, commentary, timelines, forums, and interactive data, which are drawn primarily from Rowling's works.

As the court discussed, RDR's president, Roger Rappoport, contacted Vander Ark in August 2007 about writing a *Harry Potter* encyclopedia after reading a newspaper article about him. The court noted that Vander Ark was aware of Rowling's public statements regarding her plans to write a *Harry Potter* encyclopedia and had previously stated that publishing such a book would violate Rowling's intellectual property rights, and that he would never do so except with her permission. The court also noted that Vander Ark changed his mind after meeting with Rappoport, who assured him that publication of content from the Website was legal and agreed to add an atypical clause to the publishing contract for the *Lexicon*" providing that RDR would defend and indemnify Vander Ark in the event of any lawsuits.

The court found that Vander Ark created the *Lexicon* using the encyclopedia sections of the Website. It contains descriptions of all of the persons, places, spells and creatures from Rowling's *Harry Potter* works in an A-to-Z for-

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mat. The information included in the entries includes descriptions of the subject's attributes, and role in the story, relationship to other characters and events, as well as the events involving the subject of the entry. The entries generally but not always include references, including chapter references for the novels. The *Lexicon* also includes a small amount of material from third-party sources, including "sporadic" etymological references.

The court noted that RDR and Vander Ark had planned to rush the book to market by late October 2007, in part to capitalize on the interest generated by the publication of the final *Harry Potter*. Some of RDR's marketing materials mischaracterized Rowling's previous statements about the Website, giving the impression that she supported publication of the *Lexicon*.

Rowling's literary agency first learned of the *Lexicon* upon seeing an ad for it on a publishing industry website. In September 2007, plaintiffs' counsel sent a letter to Vander Ark, copied to RDR, stating that the *Lexicon* appeared to infringe Rowling's copyrights and asking that RDR cease its publication efforts. RDR replied, promising to look into the matter, and meanwhile continued marketing the book. An exchange of letters followed. On October 31, 2008, after RDR refused to delay publication or provide a copy of the manuscript, plaintiffs commenced an action against RDR Books in the Southern District of New York, alleging copyright infringement, as well as various other claims under federal and state law, and seeking both injunctive relief and damages.

On March 5, 2008, the court consolidated the scheduled evidentiary hearing with a trial on the merits, pursuant to Fed. R. Civ. P. 65(a)(2). The pretrial orders narrowed the issues to be tried to (i) plaintiffs' claim for copyright infringement and statutory damages and (ii) defendant's defenses of copyright fair use, copyright misuse and unclean hands. A bench trial was held from April 14 to 17, 2008. On September 8, 2008, the court issued an opinion finding that RDR had infringed Rowling's copyrights and rejecting its fair use defense.

Substantial Similarity

In considering whether the *Lexicon* infringed plaintiffs' works, the court first noted that there was no dispute that

the *Lexicon* had copied Rowling's works, as Vander Ark had admitted that he created and updated the book's content using notes that he took while reading Rowling's works as well as unauthorized scanned, electronic copies of those works.

In deciding whether the copying rendered the *Lexicon* substantially similar to plaintiffs' works, the court examined whether it was quantitatively and qualitatively substantial. As to the first prong, the quantitative extent of the copying, the court relied on the Second Circuit's decision in *Castle Rock v. Carol Publishing*, 150 F.3d 132, 140 n.6 (2d Cir. 1998) in noting that it would consider the amount of copying not only of the direct quotations and close paraphrasing, but also all of the other protectable expression. The court also noted that where, as here, the copyrighted work was "wholly original," a lower quantity of copying would support a finding of substantial similarity.

The court then concluded that plaintiffs had shown that the *Lexicon* copied a sufficient quantity of the *Harry Potter* series and the Companion Books to support a finding of substantial similarity where most of its 2,437 entries "contain direct quotations or paraphrases, plot details, or summaries of scenes from one or more of the *Harry Potter* novels" and the copied expression was "entirely the product of the original author's imagination and creation." 575 F. Supp. 2d at 535. The court noted that the copying was "even more substantial" as to the Companion Books. Although they were only 59 and 56 pages long, the *Lexicon* reproduced a "substantial portion of their content, with only sporadic omissions, across hundreds of entries." *Id.*

The court also found that the second prong was satisfied, concluding that despite the dissimilarity in the overall structure of the *Lexicon* and plaintiffs' works, the copying of Rowling's creative, original expression was qualitatively substantial where "the plotlines and scenes encapsulated in the *Lexicon* are appropriated from the original copyrighted works." 575 F. Supp. 2d at 538.

Derivative Work

The court next addressed plaintiffs' claim that the *Lexicon* was an unauthorized derivative work. The court rejected that argument, concluding that because the *Lexicon* was structurally different and did not recast the original

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New York Court Grants Permanent Injunction Against Harry Potter Companion Book

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material in another medium to tell the same story, it was not a derivative work. 575 F. Supp. 2d 539.

Fair Use

Having found that plaintiffs had established a prima facie case of copyright infringement, the court turned to RDR's affirmative defense of fair use. It began with the first statutory fair use factor, whether and to what extent the new work is transformative, meaning whether it merely supersedes the objects of the original creation or instead adds something new with a further purpose or character. 575 F. Supp. 2d at 541. The court found that the purpose of the *Lexicon* was transformative in that it used material from the original works to make information about the "intricate" world of the *Harry Potter* series accessible to readers as a reference guide.

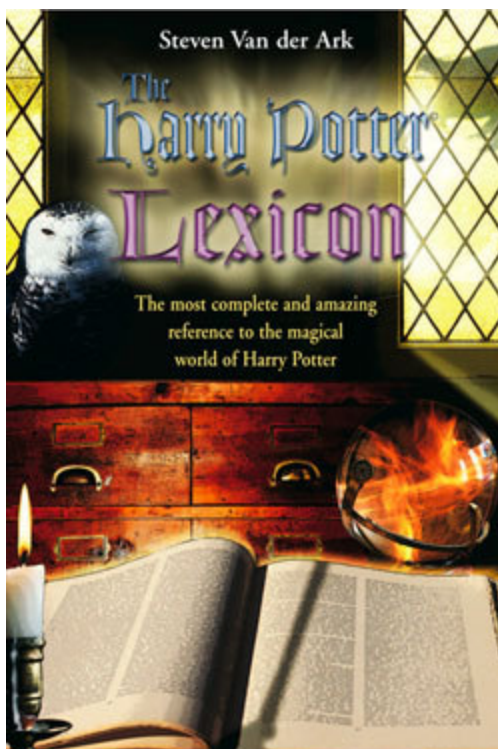
It concluded that this transformative purpose distinguished the *Lexicon* from the "Seinfeld" trivia book at issue in *Castle Rock*, which the Second Circuit had found simply repackaged the television program to entertain viewers. 150 F.3d at 142. The court also found that, notwithstanding plaintiffs' assertion that the *Lexicon* did not add any significant analysis or commentary, it did offer some new insights regarding plaintiffs' works. But the court found that the book was transformative of the Companion Books to a much lesser extent because they could also be used for reference purposes.

Ultimately, the court concluded that the book's transformative character was diminished by the fact that it was not consistently transformative because it engaged in verbatim copying beyond what was reasonably necessary to achieve its transformative purpose. 575 F. Supp. 2d at 544. The court also concluded that the *Lexicon* lacked transformative character where its value as a reference guide lapsed, as in some of the longest entries which contained few or no citations.

The court also considered the commercial nature of the *Lexicon*, noting that the commercial nature of RDR's use of plaintiffs' works weighed against a finding of fair use. It also considered what it called the "subfactor" of whether defendant had acted in good faith. The court found that RDR was entitled to proceed with its marketing efforts based on a reasonable belief that its use was a fair use, and that Vander Ark's use of unauthorized electronic copies of plaintiff's works was insufficient to support a finding of bad faith where he did not obtain any material that was not already available to the public. The court concluded that this subfactor only weighed slightly in favor of plaintiffs because defendant reasonably believed that its use was fair.

Turning next to the third factor, the court considered the amount and substantiality of defendant's use. The court framed the question as whether the amount and value of the original expression used was reasonable in relation to the *Lexicon*'s transformative purpose of creating a complete A-to-Z guide to the *Harry Potter* world. It found that in order to fulfill its purpose as a reference guide, it was reasonably necessary for the *Lexicon* to make considerable use of the original works. The verbatim copying and close paraphrasing, however, weighed against RDR, given that in many instances the copied material was a colorful literary device or distinctive description. The court noted that such language was of great quality and importance, what Rowling had described as "the plums in [her] cake." 575 F. Supp. 2d at 547.

The verbatim copying of this "highly aesthetic expression" raised a significant question as to whether it was reasonably necessary to achieve the purpose of the *Lexicon*. It concluded that although it was difficult to draw a line, the copying in the *Lexicon* was of the sort that might be expected from a copyright owner, not a third party, and was substantial enough to tip this factor against a finding of fair use. The court noted that the analysis was easier with respect to the Companion Books, as the *Lexicon* "takes wholesale from these short books." 575 F. Supp. 2d at 548.



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New York Court Grants Permanent Injunction Against Harry Potter Companion Book

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Because its purpose as to them was only slightly transformative, the amount and substantiality of the material copied from those works weighed more heavily against a finding of fair use.

The court then considered the second statutory fair use factor, the nature of the copyrighted work. It noted that it is well-settled that creative and fictional works are generally more deserving of protection of factual works. The court found that in creating the *Harry Potter* works, Rowling “has given life to a wholly original universe of people, creatures, places, and things.” 575 F. Supp. 2d at 549. Such “highly imaginative and creative” material is close to the core of copyright, particularly where, as here, the defendant’s work was not consistently transformative.

Finally, the court considered the fourth statutory factor, the effect of the defendant’s use on the potential market for or value of the original work. It noted that courts must consider not only the primary market for the copyrighted work, but also the current and potential market for derivative works based on it. Both plaintiffs and defendant had presented expert testimony on the issue of market harm to the *Harry Potter* works, but the court concluded that such testimony was not relevant because the *Lexicon* was not a derivative work and therefore was allowed to compete with Rowling’s planned encyclopedia.

The court also found that there was no basis for concluding that publication of the *Lexicon* would impair sales of the *Harry Potter* novels, as it found that reading the *Lexicon* would not serve as a substitute for reading the original works given the *Lexicon*’s transformative purpose as a reference guide.

Nevertheless, the court found that publication of the *Lexicon* could harm sale of the Companion Books. Given that those books had been taken wholesale, consumers who bought the *Lexicon* would have little reason to purchase either of the Companion Books. In light of this market harm, the court found that the fourth factor weighed in favor of plaintiffs. The court also found that the fourth factor favored plaintiffs because the *Lexicon* would impair the market for derivative works based on plaintiffs’ works that they might license, such as musical productions based on the songs and poems in the *Harry Potter* works. The court concluded that defendant unfairly harmed this market by copying the songs and poems verbatim.

Weighing all of the fair use factors together, the court concluded that defendant’s use of the *Harry Potter* works was not a fair use. The first factor did not completely favor RDR because the *Lexicon* was not completely transformative. As compared to the third factor, the amount and substantiality of the use, the balance weighed against a finding of fair use. The creative nature of the *Harry Potter* works also weighed against fair use, as did the harm to the market for the Companion Books. The court concluded that although reference guides to literary works should generally be encouraged, they should not be allowed to “plunder” copyrighted works.

Conclusion

Having rejected defendant’s fair use defense, the court concluded that a permanent injunction was warranted given the presumption of irreparable injury that followed from a finding of infringement, as well as the evidence that publication of the *Lexicon* would harm Rowling as a writer (by impairing her incentive to write her own book), the charities to whom she would have donated the proceeds from sales of such work, the public (by preventing it from enjoying such work), and the sales of the Companion Books.

The court found that the only harm to defendant from issuing an injunction would be loss of the opportunity to sell an infringing book, which was not the sort of harm that courts recognized in balancing the equities. The public interest favored injunctive relief to prevent the misappropriation of the copyrighted work, but weighed against it to the extent it might deter the creation of transformative works. On balance, the court concluded that because the *Lexicon* took too much of Rowling’s works for its purpose as a reference guide, injunctive relief was warranted. The court also awarded plaintiffs the minimum statutory damages award for each infringed work, concluding that a higher amount was not warranted given that the *Lexicon* had not yet been published.

Claudia Ray is partner with O’Melveny & Myers LLP in New York. Dale M. Cendali of O’Melveny & Myers represented the plaintiffs. RDR Books was represented by David S. Hammer of New York and Robert A. Handelsman of Chicago, Illinois.

Maryland's High Court Considers Protection For Anonymous Online Speech

Newspaper Urges Court to Adopt Dendrite Standards

Courts around the country have continued to grapple with how to protect anonymous online speech in the context of defamation claims. On December 8, the Court of Special Appeals of Maryland, the state's highest court, heard oral argument in a case that will decide what if any showing a libel plaintiff must make to obtain the identity of an online poster in a defamation suit. *Independent Newspapers, Inc. v. Zebulon J. Brodie*, No. 0054 (Md. 2008).

At issue in the case are allegedly defamatory postings to a community bulletin board operated by Independent Newspapers, Inc. ("INI"), the publisher of community newspapers in Maryland and other states. In a web forum about local news in Centreville, Maryland, a person writing under the screen name "CorsicaRiver" criticized plaintiff, a local businessman and property owner, for selling his house to developers and operating a dirty Dunkin Donuts franchise.

In the posts at issue, "CorsicaRiver" wrote "Shame on you, Mr. Brodie!" in a discussion thread about the sale of his house to developers who then allegedly burned the house down. As to plaintiff's fast food business, "CorsicaRiver" wrote: "I wouldn't go to that Dunkin' Donuts of Brodie's anyway . . . have you taken a close look at it lately? One of the most dirty and unsanitary-looking food-service places I have seen . . . I bought coffee [a] couple of times but quickly lost my appetite."

The plaintiff sued INI and three posters for libel. On November 21, 2006, the trial court dismissed the claims against Independent Newspapers under Section 230 of the Communications Decency Act. However, the trial court went on to uphold a subpoena to INI, stating that:

none of this means that the original, culpable parties who posted the defamatory statements escape accountability if their statements were indeed defamatory. Therefore, it is incumbent upon INI to provide identifying information for the three registered users also named in the present suit.

INI moved for reconsideration of its request for a protective order, citing *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) and *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App. 2001), to argue that the plaintiff must make a legal and evidentiary

showing of a valid cause of action before impinging on the anonymous posters' right to speak anonymously.

On March 12, 2007, the court agreed that the First Amendment protects lawful anonymous speech, but ruled that plaintiff had stated "a valid claim" for defamation over the comments about his fast food franchise because they refer negatively to his business. Thus, "Plaintiff may enforce a subpoena regarding the identity of individuals" who made those statements. The trial court later granted the plaintiff's request for discovery of the identities of other anonymous posters who participated in the message threads about plaintiff's house and business.

On appeal, INI argued that:

there is a developing consensus that a court faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

INI is represented in this case by Paul Alan Levy of Public Citizen Litigation Group in Washington, D.C.; and Bruce Sanford, Mark Bailen and Laurie Babinski of Baker Hostetler in Washington, D.C.

Update: Case Law Since 2006 on Protection for Anonymous Speech

California

Feb. 6, 2008: *Krinsky v. Doe* 6, 159 Cal.App.4th 1154 (2008)

A California appellate court held that Internet users have a First Amendment right to engage in anonymous speech, but this right must be balanced against a plaintiff's legitimate interest in pursuing a valid legal claim based on constitutionally unprotected speech, such as defamation.

The test the court adopted requires that a plaintiff make a "prima facie showing" that he or she has a valid legal claim against the anonymous speaker before allowing disclosure of the speaker's identity.

In this case, the court found that the plaintiff could not make a prima facie showing and that an anonymous Internet poster on a Yahoo message board does not have to reveal his identity after being sued for "scathing verbal attacks." The court found that Doe 6's messages, "viewed in context, cannot be interpreted as asserting or implying objective facts," and were instead nonactionable expressions of scorn, contempt and satire that are protected by the First Amendment.

Connecticut

June 13, 2008: *Doe I v. Individuals*, 561 F.Supp.2d 249 (D. Conn. 2008)

Two women law students at Yale University brought libel, invasion of privacy, and emotional distress claims against anonymous posters to the website autoadmit.com. The postings made under 39 different screen names made sexually insulting and derogatory comments about the students and allegedly interfered with their job search efforts. An anonymous poster moved to quash a subpoena issued to an Internet service provider for informa-

tion relating to his identity and moved for permission to proceed anonymously in litigation.

The test the court adopted was whether "the plaintiff [can show] sufficient evidence supporting a prima facie case for libel, and thus [satisfy] the balancing test of the plaintiff's interest in pursuing discovery" against the defendant's First Amendment right to speak anonymously.

In this case, the court found that the plaintiff was able to satisfy the burden and denied defendant's motions to quash and to proceed anonymously.

Illinois

Sept. 29, 2008: *In re Grand Jury Subpoena Directed to the Alton Telegraph*, No. 08-MR-548 (Ill. Cir. Ct. 2008)

The Alton Telegraph is fighting a request by a grand jury and the Madison County state's attorney to turn over identifying information about posters to its website. The newspaper argues that it is protected under the state Reporters' Privilege Statute because the posters' identity is unpublished information obtained in the course of newsgathering.

The case is pending.

Kansas

Dec. 10, 2007: *In re Lawrence Journal-World*

A Douglas County District Judge issued a search warrant against the Lawrence Journal-World, a newspaper in Lawrence, Kan., demanding access to the newspaper's computer servers to discover information about the identity of an individual who had posted anonymous comments on the newspaper's website, LJWorld.com.

Court does not indicate what test was used to come to this result.

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Maryland's High Court Considers Protection For Anonymous Online Speech

(Continued from page 29)

Maryland

March 12, 2007: *Broadie v. Independent Newspapers, Inc.*, No. 0054 (Md. Dist.)

A Maryland trial court denied a newspaper publisher's motion for protective order to block discovery of the identities of three anonymous posters to a community bulletin board operated by the newspaper. The court agreed that the First Amendment protects lawful anonymous speech, but ruled that plaintiff had stated "a valid claim" for defamation.

The case is now on appeal to the Court of Special Appeals of Maryland, the state's highest court.

Montana

Sept. 3, 2008: *Doty v. Molinar*, No. DV 07-022 (Mont. Dist. Ct.)

A Montana District Court judge found that the state shield law that protects reporters from disclosing anonymous sources – the Media Confidentiality Act – also protects the identity of anonymous posters on the Billings Gazette newspaper's website. The act protects from forced disclosure "any information obtained or prepared" by a news agency.

Dec. 21, 2007: *Township of Manalapan v. Stuart Moskowitz*, Docket No. MON-L2893-07 (N.J. Super. 2007)

Monmouth County officials subpoenaed Google to discover the identity of an anonymous blogger critical of local government. A New Jersey Superior Court judge quashed the subpoena and called the request "an unjust infringement on the blogger's First Amendment rights."

Court does not indicate what test was used to come to this result.

New York

July 8, 2008: *Ottinger v. The Journal News*, No. 08-03892 (N.Y. Sup. 2008)

A Westchester County Court judge held that, after former Congressman Richard Ottinger and his wife notified an online poster of the right to intervene anonymously and stated a prima facie case of defamation over the posting, the couple had satisfied the standard necessary to obtain the identity of the poster from The Journal News.

The court based its decision on the *Dendrite* criteria for disclosing the identity of an anonymous poster.

Oct. 23, 2007: *Matter of Greenbaum v Google, Inc.*, 2007 NY Slip Op 27448 (N.Y. Sup. 2007)

A New York trial court ruled that the First Amendment protected the right of an blogger to remain anonymous. The court used a balancing test that weighs a bloggers's First Amendment rights to post anonymously with the plaintiff's right to pursue a valid cause of action for defamation.

Oregon

Sept. 30, 2008: *Beard v. Doe*, No. CV08030693 (Or. Cir. Ct. 2008)

A local businessman filed a defamation suit in response to an anonymous comment made on a newspaper's website regarding a municipal election campaign. The Portland Mercury and Willamette Week, another newspaper, objected to the request.

The Clackamas County Circuit Court ruled that the identity of an anonymous commenter on the Portland Mercury's website is protected under the Oregon Shield Law, which protects "the source of any published or unpublished information ob-

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Maryland’s High Court Considers Protection For Anonymous Online Speech

(Continued from page 30)

tained by the person in the course of gathering, receiving, or processing information for any medium of communication to the public.”

Texas

Dec. 12, 2007: *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

A Texas hospital, sued several John Doe defendants for libel and related claims over a series of anonymous web postings. The trial court ordered an Internet service provider to disclose the identity of one of the defendants. The appellate court held this was an abuse of discretion. The court re-

viewed the constitutional protection for lawful anonymous speech, and the various approaches to anonymous online libel claims, and concluded that a summary judgment standard should be applied before the identity of an anonymous poster is disclosed. Explaining how this should be applied, the court stated that “the trial court should view the matter as if Doe 1 had filed a traditional motion for summary judgment establishing its defense by alleging that his identity was protected from disclosure by virtue of the First Amendment right of free speech. To obtain the requested discovery, the Hospital would then be required to produce evidence which would be sufficient to preclude the granting of a summary judgment.”

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Law Firm's Trademark Suit Against Real Estate Website Survives Motion to Dismiss

Law Firm Sued Over Use of Name and Links to Firm's Website

An Illinois district court denied a motion to dismiss a trademark lawsuit filed by the Jones Day law firm against Blockshopper.com, a website that publishes short articles on residential real estate transactions. *Jones Day v. Blockshopper LLC*, No. 08 CV 4572, 2008 WL 4925644 (N.D.Ill. Nov. 13, 2008). (Darrah, J.).

The law firm alleged that the use of its name in headlines reporting on purchases by two of its Chicago lawyers, as well as the use of the lawyers' pictures and links to their biographies on the firm's website, created the false impression that the law firm was affiliated with and/or endorsed Blockshopper. The district held that plaintiff had sufficiently pled trademark claims to withstand a motion to dismiss.

Several Internet advocacy groups sought leave to file an amicus brief in the case, but their request was denied.

Background

Blockshopper was founded in 2006 by Brian Timpone, a newspaper publisher and former reporter, and Edward Weinhaus, a real estate investor. The website compiles and publishes information about residential real estate transactions in a number of cities and regions across America. The website describes itself as "a local news and market data service for current and aspiring homeowners, home buyers and home sellers. In short, we're one part community newspaper, one part ultimate hyper-local real estate research tool. Read our daily news stories and learn who's buying and who's selling in your neighborhood."

The website's reports on real estate sales typically include identifying information about the purchaser and hyperlinks to other websites containing information about the purchaser.

At issue in the case are reports about real estate purchases made by two associates in Jones Day's Chicago of-

fice. An April 23, 2008 article was headlined "New Jones Day lawyer spends \$760K on Sheffield." A July 7, 2008 article was headlined "Jones Day attorney spends \$463K on Buckingham Pl." Both articles described the properties purchased, and included photos of the buyers and biographical details taken from Jones Day's website. The lawyers' names in the articles contained an embedded hyperlink to their biography pages on the Jones Day website.

In August 2008, Jones Day filed suit against Blockshopper and its owners for false designation and dilution under the Lanham Act, as well as unfair business practices, infringement, and unfair competition under state law. The

firm claimed that the use of the name Jones Day, the links to the Jones Day website, and information from the website, was used to generate advertising revenue and created the false impression that Jones Day is "affiliated with and/or approves, sponsors or endorses Defendants' business, which it does not."

On August 19, the parties stipulated to a temporary restraining order and Blockshop-

per removed the articles from its website pending resolution of the case.

Motion to Dismiss

Blockshopper moved to dismiss arguing that it used the words "Jones Day" to identify the two lawyers and thus, as a matter of law, there could be no claims for false designation or dilution. It further argued that even if Jones Day's

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JULY 7
Jones Day attorney spends \$463K on Buckingham Pl.
by Dan Fey

Dan Malone Jr. bought a two-bedroom, two bath condo at 859 W. Buckingham Place in Lake View for \$463,000 from Amy Bollinger on May 16.

Bollinger paid \$452,500 for Unit #2 in Aug. 2005. There are four units in the building.

[Malone](#) is an associate in the Chicago office of global law firm Jones Day. He specializes in general corporate law, with a focus on private equity transactions, leveraged buyouts as well as mergers and acquisitions.

He earned his J.D. from Boston College (2006) and his bachelor's from Fordham University in New York City ('03).



Mr. Malone

Law Firm's Trademark Suit Against Real Estate Website Survives Motion to Dismiss

(Continued from page 32)

stated a claim, its claim should be dismissed under the exemption for “news reporting and news commentary” and/or as “nominative fair use.”

The district court held that Jones Day sufficiently pled the elements of a trademark claim and that the defenses raised by Blockshopper “present legal and factual issues not appropriate for resolution at this motion to dismiss stage.”

Interestingly, Jones Day argued in opposition

to the motion to dismiss that trademark dilution can exist by hyperlinking. The links on the Blockshopper website to the lawyer biographies were “likely to create the false impression that Jones Day is affiliated with, sponsors, or endorses Blockshopper’s business.”

Blockshopper also argued that no plausible confusion could exist between Blockshopper’s business and Jones Day. However, the district court found that Jones Day sufficiently pled a claim by alleging that “Defendants’ use of the Jones Day Marks, in connection with their real estate advertisement scheme, is likely to deceive and cause confusion and mistake among customers as to the source of origin of the services provided or offered for sale by Defendants and the affiliation of Jones Day with those services and/or the sponsorship or endorsement of those services by Jones Day.”

Claims Against Website Owners

The district court dismissed all claims against the individual owners of Blockshopper. To hold an individual officer liable for the infringing acts of a corporation, a plaintiff

APRIL 23
New Jones Day lawyer spends \$760K on Sheffield
by James Trotter

Jacob C. Tiedt and his wife, Erin Shencopp, bought a three-bedroom, 2.1 bath at 2048 N. Sheffield Ave. in Lincoln Park for \$760,000 from the Cartus Financial Corporation on March 24.

Unit #1 is one of three in the building.

[Tiedt](#) is an associate in the Chicago office of international law firm Jones Day. He practices corporate law with a focus on capital markets transactions for the firm, which he joined earlier this year.

He previously spent three years as an attorney at Simpson, Thacher & Bartlett in New York City and two years with Baker & Hostetler in Columbus, Ohio.



Mr. Tiedt

must demonstrate that the individual “wilfully and deliberately induced, aided and abetted the past and continuing infringement.” Since Jones Day did not allege that Timpone and Weinhaus, the co-founders of Blockshopper, established their website for the purpose of committing infringing acts or ordered such infringing acts to be carried out, the court held that they could not be found liable. It said: “Even assuming the alleged conduct of blockshopper.com is ultimately found to constitute

illegal infringement, the Complaint does not contain sufficient allegations to plausibly state a claim of individual liability against Timpone and Weinhaus.”

Motion for Leave to File Amicus Brief

Finally, the court rejected a motion by the Electronic Frontier Foundation, Public Citizen, Public Knowledge, and Citizen Media Law Project for permission to file an amicus brief raising First Amendment concerns about Jones Day’s claims. Noting that permitting an amicus curiae brief is discretionary, the court stated that such a brief would not be helpful.

Blockshopper is represented by Martin B. Carroll, Adam A. Hachikian, Daniel S. Hefter, Tracy Katz Muhl, of Fox, Hefter, Swibel, Levin & Carroll in Chicago; and Paul Alan Levy, Public Citizen Litigation Group, Washington, DC. Jones Day is represented by Paul W. Schroeder, Brent P. Ray, and Irene Savanis Fiorentinos of the firm’s Chicago office.

Trade Libel, Tortious Interference and Misrepresentation Claims Dismissed Over Website Visitor Ranking

A New York federal district court dismissed a Spanish newspaper's claims for trade libel, tortious interference and negligent misrepresentation against The Nielsen Company over the measurement of the newspaper's online audience. *Diaro El Pais v. The Nielsen Company, (U.S.), Inc.*, No. 07CV11295, 2008 WL 4833012 (S.D.N.Y. Nov. 6, 2008) (Baer, J.).

Dismissing for failure to state a claim, the court found that plaintiffs' could not escape the terms of a contract by pleading tort claims. Moreover, even if the tort claims were not barred by contract, plaintiffs failed to plead facts to support the tort claims.

Background

The plaintiff, El Pais, is the owner and publisher of the Spanish newspaper *El Pais*, Spain's largest circulation newspaper. Plaintiff Prisma operates the digital version of the newspaper. The Nielsen Company provides audience measurement services. A subsidiary, Nielsen Net Ratings (NNR), provides estimates of online audiences in Spain.

NNR had ranked the online version of the newspaper, www.elpais.com, as the number one media website in Spain. NNR later revised its estimates and ranked elpais.com as the number three media website in Spain. Plaintiffs complained about the estimate and defendant reviewed and affirmed the results. The plaintiffs then sued alleging the ranking was incorrect and published to advertising agencies causing a decline in advertising revenues for the online version of the newspaper.

District Court Decision

The district court held that the claims were barred by a contract which, among other things, denied any warranty that NNR's estimates were an accurate statement of web usage and denied liability for damages such as loss of ad-

vertising. Instead, the contract simply warranted that the estimates would be generated in accordance with NNR's own methodologies. The court found that the contract encompassed the fundamental subject matter of all of plaintiffs' tort claims and was therefore barred.

However, even if not encompassed by the contract, plaintiff failed to plead sufficient facts to support its tort claims. As to the trade libel claim, the court found that plaintiffs' allegations that defendant knew its estimate was wrong was insufficient to meet the pleading requirement for actual malice. Moreover, from the pled facts the court found it clear that defendant tried to ensure that its estimate was accurate in accordance with its methodology and thus there could be no "reckless disregard" under the circumstances.

Defendants had also argued that its estimates were protected under the First Amendment and New York State Constitution as opinions, but the court found no need to reach these constitutional issues.

On the tortious interference claim, the court noted that the claim has "an extremely high pleading standard." This requires specific factual allegations that "but for" defendant's conduct plaintiff would have entered into a specific contract – and that defendant had an "intent to interfere with plaintiffs' business. Here plaintiffs failed to plead any specific advertising relationships or improper means.

Finally, plaintiffs' negligent misrepresentation claim failed because of the arms-length dealings of the parties and plaintiffs' failure to plead any facts to show that defendant had a specific intent to defraud. This was particularly clear where plaintiff pled that defendant reviewed its ranking to ensure it was generated in accord with its own methodology.

Plaintiffs were represented by William Purcell K&L Gates LLP, New York. Defendants were represented by William James Taylor, Jr. and Aidan John Synnott, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York.

U.S. District Court Orders Release of Search Warrant Materials Related to the “Amerithrax” Investigation

Public Has First Amendment Right of Access After Investigation Was Concluded

By Jeanette Melendez Bead

The United States District Court for the District of Columbia recently ordered the release of search warrant materials related to the “Amerithrax” investigation, finding that the public has a First Amendment right of access to search warrants and related materials after an investigation has concluded. *In the Matter of the Application of the New York Times Company for Access to Certain Sealed Court Records*, 2008 WL 4900605 (D.D.C. Nov. 17, 2008) (Lamberth, J.).

The Order, issued by Chief Judge Royce C. Lamberth, required the release of any search warrants, applications, supporting affidavits, orders, and returns relating to two individuals known to have been targeted in the Amerithrax investigation: Dr. Steven J. Hatfill and Dr. Hatfill’s girlfriend, Peck Chegne.

Background

The court records sought by *The New York Times* and the *Los Angeles Times* arose out of the massive federal investigation into the deaths of five persons, and the injury of dozens of others, that resulted from several anthrax-laced letters mailed to members of Congress and the news media in late 2001. This investigation, which the FBI dubbed “Amerithrax,” was among the highest priorities of the Department of Justice for the past seven years.

Dr. Hatfill, a researcher at the United States Army Military Research Institute of Infectious Diseases (“USAMRIID”), was publicly identified as a “person of interest” to the Amerithrax investigation in 2002, after the FBI conducted two highly publicized searches of his properties. For years, Dr. Hatfill was the subject of intense media and public scrutiny as a result of his status as a “person of interest” to the investigation.

In June, Dr. Hatfill reached a multimillion dollar settlement with the government to resolve a Privacy Act lawsuit he had filed in 2002 arising from allegedly improper press disclosures, and the government officially exonerated him

of guilt. Just six weeks after the settlement, the Justice Department announced at a press conference that Dr. Bruce Ivins, another USAMRIID researcher who had died from an apparent drug overdose one week earlier, was the “sole suspect in the case” and that the government was closing the investigation.

During the press conference, the Justice Department discussed in detail previously sealed search warrant materials relating to searches of property owned or used by Dr. Ivins, explaining that it was compelled to both seek the unsealing of some of the search warrant materials and explain their significance to the American public “because of the extraordinary and justified public interest in this investigation, as well as the significant public attention resulting from” Dr. Ivins’ death.

Of course, these events generated significant public interest in understanding and evaluating the manner in which the investigation was carried out and renewed the public’s interest in understanding the reasons why Dr. Hatfill was targeted in the first instance.

In September, *The New York Times* and the *Los Angeles Times* (the “Media Applicants”) sought the release of the previously sealed warrant materials relating to Drs. Ivins and Hatfill and Ms. Pegne. While the motion was pending, the government itself moved to unseal the remaining search warrant materials relating to Dr. Ivins; that motion was granted by the Court in September, and the released materials are available on the Court’s website at <http://www.dcd.uscourts.gov/Anthrax-Case-Info.html>.

The government, however, objected to the disclosure of materials relating to Dr. Hatfill, asserting that Dr. Hatfill’s right to “get on with his life” trumped the public’s right of access.

Rights of Access to the Search Warrant Materials

The court’s resolution of the motion for public access turned on the following question: whether the First Amendment “afford[s] the press and public a qualified right of ac-

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U.S. District Court Orders Release of Search Warrant Materials Related to the “Amerithrax” Investigation

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cess to inspect warrant materials following the close of an investigation.” Both the Fourth and Ninth Circuits have declined to recognize a First Amendment right of access to search warrant materials while an investigation is pending. Neither Circuit, however, has addressed the right of access to post-investigation materials where the criminal investigation is completed and the crime solved.

The Eighth Circuit, on the other hand, has recognized a qualified First Amendment right of access to search warrant materials even where an investigation is ongoing but has found that a compelling interest sufficient to defeat the right exists where disclosure would compromise an ongoing investigation. As Judge Lamberth observed, none of these cases is precisely on point. Thus, the court turned to its own analysis.

First, the court acknowledged that resolving the motion on constitutional grounds was “unusual,” “when the case can be resolved on common law grounds.” Nevertheless, as the Media Applicants had urged, the court followed the instructions of the D.C. Circuit in *Washington Post Co. v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991), to decide the access question on constitutional grounds “because of the different and heightened protections of access the first amendment provides over common law rights.”

Next, the court applied the “experience” and “logic” test articulated in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny. On the experience side, the court found that post-investigation warrant materials historically have been available to the public, noting that such materials are routinely filed with the clerk of court, and that the existence of a common law right of access to the materials, which the government conceded, “weighs strongly in favor of a First Amendment qualified right of access” On the logic side, the court noted that the general openness of judicial proceedings “helps ensure the appearance of fairness” and demonstrates to the public “that there is nothing to hide.”

The court observed that, with respect to search warrant proceedings in particular, which, as the Media Applicants noted, “are often used to adjudicate important [Fourth Amendment] rights,” “openness plays a significant positive role in the functioning of the criminal justice system,” because it “serves as a check on the judiciary” and allows the public to “ensure that judges are not merely serving as a rubber stamp for the police.”

Dr. Hatfill’s Privacy Interests

The court then considered whether Dr. Hatfill’s privacy interests were sufficiently compelling to outweigh the public’s qualified First Amendment right of access to the warrant materials. The court found the government’s assertion of a “generalized privacy right ‘to get on with [one’s] life’” unpersuasive, noting that both the fact that Dr. Hatfill was under investigation and the fact that he had been cleared of any wrongdoing were publicly known. Thus, in the court’s view, the unsealing of the materials would not disclose the identity of an innocent third party who had been the subject of the investigation. The court also observed that Dr. Hatfill himself had revealed certain details about the searches in the course of his lawsuit against the government.

Although the court found that protecting the identities of confidential informants constituted a compelling interest, it found, as the Media Applicants noted, that the identities of any such informants could be protected through redaction rather than wholesale sealing. With respect to Ms. Pegne, the court acknowledged that she is an innocent party but concluded that disclosure of materials relating to her was appropriate because: (1) certain of the details of the searches of her properties were already known as a result of Dr. Hatfill’s disclosures in the Privacy Act case; (2) the government did not assert her privacy interests as a basis for continuing to maintain the materials under seal; and (3) based on its own *in camera* review of the materials, the court was satisfied that “no highly intimate or personal details” relating to Ms. Chegne would be revealed if the materials were unsealed.

The court also concluded that the Media Applicants were entitled to the materials under the less exacting standard applicable to the public’s common law right of access, citing, among other things, the public’s strong need for access to the materials, the government’s concession that release of the materials would not jeopardize an ongoing investigation, and the government’s failure to demonstrate a legally cognizable privacy right “to get on with one’s life.”

The Media Applicants were represented by David McCraw, Vice President and Assistant General Counsel of The New York Times Company; Karlene Goller, Vice President, Legal and Deputy General Counsel of the Los Angeles Times; and David C. Schulz and Jeanette Melendez Bead of Levine Sullivan Koch & Schulz, L.L.P.

A Decision Worth 21,000 Words

Photographs Depicting Abuse of Detainees by American Soldiers Not Exempt Under FOIA

By Jason P. Criss

On September 22, the United States Court of Appeals for the Second Circuit issued its decision in *American Civil Liberties Union v. Department of Defense*, No. 06-3140-cv, 2008 WL 4287823 (2d Cir. Sept. 22, 2008). The Second Circuit held that 21 photographs depicting abusive treatment of detainees by United States soldiers in Iraq and Afghanistan had to be disclosed pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In doing so, the Second Circuit rejected the Government's argument that the FOIA exemption 7(F), which authorizes withholding of records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to endanger the life or physical safety of any individual," *id.* § 552(b)(7)(F), applies to these photographs. *Id.* at *4.

The Second Circuit also held that the redactions to the photographs ordered by the district court rendered inapplicable the FOIA exemptions for material that would harm personal privacy interests, *id.* §§ 552(b)(6) and 552(b)(7)(C) (exemptions 6 and 7(F)). *Id.* at *21.

Background

The appeal arose from a FOIA request made by the ACLU and the other plaintiffs on October 7, 2003 for records relating to the treatment and death of prisoners held in United States custody abroad, and the practice of "rendering" prisoners to countries known to employ torture. The Government did not respond to the plaintiffs' FOIA request, and on June 2, 2004, the plaintiffs filed suit in the Southern District of New York. On August 16, 2004, the plaintiffs provided the Government with a list of records potentially responsive to the FOIA request.

The list included 87 photographs and other images of detainees at detention facilities in Iraq and Afghanistan, including Abu Ghraib prison (the "Abu Ghraib photographs"). In the parties' cross-motions for partial summary judgment, the Government initially only invoked FOIA's personal privacy exemptions (exemptions 6 and 7(C)) as its basis for withholding the Abu Ghraib photographs. The plaintiffs argued that these exemptions did not apply, because redactions could prevent any unwarranted invasions of privacy. *Id.* at *1.

Two months after oral argument on the cross-motions, the Government argued, for the first time, that exemption 7(F) also applied to the photographs. The Government argued that this exemption applied because release of the Abu Ghraib photographs could reasonably be expected to endanger the life or physical safety of United States troops, other Coalition forces, and civilians in Iraq and Afghanistan. The Government did not identify any specific individuals who would be put at risk by the disclosure of the photographs. *Id.* at *2.

On September 29, 2005, the district court issued its order on the cross-motions for partial summary judgment, and it ordered the release of the Abu Ghraib photographs. The district court determined that redactions of all identifying characteristics of the individuals depicted in the photographs would prevent an invasion of privacy interests. It also rejected the Government's exemption 7(F) argument, on the ground that "the core values that Exemption 7(F) was designed to protect are not implicated by the photographs, but . . . the core values of FOIA are very much implicated." *Id.* (quoting *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005)) (internal quotation marks omitted).

The Government appealed the district court's decision, but while the appeal was pending, many of the Abu Ghraib photographs were published by a third party. The Government then withdrew its appeal. In response, the plaintiffs sought clarification to determine if there were other detainee abuse images being withheld. In response, the Government confirmed that an additional 29 images were being withheld based on these same FOIA exemptions. In orders dated June 9, 2006 and June 21, 2006, the district court ordered the release of 21 of the 29 photographs, 20 of them in redacted form. In doing so, the district court adopted its prior reasoning rejecting the interpretations of the FOIA exemptions advanced by the Government. The Government then appealed that decision to the Second Circuit. *Id.* at *2-3.

Second Circuit Decision

The Government's exemption 7(F) argument was the focus of Second Circuit appeal. The Second Circuit rejected the Gov-

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A Decision Worth 21,000 Words

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ernment's interpretation of the exemption as inconsistent with FOIA's language and structure, the chronology of amendments to FOIA, and the requirement that FOIA exemptions be narrowly construed. The Second Circuit concluded that the statute's use of the term "any individual" supported the interpretation that exemption 7(F) exempts documents that could endanger identified individuals, not mere "diffuse threats." *Id.* at *5-6.

The Second Circuit also noted that FOIA contains a separate national security exemption, which was not cited by the Government as basis to withhold these photographs, and it concluded that it would be anomalous to interpret exemption 7(F) in a manner that covered general threats to American military forces, which is a national safety matter. *Id.* at *9-10. Finally, the Second Circuit noted that the legislative history of this exemption showed that it was designed to address criminals using FOIA to target specific individuals in furtherance of the criminals' illegal activities. *Id.* at *11, *15.

Accordingly, the Second Circuit held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to identify that individual." *Id.* at *8. The Second Circuit did not "shape the precise contours of the exemption" in its opinion, because it determined that "it is not a close question whether the government has identified any relevant individual with reasonable specificity." *Id.* The Second Circuit further stated that "it is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." *Id.*

The Second Circuit also agreed with the district court that FOIA exemptions 6 and 7(C) did not justify the withholding of these photographs. FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt," and "courts have found redacting of identifying information adequate to prevent infringement of the significant interests that FOIA's privacy exemptions were designed to protect." *Id.* at *20 (quoting 5 U.S.C. § 552(b)). The Second Cir-

cuit noted that the district court reviewed the 29 withheld photographs, determined which ones should be released, and the extent of the redactions needed to shield the identities of the individuals depicted in them. The Second Circuit undertook its own review of the photographs and determined that the redactions ordered by the district court were sufficient. *Id.* at *20.

The Second Circuit also rejected the Government's argument that it should interpret exemptions 6 and 7(C) to permit the withholding of these photographs because the Geneva Conventions prohibit subjecting prisoners to "insults and public curiosity."

The Second Circuit noted that a reasonable Executive Branch interpretation of a treaty is due deference, provided that the interpretation has been consistently adhered to. *Id.* at *22. But the Second Circuit found that the interpretation of the Geneva Conventions advanced by the Government was inconsistent with its prior interpretations: "Prior to this litigation, the United States has not consistently considered dissemination of photographic documentation of detainee mistreatment to violate the public curiosity provisions of the Geneva Conventions, at least not when the detainee is unidentifiable and the dissemination is not itself intended to humiliate." *Id.* at *23.

The Second Circuit held that the Geneva Conventions did not bar the disclosure of these photographs, because they had been redacted to conceal the detainees' identities and the purpose of the dissemination was to document detainee abuse, not to humiliate the detainees. *Id.* The Second Circuit went further and noted that releasing the photographs actually would further the purposes of the Geneva Conventions, by increasing public awareness of the events depicted in them. *Id.*

The Second Circuit noted that "while this [appeal] is one of the first cases to examine whether exemption 7(F) can be conscripted into an service as an ersatz classification system, it is unlikely to be the last." *Id.* at *8. This decision should provide other parties making FOIA requests with a number of powerful arguments to challenge overbroad interpretations of these exemptions.

Jason P. Criss is Special Counsel to Covington & Burling LLP in New York, which represented a group of professors of law of armed conflict as amici curiae in this appeal.

New Jersey Appellate Division Applies News Privilege to Book about Donald Trump

In a published opinion, the New Jersey Appellate Division reversed a ruling of a New Jersey trial court that would have required Timothy L. O'Brien, a reporter for *The New York Times*, to produce confidential and non-confidential materials and information collected in the course of researching and writing a book about Donald Trump. *Trump v. O'Brien*, No. A-3905-06T2 (N.J. App. Ct. Oct. 24, 2008).

Background

O'Brien wrote a 2005 book titled *TrumpNation: The Art of Being the Donald* about the life of Trump. Some of the information contained in the book had been gathered in the course of O'Brien's reporting on Trump for *The New York Times*. In January 2006, Trump sued O'Brien, along with his book publisher, alleging that O'Brien's inclusion of an estimate from three anonymous sources that Trump was worth "somewhere between \$150 and \$250 million," which appeared among other estimates from a variety of



privilege under either New York or New Jersey law.

Privilege Extends to Books Under NY Law

First focusing on the New York Shield Law, the court held that, contrary to the lower court's interpretation, New York legislation and case law had extended the protections of the news privilege to an "author who obtains news in confidence for dissemination to the public through the medium of a published book." Noting that O'Brien had sufficiently demonstrated that the sources that provided the allegedly defamatory information were confidential, the court further concluded that it

would be "anomalous" not to recognize authors as beneficiaries of the news privilege because it would result in the same sources being protected when used in a *Times* article, but not when cited in a book, which would create both a "tortured" reading of the shield law and an "indefensible result."

... information about Trump was, regardless of tone, "a matter of public interest and thus "news" protected by the Shield Law."

The Book is News

The Appellate Division also rejected the lower court's determination that *TrumpNation* was not news because the

sources including Trump employees and Trump himself, was false, and damaged his business interests.

In the course of discovery, Trump sought the research materials and information for the book, including the identities of the three confidential sources of the allegedly defamatory information regarding Trump's net worth. O'Brien asserted the newsgatherer's privilege and on that basis refused to produce information about the confidential sources, as well as interview notes, and other new-gathering and editorial material. Trump moved to compel production, and the trial court granted the motion, holding that New York law governed and did not extend a news privilege to the book because the book was entertainment rather than news.

O'Brien appealed the Order, arguing that the book contained news, including some information published in *The New York Times*, and should therefore be afforded the protections of the news

tone of the book was "breezy" "irreverent" or "facetious." The court identified a "danger, recognized in the allied areas of privacy law and defamation, in simply weighing the entertainment value against the news value . . . and according Shield Law protection or not on our essentially subjective view of which is weightier." Citing *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967), a privacy case, the court stated that "the line between the two is too elusive to form a basis upon which to gauge the extent of critical and absolute press protections."

The court engaged in a lengthy analysis of New York law pertaining to newsworthiness and, relying on both unpublished reporter's privilege cases and privacy cases, found that information about Trump was, regardless of tone, "a matter of public interest and thus "news" protected by the Shield Law." The court therefore

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New Jersey Appellate Division Applies News Privilege to Book about Donald Trump

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reversed the lower court's decision and found that *TrumpNation* was subject to the absolute protection of confidential sources provided by the New York Shield Law.

Qualified Privilege Not Overcome

The court also reversed the lower court's order requiring discovery of nonconfidential materials and information. Reviewing the record below, the court indicated that Trump had not made a showing that the discovery of nonconfidential sources that he sought was relevant, necessary, and unavailable from other sources, as required by the New York Shield Law. The court specifically noted that at the time of the motion hearing, no depositions had occurred to provide a basis for Trump to overcome the qualified statutory privilege.

Editorial Materials Privileged

Again reversing the lower court, the Appellate Division acknowledged that a reporter has an interest in "preventing intrusion into the editorial process." Citing *People v. Iannaccone*, 447 N.Y.S.2d 996, 997 (Sup. Ct. 1982). The court therefore held that the New York Shield Law and constitutional protections provide a privilege for information related to the editorial process.

Discovery Privileged if NJ Law Applies

The New Jersey Appellate Division agreed with the lower court that New Jersey law provides a generally broader news privilege than New York, and if it applied *TrumpNation* would plainly be covered by the news privilege. Citing *Kinsella v. Welch*, 362 N.J. Super. 143, 154 (App. Div. 2003), the court indicated that "all discovery sought by Trump would be protected by the New Jersey newspaper's privilege," which, "in the absence of a countervailing constitutional right . . . is absolute" regardless of whether it was obtained from a confidential source.

The court also noted that, while the conflicts-of-law issue was not yet ripe for determination, there was precedent supporting defendants' argument that "New Jersey has the greatest interest in protecting newsgathering activities, and thus New Jersey law should be applied to prevent the disclosure of the nonconfidential materials that the motion judge deemed discoverable in this case."

Timothy L. O'Brien, Time Warner Book Group, Inc., and Warner Books, Inc. were represented by Mary Jo White, Andrew J. Ceresney, and Andrew M. Levine of Debevoise and Plimpton LLP, and Mark S. Melodia, James F. Dial, and Kellie A. Lavery of Reed Smith LLP. Donald J. Trump was represented by Marc E. Kasowitz and Mark P. Ressler of Kasowitz, Benson, Torres & Friedman, and William M. Tambussi and William F. Cook of Brown and Connery LLP.

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Pennsylvania Supreme Court Upholds Absolute Protections of State Shield Law

Court Declines to Engraft “Crime-Fraud” Exception to Shield Law

By Robert C. Clothier

The Pennsylvania Supreme Court ruled that the protections afforded journalists by the Pennsylvania Shield Law, 49 Pa.C.S. § 5942, remain absolute even where the disclosure of information by a confidential source may have violated grand jury secrecy. *Cas-tellani v. Scranton Times, L.P.*, 2008 WL 4351142 (Pa. Sept. 24, 2008) (Castille, Saylor, Eakin, Baer McCaffery (dissenting) JJ.).

In a 4-1 decision, the Court declined to engraft a “crime-fraud” exception to the Shield Law where a libel plaintiff sought to determine the identity of the source of allegedly defamatory information published by a newspaper. The Court, however, reserved for another day whether the same result would obtain where the government, not a private litigant, sought a reporter’s evidence regarding the source of a grand jury leak in a criminal investigation or prosecution.

Underlying Libel Lawsuit & Lower Court Rulings

The plaintiffs, county commissioners, sued a local newspaper in Scranton, Pennsylvania over an article accusing them of “stonewalling” a grand jury that was investigating wrongdoing at a local prison. The accusations were attributed to “an unnamed source close to the investigation.” Shortly after the article was published, the grand jury supervising judge found that there was “no breach of any secrecy” because the article’s accusations “are completely at variance with the transcript” of the plaintiffs’ testimony.

In discovery, the plaintiffs moved to compel the disclosure of the identity of the unnamed source. Granting the motion, the trial court held that when the Shield Law “clashes with the need to enforce and protect the foundation of the grand jury purpose, the Shield Law should relinquish its priority.” The Pennsylvania Superior Court reversed the trial court’s decision, ruling that “we, like the trial court, are forbidden from reading into the Shield Law an exception neither enacted by the General Assembly nor found by the Supreme Court as a result of a developing body of law.” Plaintiffs appealed to the Pennsylvania Supreme Court.

Pennsylvania Supreme Court’s Decision

The Pennsylvania Supreme Court determined that the result was governed by several prior decisions. In *In re Taylor*, 193 A.2d

181 (Pa. 1963), the Court ruled that the Shield Law protected reporters from having to disclose their sources to an investigating grand jury even though that result “will enable newsman to conceal or cover up crimes.”

In *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987), the Court held that, at least in the context of libel actions, where the plaintiff has a protected interest in his or her reputation under the Pennsylvania Constitution, the Shield Law protected only information that could reveal the identity of a confidential source (and not other non-confidential source information).

Lastly, in *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003), the Court held that the Shield Law did not prevent disclosure to the prosecution statements made by a non-confidential source to a reporter.

Given the clear and absolute protection afforded confidential source information by these cases, the Court found no basis to “engraft upon the statute an exception which would not only contradict the well-established public policy underlying the Shield Law, but, as importantly, would contravene the statute’s unambiguous text.” The Court explained: “If the General Assembly disagreed with our interpretation [of the Shield Law in prior decisions], or wished to establish a crime-fraud exception to the Shield Law, it could easily have done so.”

The Court rejected the plaintiff’s contention that the analogous crime-fraud exception to the attorney-client privilege should extend to the Shield Law, finding that the Shield Law is, unlike the attorney client privilege, an absolute privilege and serves the recipient of the information (the reporter), not the source. The Court also noted that while the paper “may have published defamatory information, they did not commit a crime” by reporting information that may have violated grand jury secrecy. In a particularly valuable holding, the Court said: “[T]he news media have a right to report news, regardless of how the information was received.”

The Court emphasized the fact that the context was a defamation case seeking monetary damages, not a criminal investigation or prosecution seeking “restoration of the grand jury’s integrity.” As a result, “the public’s interest in the free flow of information to the news media is not presently in conflict with the public’s interest in grand jury secrecy.” With that, the Court did not rule out a different result “where the Commonwealth sought a reporter’s evi-

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Pennsylvania Supreme Court Upholds Absolute Protections of State Shield Law

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dence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak.”

In that situation, “the Shield Law and the secrecy provision of the Grand Jury Act would be more directly in conflict.” The Court did not resolve that issue: “[W]e need not determine whether there is any situation where the absolute language of the Shield Law would have to yield to a competing, constitutional value.”

Dissenting Opinion

Placing great weight on “the constitutional interests in the protection of plaintiff’s reputation,” the [dissenting opinion](#) focused on the possibility that the “unnamed source” did not exist, given that the information supposedly provided by that source was ostensibly incorrect. Where a libel plaintiff “makes a colorable showing” that a source “may not, in fact, exist,” the dissent found, the plaintiff should be able to compel the defendant to disclose the identity of the source. “Otherwise, the plaintiff is left without the ability to sustain his or her burden to show that the alleged defamer acted with actual malice.” To the extent prior Pennsylvania Supreme Court precedent (*e.g.*, *Hatchard*) did not permit such compelled disclosure, the dissent opined that those decisions should be overruled.

First Amendment Reporter’s Privilege in Pennsylvania?

Although the Pennsylvania Superior Court, following numerous Third Circuit decisions, has held that there is a qualified First Amendment reporter’s privilege, the Pennsylvania Supreme Court has not yet done so. In the *Bowden* case, the Court “assume[d], without deciding,” that there was such a privilege (an issue it considered “thorn[y]”), and held that it did not protect a reporter from having to disclose statements made by an on-the-record source.

In the *Castellani* case, the paper did not assert the First Amendment-based reporter’s privilege. The Supreme Court addressed the First Amendment privilege in a footnote when explaining the *Bowden* Court’s treatment of the Shield Law. The Court neutrally described the constitutional privilege without stating one way or another that it is the law in Pennsylvania. This issue remains an open one.

Robert C. Clothier is a litigation partner in the Philadelphia office of Fox Rothschild LLP and chairs the firm’s Media, Defamation &

Privacy Law Practice Group. Kim M. Watterson, Kevin Charles Abbott, Walter Thomas McGough, Jr., Reed Smith, LLP, Pittsburgh; and John Timothy Hinton, Jr., Haggerty, McDonnell, O’Brien & Hinton, LLP, represented The Scranton Times. Plaintiff was represented by Sprague & Sprague, Philadelphia.

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Oregon Newspaper Uses Shield Law to Quash Subpoena Seeking Identity of Online Commentator

By Jessica Goldman

On September 30, 2008, a Portland, Oregon state trial court ruled that the state's Shield Law protects *The Portland Mercury* from having to divulge information about the anonymous poster of an allegedly defamatory comment on the newspaper's Internet blog. *Doe v. TS et al.*, No. CV08030693 (Clackamas Cir. Ct. Sept. 30, 2008) (Redman, J.).

Background

The Portland Mercury, a weekly newspaper, hosts a blog called "Blogtown, PDX" where the newspaper's reporters post articles and members of the public may post comments about the articles. To post a comment on Blogtown, members of the public sign up by identifying only an e-mail address and self-assigning a "screen name."

On January 31, 2008, *Mercury* reporter Amy Ruiz posted an article about activities at City Hall concerning mayoral candidate Sho Dozano. http://blogtown.portlandmercury.com/2008/01/busy_day_at_city_hall_part_2.php. Reader comments were posted in response by "Roads are not free" and "Selling Salem Snake PetroOil in PDX." The final comment was by "Ronald" who wrote:

Now that Sho Dozano has severed all business ties with Terry Beard (cantakerous [sic] obnoxious dishonest new money pig self proclaimed god) of Beard Frame Shops and of TheBigBidet.com, oops, I mean Thebigday.com, I will vote for him. Many business leaders in Portland feel the same way. He really did himself a serious disservice [sic] when he decided to trust someone like Terry Beard. After hearing of how Terry Beard had mistreated so many, including his own employees, we couldn't understand why Sho was doing business with him. Thanks Sho for restoring out faith in you. Wow. What if Terry Beard ran for Mayor. That would be a joke. He thinks he is going to write a book on manners when he doesn't have any. I was in the booth next to him at Ringside, and all he did was brag about himself. Sad. Again, many of us are rooting for Sho here in Portland after he got rid of Terry Beard.

There were no further comments to Ms. Ruiz' post.

The Mercury provides access to Blogtown as a public service to permit members of the public a forum to comment on the posts made by the newspaper's reporters. The newspaper does not edit or fact-check the public comments. Rather, as with other blogs, *The Mercury* simply provides the server that passively posts the comments submitted. Once a member of the public has signed up to post comments on Blogtown, *The Mercury* has no way of confirming the accuracy of the e-mail address input in the sign-up form and the screen names usually do not identify the person posting a comment.

The only information the newspaper has about someone posting a comment is the list of numbers representing the IP (Internet protocol) address. An IP address, such as "192.168.100.1," generally identifies the Internet service provider from which an e-mail is sent but does not specifically identify the individual sender. See http://en.wikipedia.org/wiki/IP_address.

Third Party Subpoena to Newspaper

Terry Beard, the man derogatorily referenced in the blog comment by "Ronald," filed suit against "Ronald" and those who had posted comments about Beard on other blogs. Beard served a third-party subpoena on *The Mercury* contending that he could pursue his defamation claim against "Ronald" only if *The Mercury* would provide the information the newspaper had obtained from "Ronald" when he signed up to post comments on Blogtown. The subpoena demanded production of any documents referring to Terry Beard and any information supplied by "Ronald." *The Mercury* objected to the subpoena by letter, as required by court rule.

Three months later, Beard moved to compel *The Mercury's* compliance with the subpoena. *The Mercury* opposed the subpoena based on the Oregon Shield Law and the First Amendment protection of anonymous speech.

Oregon Shield Law

The Oregon Shield Law provides in relevant part:

- (1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or

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Oregon Newspaper Uses Shield Law to Quash Subpoena Seeking Identity of Online Commentator

(Continued from page 43)

body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:

The source of any published or unpublished **information obtained** by the person **in the course of** gathering, receiving or **processing information** for any medium of communication to the public; or

Any unpublished information obtained or prepared by the person **in the course of** gathering, receiving or **processing information** for any medium of communication to the public.

ORS 44.520(1).

The Mercury argued that a newspaper may not be compelled to identify the source of information or produce any “unpublished information” the newspaper has obtained in the course of “receiving” or “processing” information for a “medium of communication.” “Unpublished information” refers to “any information not disseminated to the public” and includes “all ... data of whatever sort not themselves disseminated to the public.” ORS 44.510(5). “Processing” and “receiving” must mean something other than the alternative verb that accompanies these words, “gathering ... information,” and “processing” is defined by the statute to have “its ordinary meaning and includes, but is not limited to, the compiling, storing and editing of information.” ORS 44.510(3) (emphasis added).

In short, the Shield Law protects a newspaper from compelled disclosure when the newspaper is “gathering ... information,” “receiving ... information,” or “processing information.” That means that a newspaper is protected in its conduct beyond mere gathering of information and includes the passive receipt or processing of information without any requirement that the information have been solicited or edited by the newspaper.

Anonymous Speech Protection

The Mercury also argued that the First Amendment independently protected the anonymous speech of “Ronald.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995) (“an author’s decision to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment”). The importance of this bedrock principle has been reaffirmed in the context of the unique speech capabilities of the Internet.

As Internet technology has evolved over the past two decades,

computer users have encountered a proliferation of chat rooms and websites that allow them to share their views on myriad topics from consumer products to international diplomacy. Internet bulletin boards, or “message boards,” have the advantage of allowing users, or “posters,” to express themselves anonymously, by using “screen names” traceable only through the hosts of the sites or their Internet Service Providers (ISPs). *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1158 (2008). The *Krinsky* Court explains:

The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers’ identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

Id. at 1162.

Although the First Amendment protection of anonymous Internet speech is not absolute, it is significant. The First Amendment protects the identity of the anonymous speaker from compelled disclosure unless the plaintiff can first establish a *prima facie* case of defamation. *Id.* at 1172. “Requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism.” *Id.* at 1171.

Trial Court Decision

The Clackamas County Circuit Court denied the motion to compel based only on the Shield Law. The court recognized that the plaintiff’s position was that the statutory language “in the course of gathering, receiving, or processing information” is synonymous with “in the course of gathering news.” The court rejected this proposition, concluding that the Shield Law was intended to have a wider scope than newsgathering. Straying from both the Shield Law and the facts before it, the court also noted in *dicta* that “[i]f the comment had been totally unrelated to the blog post [by the reporter], then the argument could be made that the Portland Mercury did not receive it in the ‘course of gathering, receiving, or processing information for any medium of communication to the public.’”

Jessica L. Goldman is a member of Summit Law Group in Seattle, Washington. She represents The Portland Mercury.

Prior Restraint Against The Orange County Register Vacated

Newspaper Allowed to Report on Class Action Trial

A California appellate court lifted an order against The Orange County Register that prohibited it from reporting on trial testimony in a \$100 million class action lawsuit brought by delivery workers against the newspaper. *Freedom Communications v. Gonzalez et al.* 167 Cal.App.4th 150, 83 Cal.Rptr.3d 861 (Cal. App. Sept. 29, 2008) (Sills, Aronson, Ikola, JJ.).

The appellate court held that it was an impermissible prior restraint under both the United States and California Constitutions.

Background

The Orange County Register is the defendant in a lawsuit brought by current and former newspaper carriers for unfair labor practices. They allege that the newspaper wrongly classified them as independent contractors in order to deny them the meal breaks, overtime pay, minimum wage, and other benefits to which they were entitled as full-fledged employees. The plaintiffs sought a sweeping order barring The Register from reporting on any aspect of the litigation, any of the attorneys involved, or anything related to the newspaper's financial condition. The trial court rejected this request, but it issued its own sua sponte order enjoining the newspaper from reporting on the trial testimony of any witness.

The trial court judge, David Velasquez, justified the gag order as one of several related measures put in place to prevent witnesses from being influenced by the testimony of others. The order also barred non-expert witnesses from the courtroom except during their own testimony, prohibited witnesses from discussing their testimony with other witnesses, and prevented the parties from disclosing to non-expert witnesses the testimony of any other witness.

The Register, however, along with a large coalition of news organizations and First Amendment rights groups, challenged the gag order and filed a request for an emergency stay on the grounds that the order constituted a prior restraint that plainly violated the freedom of press guaranteed by the First Amendment.

Decision

In its unanimous decision directing the trial court to vacate its order, the three-judge panel indicated that this case was not even a close case. It wrote: "Because petitioners' entitlement to the relief requested is so obvious that no purpose could be served by plenary consideration of the issue, we issue a peremptory writ of mandate in the first instance."

Citing *Nebraska Press Ass'n v. Stuart* (1976), the landmark decision in which the U.S. Supreme Court struck down an order preventing a newspaper from reporting about a criminal defendant's confession, the California appellate court said that the gag order here was presumptively invalid. "A prior restraint is the most serious and the least tolerable infringement on First Amendment rights," it said, noting that Justice Blackmun said in *CBS v. Davis* (1994) that such an "extraordinary remedy" is only available "where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive means."

The California appellate court said that the United States Supreme Court has only identified two such exceptional circumstances in which a prior restraint might be unavoidable: to prevent the disclosure of troop movements during wartime (*Near v. Minnesota*, 1931) and to prevent the dissemination of information that could lead to a nuclear holocaust (*NY Times v. U.S.*, 1971, Brennan, J. concurring).

By contrast, the interest in this case not compelling. The court wrote: "This case law makes clear that the danger the trial court sought to avert by its prior restraint here – the risk that witnesses in a civil trial might be influenced by reading news reports of the testimony of other witnesses – cannot possibly justify the censorship imposed."

Furthermore, the appellate court concluded that there were less restrictive alternatives available to the trial court to protect plaintiffs' fair trial rights without violating *The Register's* First Amendment rights. The trial court could have admonished witnesses to avoid all news accounts about the trial. Since the gag order only applied to *The Register*, and not to other publications covering witness testimony at the trial, such a measure would likely have been far more useful. The failure of the trial court to implement a less intrusive procedure to protect plaintiffs' interests led the court to strike down the gag order as an unconstitutional prior restraint.

In vacating the trial court order and emphasizing its plain error, the California appellate court concluded by quoting from Justice Black's concurrence in the Pentagon Papers case: "Every moment's continuance of [a prior restraint] amounts to a flagrant, indefensible, and continuing violation of the First Amendment."

Kelli L. Sager, Alonzo Wickers IV, and Jeff Glasser of the Los Angeles office of Davis Wright Tremaine LLP represented Freedom Communications. The class action plaintiffs were represented by Daniel J. Callahan, Javier H. Van Oordt, and Jill A. Thomas, Callahan & Blaine, Santa Ana, CA.

MLRC's Annual Dinner November 12, 2008

Panel Discusses The Presidency and the Press

On November 12, 2008, over 600 MLRC members and friends gathered at the Grand Hyatt Hotel in New York City for MLRC's Annual Dinner. Coming just one week after the presidential election, the dinner program featured a very timely discussion on the Presidency and the Press. Panelists Michael Beschloss, David Gergen, Joe Lockhart, and moderator Martha Raddatz, discussed the issue in light of the recent campaign and also from a historical perspective.

MLRC Chair Ralph Huber introduced the program with the following remarks: *It wasn't so long ago that what the public learned about our presidents and their administrations was largely based on the interplay between the national press corps and the president or his press secretary. New technology certainly has changed that equation. On the one hand, technology has turned us all into citizen journalists, and made it possible to report on statements and other activities which are not necessarily meant for widespread public consumption, and which now end up on a vast array of sites, such as YouTube.*

We all recall the stir created by Candidate Obama's remarks last April, recorded at a San Francisco fundraiser, where he described people from small town Pennsylvania as being bitter and clinging to guns and religion. Will this phenomenon cause our President to become more guarded or isolated? Or on the other hand, to what extent will the Obama Administration use new journalism to bypass the establishment media in the way his campaign succeeded in using new media to reach the public in their fundraising and get out the vote efforts.

His team has already rolled out a website, change.gov, which will allow the President-Elect to communicate directly with 300 million Americans without the filter or interpretation of the press. We've invited key figures, insiders from past administrations, as well as astute outside observers, to talk about the evolving relationship between the presidency and the press.



Left to right: Michael Beschloss, David Gergen, Martha Raddatz and Joe Lockhart

Michael Beschloss: *A lot of people in the media, and even those of us who are not, are going to talk an awful lot about President Obama's first 100 days, and it's an interesting measure, but in history it really doesn't have too much bearing on the way that a president looks, either to his own generation or to later historians. So I would say, read it, listen to it, but take it with a little bit of a grain of salt.*

Video of the Dinner now available. [Click here](#)

MLRC's Annual Dinner November 12, 2008



Joe Lockhart

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Joe Lockhart: *Barack Obama was clearly the most compelling story in this cycle, and maybe even in a generation, and without a long record or history, did not get the scrutiny that some others did. But again, I don't think it was because the press all got together and decided we're going to give him a free ride.*

Martha Raddatz: *And do you think the press has a responsibility then to say somehow we've got to be fairer? That he may be a compelling story, but we still have to approach this campaign in a different way?* **Joe Lockhart:** *Well, you know, far be it from me to tell the press what their responsibility is. I tried that. It didn't work.*

Martha Raddatz: *Is there anything that McCain could've done better, David?* **David Gergen:** *Yeah. Run a good campaign.... At the end of the day, I certainly do not believe that John McCain lost the election or that Barack Obama won the election, because of the tone and tenor of the press coverage.*



Martha Raddatz



Michael Beschloss and David Gergen

David Gergen: *The press corps plays an invaluable role, and holding people accountable, and I can tell you from having worked inside, it makes everybody else inside stay on their toes, because they realize they have to answer questions. And if you shut the press out, you get very sloppy and lazy in your policymaking. It's when you have to answer questions that you really are in fact are more responsive, in a variety of ways, and you act in a more responsible fashion.*

Michael Beschloss: *Blogs are wonderful, and bloggers, and I read them, and I'm addicted to a lot of them, but you know, take my example about Nixon and Agnew in 1968. I don't think a blogger, if they had existed then, would have had the motivation or the resources to find out that Spiro Agnew was on the take, and that person probably could not have gotten their call returned to do the kind of digging that Martha Raddatz does*



Michael Beschloss

MLRC's Projects and Finances Reviewed at 2008 Annual Meeting

The Annual Meeting of the Media Law Resource Center, Inc. ("MLRC") was held on November 12, 2008, at the Grand Hyatt in New York. The meeting was called to order by Ralph Huber, Chairman of the MLRC Board of Directors. Ralph welcomed everyone to the meeting, calling attention to the successful conferences in Virginia and California and MLRC's other projects.

Director Elections

Ralph explained that, due to the staggered terms of the directors, all individuals on the slate are returning directors who are up for re-election: Dale Cohen of Cox Enterprises, Inc.; Ralph P. Huber of Advance Publications, Inc.; Karole Morgan-Prager of The McClatchy Company; Elisa Rivlin of Simon & Schuster; and Susan E. Weiner of NBC Universal, Inc.

Ralph made a motion to approve the re-election of the entire slate, and Jim Borelli seconded the motion. All present voted in favor and MLRC's Executive Director Sandy Baron voted the 51 proxies (that had been retained and were brought to the meeting) in favor. Ralph announced that Kenneth Richieri has agreed to be the new Chairman of the Board for the next two years.

Financial Report

Ralph introduced Ken Richieri, Chair of the Finance Committee, to provide the Finance Committee's report. Ken began by explaining that in his report, he would be supplementing the August 31, 2008, statement that was provided to meeting attendees and prepared in accordance with New York state nonprofit law with a more informative reporting on MLRC's finances based on the September 31, 2008, statement of financial condition.

He reported that MLRC is, and continues to be, soundly run from a financial point of view and that the organization's net cash balances are in the \$1.4 million range. In addition he stated that, as a result, the poor economic condition of the economy at large should not affect MLRC's provision of services, and the organization has the ability to expand those services if the board wishes to do so. He also reported that MLRC's assets are kept in Treasury bills and are secured against the volatile economy.

Comparing this year's income statements to last year's, Ken stated that there was \$910,000 total income last year and \$800,000 this year. If, however, one discounts the income from the biennial MLRC London Conference in 2007 and the receipt in 2007 of the net income payout from the 2006 NAA/NAB/MLRC biennial Conference, the income comparison is \$785,000 last year to \$795,000 this year, which indicates a very steady state in terms of income. Total payroll expenditures were \$510,000 last year and \$515,000 this year.

Ken next reported on year-to-date net income. This year, net income was in the \$55,000 range, while it was in the \$150,000 range last year; however, without the two extraordinary income items of last year that Ken mentioned previously, net income this year is \$55,000 compared to \$45,000 last year. He said that this year's budget projects a net income of \$20,000.

Executive Director's Report

Ralph next introduced Sandy's Executive Director's report. Sandy began her report by thanking MLRC office administrator Debby Seiden for her hard work on the administrative side of MLRC's operations; that without Debby's extraordinary efforts, MLRC's financial condition would not be as stable and positive. She also thanked all the MLRC Directors for all of the efforts that they put in on behalf of MLRC during the course of the year.

Sandy reported on the robust and growing Media Membership, which increased from 102 in 2007 to 107 in 2008. In order to sustain and grow the DCS membership, Sandy said that MLRC plans to reach out more aggressively to firms in California and especially firms that represent the digital community.

Next, Sandy introduced David Bralow to report on the 2008 NAA/NAB/MLRC Conference in Chantilly, Va. David reported that there was substantial attendance with no significant drop from the previous Conference. He noted that the Conference

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materials were more comprehensive than in previous years. This year, David said, the materials were provided to attendees on DVD to be “green,” but they will try to offer the DVD beforehand next time so people can better prepare for the sessions.

David reported that MLRC honored Hal Fuson of Copley Press with the MLRC First Amendment Leadership Award. He thanked Laura Handman for the successful politics and Internet panel on Wednesday night of the Conference and Hiscox for the reception and dinner party at the Smithsonian Air & Space Museum on Thursday night. David anticipated that planning for the 2010 NAA/NAB/MLRC Conference will start about this time next year.

Next, Sandy introduced Dave Heller to report on the 2009 London Conference. Dave reported that the committee has already begun planning the event, which will take place October 1-2, 2008, at Stationers Hall. The planning committee includes Dave Schulz, David McCraw, Slade Metcalf and Jay Brown on the U.S. side; and Nuala Cosgrove, Gill Phillips, Rosalind McInness, David Hooper and Mark Stephens on the UK side.

Sandy then presented on the Southwestern Law School / MLRC Conference scheduled for January 15, 2009. The conference will consist of three sessions: reality programming, covering celebrities, and the issues raised by the intermixing of commercial and noncommercial speech.

In May 2009, MLRC will again organize a conference on digital publishing issues at and with two programs at Stanford University.. Sandy said that information on the May conference at Stanford would be posted on the Stanford website in the next two weeks to 30 days.

Following Sandy, Dean Ringel reported on the First Amendment for the Future discussion sessions held in New York and Virginia which discussed how the changing face of media may or may not change First Amendment doctrinal approaches.

Legislative Issues

Next, Ralph introduced MLRC Staff Attorney Maherin Gangat who reported on legislative issues. On the right of publicity front, Maherin reported that New York, New Jersey, Michigan, Illinois and Washington state had introduced right of publicity bills in 2008. She anticipated that problems regarding the New York bill will resurface in 2009. While she said that the newest amendment improves it, the bill still has problems.

Sandy said that right of publicity, especially descendible right of publicity, should be on members' radar. She reported that, thanks to Maherin's efforts, MLRC now has a connection with the MPAA. MPAA, which has an extensive lobbying reach on this issue, is currently using language written by the MLRC coalition that attempts to exempt the wide range of media from the application right of publicity statutes. While MLRC cannot possibly engage on every right of publicity legislative matter, the MPAA generally does so and, at the least, may be offering a position that would protect to a large degree many of the important speech and press uses.. Sandy reported that MLRC's goal in the future is to get a better grip on legislation across the country, possibly by forging better relations with state press associations.

Continuing her report on legislative issues, Maherin reported that three states – Hawaii, Maine and Utah (which recently put into place an evidentiary rule that allows for a qualified privilege) – legislated shield laws. In addition, six or seven states will consider shield laws this year, and the federal bill passed the House and MLRC hopes it will pass the Senate, as well.

Ralph thanked Sandy and Maherin for their tangible legislative results that have had a positive impact on the MLRC membership. He next introduced Dean Ringel to report on the Defense Counsel Section.

Dean reported that DCS has had a very active year and that DCS membership increased to 217 in 2008. He noted the many useful publications that DCS members have produced, including the monthly Ethics Corner articles in the MediaLawLetter, the Practically Pocket-Sized Internet Guide, the 50-State Fair Report Survey, the checklist for sting stories and the model brief on newsgathering. Dean said that DCS wants to make an effort to bring digital media professionals into the membership.

Next, Ralph introduced Sandy to report on the MLRC Institute. Sandy said that the Institute was successful this year in part to MLRC Institute fellow Jennifer Liebman's work. She explained that the MLRC Institute is a 501(c)(3) education-oriented entity and that it is able to operate the First Amendment Speakers' Bureau with a grant from the McCormick Foundation.. The program has held talks on topics such as reporters' privilege and Internet publishing issues and there are over 30 upcoming talks scheduled. However, the McCormick Foundation will not continue its funding past February 2009. Sandy said that MLRC Institute needs \$35,000 to fund the program for another year.

To bring the annual meeting to an end, Ralph thanked the MLRC staff and closed the meeting.

Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

Kelli Sager Incoming DCS President; Elizabeth Ritvo Joins as Treasurer

The Defense Counsel Section's Annual Meeting was held on November 13, 2008, in New York at Carmine's Restaurant. DCS Executive Committee President Dean Ringel called the Annual Meeting to order, welcomed everyone to the lunch and thanked them for attending.

Dean Ringel commended the Conference Committee on its great work on September's 2008 NAA/NAB/MLRC Conference in Chantilly, Va., especially for the new venue and the dinner programs. He also discussed the First Amendment for the Future discussion sessions, which tackled the issues of the role of the First Amendment and how it might be applied differently as a result of new media. The DCS plans to pursue the subject both on a theoretical and a practical level over the next year.

President's Report & Election of Treasurer

The first order of business was the succession of DCS Executive Committee officers. In 2009, Kelli L. Sager will be DCS President; Robert D. Nelson, will be Vice President; and Nathan Siegel, Secretary. Next, Dean reported that the Executive Committee had nominated Elizabeth Ritvo of Brown Rudnick Berlack Israels in Boston, to be Treasurer. No other nominees for the Executive Committee had been received and, by a voice vote, the membership approved by acclamation Elizabeth Ritvo as Treasurer. Dean Ringel then explained that he would be joining former DCS President Peter Canfield in emeritus status.

Executive Director's Report

Sandy Baron began her report by thanking everyone for coming to the meeting and for all of the members' service to the organization during the past year. She noted that MLRC thrives on the participation of its membership and hopes members continue their support. Sandy gave a special thanks to the DCS Executive and Conference Committees for the time they have put in.

Conferences & Programs

Sandy started by reporting that the NAA/NAB/MLRC Conference went well this year, with some of the most suc-

cessful breakout sessions and boutiques they have ever had. She noted that distributing the conference materials on DVD was new for this year, but they will try to send it out in advance for the next conference. She also mentioned that Hal Fuson received the MLRC First Amendment Leadership Award on the Wednesday evening of the conference, followed by a terrific panel thanks to Laura Handman. Sandy also thanked Hiscox for the beautiful dinner reception at the Smithsonian Air and Space Museum and encouraged them to plan another event for the 2010 conference.

Next, Sandy reported that MLRC has started planning the London conference, which will take place October 1-2, 2009, at Stationers Hall, which is a Thursday and Friday.

Sandy discussed the next conference, the MLRC/ Southwestern Law School Media and Entertainment Law Conference in Los Angeles on January 15, 2009. The Conference will have three sessions on issues related to reality programming, covering celebrities, and problems that arise when one mixes commercial and noncommercial speech. Brochures for the conference have been mailed to members.

She also reported on the Digital Publishing Conference, jointly produced with Stanford Law School's Center for Internet & Society and Stanford Professional Publishing Courses, at Stanford University on May 14-15, 2009. The conference is still in the planning phase, but details should appear on the MLRC and Stanford websites shortly. Sandy noted the success of last year's program.

Sandy then thanked Kenneth Richieri for setting up the Forum on Digital Technologies held on November 12, 2008, and also thanked Michael Zimbalist of the New York Times for his participation. She asked members to keep submitting their ideas for MLRC projects and events and thanked everyone for what they've done this year for the organization.

Committee Reports

Dean then asked for the reports from the committees.

Advertising & Commercial Speech Committee

In Nancy Felsten's absence, Dean reported that one of the committee's projects last year dealt with Internet gam-

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Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

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bling. Going forward, the committee plans this year to address embedded advertising and FTC revisions on green advertising.

ALI Task Force Committee

Tom Leatherbury reported that nothing new has arisen on the enforcement of foreign judgments front, but he anticipates that ALI will move forward on its privacy project.

California Chapter

Kelli Sager reported that the California Chapter has conquered the challenge of assembling committee members by scheduling convenient meetings at Southwestern Law School. She stated that recent meeting topics have included prior restraints, SLAPP motions and how to best position a case in order to get fees awarded. Kelli encouraged all California members in the Los Angeles area to attend the meetings and for those outside the region to call into the meetings.

Entertainment Law Committee

Katherine Bolger reported that the committee meets every six weeks to discuss new developments in entertainment law. She also noted that the committee put out a report in December 2007 on "Copyright Infringement: The Standards in Your Circuit."

Ethics Committee

Timothy Conner reported that the committee has been publishing regular columns in the *MediaLawLetter* and is working on future columns. He also commended the individuals who organized and implemented the ethics session at the NAA/NAB/MLRC Conference this year.

International Media Law Committee

Kevin Goering thanked co-chairs Jan Constantine and David McCraw for their committee work. He reported on the success of the international media law panels at September's Virginia conference. He also reported that next year, for the first time, the committee will have a truly international vice-chair— Brian MacLeod Rogers of Toronto, who

set up the first MLRC-like organization outside the U.S., Ad Idem. Kevin noted that over the coming year the committee will be working on improving the MLRC website's international committee page with additional updates and information on international developments. Kevin also noted that planning has commenced for the MLRC's next conference in London scheduled for October 1-2, 2009. He thanked committee members Peter Bartlett of Australia and Mark Stephens of England for keeping MLRC apprised of international developments by submitting articles and recent cases.

Internet Law Committee

Mark Sableman reported that the committee published this year the "Practically Pocket-Sized Internet Law Treatise." Committee members contributed 21 short articles on a variety of Internet law issues. Mark said the committee plans to update the guide every 6 months and wants to continue to add articles about legal issues related to new technology.

Legislative Affairs Committee

Laurie Babinski spoke for the committee, noting that there will be a new Congress this year and that the committee plans to address libel tourism developments and issues of sports credentialing.

MediaLawLetter Committee

David Tomlin commended David Heller and the MLRC staff on the production of the *MediaLawLetter* every month. He reported that the committee is working with MLRC on plans to put the *MediaLawLetter* in a digital format and that Dave Heller and Phil Heijmans have produced a digital prototype.. Dave Heller added that MLRC will try to issue the *MediaLawLetter* in digital format beginning in January, but requests everyone's feedback on the look and functionality of the new design.

Membership Committee

In committee chair Guylyn Cummins's absence, Sandy reported that the Membership Committee is putting a special emphasis on California right now. The DCS has a great

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Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

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membership right now and does not feel a compelling need to bring in law firms just to boost numbers, but she noted, MLRC still wants lawyers and law firms who work in this area in the DCS. Sandy urged people to make the committee aware of firms that are not members currently but should be.

Model Shield Law Task Force

Chuck Tobin reported that the committee is continuing its efforts with the NAA and NAB. He noted that the committee's newest project is to catalog media-related subpoenas that have resulted in decisions by very fact-specific categories.

New Legal Developments

David Sternlicht reported that the committee continues to focus on broader trends. During the past year, he noted, the committee provided the impetus for an upcoming publication of an MLRC survey on the efforts by various states to adopt shield laws across the country and an MLRC Bulletin on right of publicity. David said the committee is also considering various approaches to the MLRC damages survey for libel and privacy cases.

Newsgathering Committee

Steve Zansberg reported that the committee has 28 members, but not all participate in bimonthly meetings, so new members are welcome to discuss prior restraint, access and

claims for newsgathering activities, among other relevant issues. He noted that the committee recently published a 2008 Model Brief on Newsgathering Claims, which is a companion to the MLRC Model Trial Brief on Libel and Privacy Claims. Steve said the committee also distributed the 2008 update to the 2006 Panic Book and published a short memo on managing materials that was published in the *MediaLawLetter* and used at the 2008 NAA/NAB/MLRC Conference. He said that the committee plans to address costs associated with FOIA at the federal level and protocols for high-publicity media circus cases and the judiciary.

Pre-Publication/Pre-Broadcast Committee

Kai Falkenberg noted the committee's list of publications, including a Pre-publication / Pre-broadcast Check List on "Sting Stories." She also reported on a number of other projects that are in the works, including one on reality programming, a checklist for advertising issues and a blogging guideline report. Kai also mentioned that the committee, on its conference calls, discusses online comments, corrections, video and other cases of interest in the field of pre-publication and pre-broadcast review.

Pre-Trial Committee

Dan Kelly reported that the Pre-Trial Committee has had a very busy year. He noted that the committee has published four papers: 1) Reporter's Privilege: Can it be Perserved in a Civil Lawsuit Against the Press?; 2) Prevailing on Summary Judgment under a Negligence Standard; 3) Excluding

UPCOMING EVENTS

<p>2009 Southwestern Conference <i>Fast Times in Hollywood:</i> <i>Keeping Up With Cutting Edge Issues in Entertainment and Media Law</i> January 15, 2009</p>			
<p>Legal Frontiers in Digital Media <i>@ Stanford University, Stanford, California</i> May 14 & 15, 2009</p>			

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Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

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Expert Witnesses in Actual Malice Cases; and 4) Motion To Stay Discovery Pending Resolution of a Dispositive Motion. Dan encouraged members to submit new ideas for papers and to join the committee. He noted that Bob Clothier will be joining the committee as co-chair for the coming year.

Trial Committee

Rob Harvey reported that the committee is following up on the update to the Model Trial Brief. He noted that the committee has two projects planned for this year: one on special verdict forms – collected by Dave Sanders and Michael Sullivan – and an update of the jury instruction project, thanks to Eric Robinson and Jim Hemphill. He said the committee plans to provide the materials in a searchable format and welcomes suggestions.

Report on the MLRC Institute

Maherin Gangat began her report on the Institute by discussing its main project, the First Amendment Speakers Bureau. Under the program, speakers are placed at public forums such as universities, libraries and bookstores with an outline and background materials in order to talk about matters related to the reporters privilege and to online publishing. Maherin said the publishing online talk deals with how the Internet has changed journalism, and the basics of privacy law, copyright and defamation. She noted that the Institute is in the process of taking on a third topic, censorship, and has completed about 50 talks this year, thanks to MLRC Institute fellow Jennifer Liebman. Maherin also reported that the Institute plans to create a presence online and welcomes ideas on how to do so.

Robert Clothier spoke briefly about his experiences participating in the MLRC Speaker's Bureau project, recommending the project to members as a useful and enjoyable experience.

MLRC Legislative Issues

Maherin reported on the status of the federal shield law, which she said MLRC has been engaged with since before its first introduction in Congress. She reported that a version of the shield law passed the House in October 2007 by an extraordinary margin. While our understanding is that it is unlikely that the bill will be up for vote in the Senate this term, there is hope that the shield law will be passed in both Houses of Congress in the next term. Maherin said that bill proponents are hopeful about its passage because President-Elect Barack Obama is a supporter of the bill.

On the state level, Maherin noted that MLRC will be publishing a report on recent efforts to pass state shield laws, and that six or seven states plan to introduce shield law bills this year.

Maherin next addressed right of publicity bills. The effort to enact a descendibility provision in New York has calmed down this Fall, but will probably pick up again in January. She noted that right of publicity bills and/or efforts to enact descendibility provisions, have also come to the forefront in Michigan, New Jersey (where it was withdrawn) and Connecticut.

New Business

Dean thanked again Sandy and the MLRC staff: Eric Robinson, Debby Seiden, Phil Heijmans, Maherin Gangat, Dave Heller, Jennifer Liebman and Stefanie Shaffer. There being no new business, the meeting was adjourned.

ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

CALL US, OR SEND US A NOTE.

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