

MULRC

Media Law Resource Center

MEDIA LAW LETTER

Associate Member Edition

2009:2

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Fresh Winds from the North

Developments in Canadian Media Law

By Brian MacLeod Rogers

A “tidal wave” of Supreme Court of Canada appeals on free expression issues promises to reshape the legal landscape affecting the media in Canada. Some twelve key cases involving libel, confidential sources, statutory publication bans, courthouse access and freedom of information are either under reserve or awaiting hearing, and decisions could start appearing as early as next month. All SCC hearings are webcast live, and archived webcasts are available for viewing on the Court’s website (www.scc-csc.gc.ca).

Libel

A year ago, the SCC released its first common law libel decision in 13 years. In [WIC Radio Ltd. v. Simpson](#), 2008 SCC 41, the Court strengthened and clarified the defence of fair comment. Since then, the Court has heard two libel appeals on the *Reynolds/Jameel* defence of “public interest responsible journalism”; both appeals were from Ontario, which was the first Canadian jurisdiction to adopt this defence developed by the English House of Lords. They were heard February 17 and April 23 and are currently under reserve, but no judgment is expected until next Fall. At present, Canada has no clear defence of privilege for media publications about matters of public interest, no matter the story’s importance or the steps taken to verify the story.

In [Quan v. Cusson](#), 2007 ONCA 771, a carefully reasoned judgment of highly respected jurist Justice Robert Sharpe, the Ontario Court of Appeal accepted the public interest defence but denied it to the *Ottawa Citizen* newspaper because it had not been sought at trial. The defendants sought leave to appeal, which was granted by the SCC (SCC no. 32420). This meant the new defence was put in jeopardy but also offered an opportunity to extend it across common-law Canada.

Another Ontario Court of Appeal decision, [Grant v. Torstar Corp.](#), 2008 ONCA 796, soon followed. At trial, the public interest defence had been raised by the media defendants but rejected by the judge. The Court of Appeal set aside the jury verdict of \$1.475 million but ordered a new trial, stipulating that the jury should decide the publication’s defamatory meaning. Leave for the plaintiff’s appeal and defendants’ cross-appeal was granted by the SCC the day after it heard *Quan v. Cusson*, and an expedited hearing was ordered, with the focus again on the new defence ([SCC no. 32932](#)).

The two-month interval appeared to have given the Court a sharper focus, and the nine justices’ questions were largely directed at how the public interest defence would really work in practice. In particular, the thorny issue of the role of judge versus jury was reflected in many of the justices’ questions. Most observers came away believing the Court would likely adopt some significant change in present law but perhaps not quite the House of Lords’ version.

Another defamation case is scheduled to be heard by the SCC on December 15, 2009. It arises under Quebec law and involves a class-action claim over an inflammatory talk-show radio broadcast that cast aspersions over Montreal’s “Arab and Haitian” taxi drivers, alleging they were incompetent and had obtained their licences through bribery. At trial, damages of \$220,000 were awarded, payable to a non-profit organization, on the basis that the various remarks were wrongful, defamatory and discriminatory. This was overturned by a majority in the Quebec Court of Appeal, which found the words were not defamatory. *Fares Bou Malhab v. Diffusion Metromedia CMR Inc.*, 2008 QCCA 1938; [SCC no. 32931](#).

Confidential Sources

Without quite the same drama played out south of the border, protection of journalists’ confidential sources has become a key issue for the media in Canada over the past few years. One case that particularly caught public attention involved *The Hamilton Spectator* reporter, Ken Peters, who was found in contempt and fined \$31,600 for refusing to reveal a confidential source during a civil trial – even though the source actually testified after being identified through other means. That decision was soundly reversed by the Ontario Court of Appeal, which set out a journalist-friendly roadmap for the proper procedure and considerations where this issue arises, and another carefully reasoned precedent of Justice Robert Sharpe should serve as a useful guide for all Canadian courts. That case, *St. Elizabeth Home Society v. Hamilton (City) [Citation of Kenneth Peters]*, 2008 ONCA 182, was not appealed.

However, weeks earlier a different panel of the Ontario Court of Appeal created a very different precedent. In *R. v. National Post* (2008 ONCA 139), the Royal Canadian Mounted Police obtained a search warrant and assistance order requiring the newspaper and its reporter, Andrew McIntosh, to turn over a document and envelope

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for a criminal investigation. They had come from a confidential source who had been instrumental in the newspaper's coverage of major controversy involving then Prime Minister Jean Chrétien. The items had been preserved by McIntosh and kept in a secret location after allegations had been raised by Chretien and others that the document was a forgery. The suggestion was that the document had been altered to make it appear the Prime Minister was more involved in a financial transaction than he really was. The police said it was "real evidence" of the crime of forgery.

They wanted to use DNA and fingerprint evidence from it and the envelope to find the confidential source and question him/her as the next step in their investigation. An initial challenge succeeded in setting aside the search warrant; the judge held for the first time in Canada that protection of journalists' sources was an inherent part of free expression guarantees. However, the Court of Appeal reversed. It insisted that claims of journalistic privilege were outweighed by the law enforcement interest in disclosure. "It is not necessarily better to write about crime than to do something about it", the court borrowed from *Branzburg v. Hayes*.

The SCC granted leave (SCC no. [32601](#)), and the *Post's* appeal was heard on May 22 by a very active Court, who were clearly troubled by the fact that the documents could be viewed as the very basis of the alleged crime and provided real evidence of it. However, there also appeared to be a strong interest in protecting journalists' confidential sources on the basis of a case-by-case privilege under the four-part test developed by US legal scholar John Henry Wigmore but infused with free expression considerations under the *Canadian Charter of Rights and Freedoms*.

As a sign of the SCC's interest in the issue, the day before the *National Post* hearing the Court granted leave to *The Globe & Mail* newspaper to appeal decisions in a Quebec civil case brought by the Government of Canada as a result of another political scandal involving the Liberal government under Prime Minister Chrétien that led to a major public inquiry. Much of this "Sponsorship Scandal" was exposed by *Globe* reporters, who relied heavily on confidential sources. The new Conservative government is trying to recover funds that went into the wrong hands in the scandal. In turn, the defendants are seeking to invoke limitation periods, saying the claim is too late, and are probing just who in the federal government knew about the unlawful payments and when, pointing to media reports prior to 2002. They are focusing on unnamed government sources for those stories.

The appeal focuses on a judge's order that the journalist, Daniel Leblanc, must identify his confidential source, whom he calls "Ma Chouette," to assist the defense. In addition, the SCC has accepted an appeal of an order by the same judge imposed specifically on Leblanc prohibiting him from publishing any news reports about confidential settlement negotiations between the government and defence, as he had previously during the case. The SCC has expedited the appeal process and will hear the appeals on October 21, 2009 (SCC no's 32975, 33114 and 33097).

Publication Bans

Canada's Criminal Code makes a publication ban on bail hearings mandatory at the request of the accused (section 517). The ban covers evidence, submissions and the judge's reasons and remains in force until the charges are dropped or the trial is ended. They are routinely requested by defense counsel, so any media reports on bail hearings are brief and uninformative. As a result, they are only covered in important cases, and the public has ended up with a very limited grasp of what goes on in the hearings and why bail is granted or refused.

In two provinces, compelling factual situations led to constitutional challenges to the mandatory nature of the provision. Appeals in both these cases will be heard by the SCC on November 16, 2009. In Alberta, it arose in the context of sensational proceedings of a man accused of murdering his wife who had initially been granted bail. That was reversed on appeal, and the Alberta Court of Appeal refused to extend the statutory publication ban to the proceedings before it, so everything became public.

The media then brought a constitutional challenge to s. 517 before the judge who had earlier granted bail, but he reserved his decision until after the accused was convicted in a jury trial. The judge then ruled the section was overly broad, and therefore unconstitutional, because it applied even to cases that were not being tried by a jury and was automatically available to all accused (*R. v. White*, 2007 ABQB 359). That ruling was appealed by the Crown, and the Alberta Court of Appeal took a different tack and upheld s. 517 on the basis that it contributed to a fair bail hearing and access to reasonable bail for accused (2008 ABCA 294). It found the provision only deferred publication and regarded media concerns over timeliness as "journalistic bootstrapping." The SCC granted the media leave to appeal and scheduled the case to be heard November 16, 2009 (SCC no. [32865](#)).

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Also being heard at the same time will be an appeal by the Crown (SCC no. [33085](#)) from an Ontario Court of Appeal ruling (*Toronto Star Newspapers Ltd. v. Canada*, 2009 ONCA 59) that held the mandatory ban was unconstitutional and required the statute to be amended so that it would only be mandatory on request where there may be a jury trial. In fact, there was a dissent by two of the five judges that would have gone further and struck down the law, giving the government a year to come up with a new provision. This case arose in the midst of sensational criminal proceedings against 18 accused, who were alleged to have hatched a terrorist plot in support of Islamic fundamentalists that involved fertilizer bombs similar to the one used in Oklahoma City. Only some of the accused requested the s. 517 ban, but the judge ordered that it applied to them all and upheld its constitutionality.

Access to Courts

Two Quebec cases recently accepted by the SCC are scheduled to be heard in March 2010. One appeal involves restrictions imposed by the judiciary restricting where cameras can be used and interviews conducted in courthouses. The Quebec Court of Appeal held these rules do not adversely affect freedom of the press since the media can still cover what goes on in court (*Canadian Broadcasting Corp. v. Attorney General of Quebec*, 2008 QCCA 1910; SCC no. [32920](#)). The other case concerns broadcasting a video statement made to police by someone later charged with aiding his uncle to commit suicide. The video was made a trial exhibit and media access to it was allowed, but the trial court denied permission to broadcast it. The appeal was then made directly to the SCC. (*Canadian Broadcasting Corp. v. Quebec*, Sup. Ct. Quebec no. 160-01-000236-075; SCC no. [32987](#))

Freedom of Information

On December 4, 2008, the SCC heard an appeal from an Ontario Court of Appeal decision that remains under reserve (*Criminal Lawyers Assn. v. Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392; SCC no. [32172](#)). It focused on whether s. 2(b) of the *Charter* included some basis for a right to government information – at least, to the extent that a “compelling public interest” override provision should apply even to law enforcement and solicitor/client privilege exemptions under Ontario’s FOI legislation. At the

hearing, the Court seemed very interested in the public’s right of access to governmental information and its importance for informed democratic debate. However, the government insisted there was no right to any such information apart from what was specifically permitted by statute. The case arose after a judge stayed criminal proceedings because of abusive conduct by the police and other public officials. The Ontario Provincial Police investigated the allegations of misconduct and in a brief press release announced that there was no evidence of an attempt to obstruct justice. Despite demands, the report was never made public. In an effort to account for the discrepancies between the investigation and the judge’s findings, the Criminal Lawyers Association sought access to records about the OPP review. The government refused disclosure based on various exemptions, including those for law enforcement and privilege that are not subject to any legislative public-interest override. That became the focus of the appeal at the Ontario Court of Appeal, where a majority found that the *Charter*’s free expression protection could extend to expanding the override in these circumstances.

Conclusion

It may only be a coincidence that all these free expression, media-related cases are finding their way onto the SCC’s docket, but the cumulative effect could reshape the legal landscape for decades to come. In earlier decisions, the Court has firmly grasped the importance of the openness principle in court proceedings. The underlying logic of those cases for transparency of public institutions and the flow of information to the public, so that proper scrutiny and public discussion can take place, has pushed its way further afield. Vigorous, informed debate lies at the heart of democracy, and the Court has a chance to encourage and allow it to flourish through these pending cases.

Brian MacLeod Rogers (Toronto) is counsel to interventions by the Media Coalition (Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, Canadian Association of Journalists, Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, Canadian Publishers’ Council, Book and Periodical Council, The Writers’ Union of Canada and PEN Canada) at the Supreme Court of Canada in WIC Radio Ltd. v. Simpson, Quan v. Cusson, Grant v. Torstar Corp. and R. v. National Post.

Supreme Court of Indonesia Sets Aside \$92 Million Libel Judgment against TIME

By Robert Balin and Edward Davis

In a case that has generated worldwide attention and concern, on April 16 a three-judge panel of the Indonesian Supreme Court vacated an earlier Supreme Court decision that had awarded former Indonesian president Suharto a staggering one trillion rupiah (about \$92 million) in a libel suit against TIME magazine. *Suharto v. Time Inc. Asia, et al.*

A collective sigh of relief has been heard from local and international news organizations that report in Indonesia, and the victory for TIME is a hopeful sign of growing legal protection for press freedoms in Indonesia and the region.

The libel suit arose from a lengthy May 1999 cover story in TIME Asia, “The Family Firm,” which reported on the vast wealth amassed by General Suharto and his family members during his three decades in power—a period notorious for corruption, nepotism and cronyism. (A report issued by the World Bank and the United Nations estimated that General Suharto made off with between \$15 and 35 billion during his 31-year rule.)

Prior to publication, TIME conducted a four-month investigation that included hundreds of interviews with government officials, lawyers, accountants and business associates of the Suhartos, and the central allegations in the article were presented to General Suharto’s lawyers, whose responses and denials were included in the article.

Suharto sued in July 1999, naming TIME and six journalists as defendants and demanding \$27 billion in damages. He challenged only four items in the 14-page article: (1) a rhetorical reference to “Suharto Inc.” on the cover, which Suharto claimed was false because none of his companies was literally named Suharto Inc.; (2) an illustration showing Suharto against a background of giant banknotes, holding miniaturized photos of a mansion, a gilded plate and sacks of money, which he alleged was false because the mansion belonged to one of his children, not to him; (3) a quote to the effect that General Suharto’s companies probably paid only a small fraction of their actual tax obligations, which was attributed to a member of Indonesian Corruption Watch; and (4) an allegation regarding a transfer of “\$9 billion of Suharto money” from a Swiss bank to an Austrian bank, which was accompanied by denials issued by General Suharto and his lawyers.

Libel Trial

The trial began in March 2000, amid concerns about whether a foreign publication could receive a fair hearing in a suit by a former president who had appointed the judges hearing the case. Suharto put on no witnesses and submitted no evidence relating to the challenged statements or to any damages. TIME submitted extensive documentary evidence and put on several witnesses, including journalism and linguistics experts who testified that the magazine had followed responsible practices in reporting the story.

In June 2000, a three-judge trial panel in Jakarta ruled in TIME’s favor. The trial court found that the article was fair and balanced and that TIME had engaged in responsible journalism on a matter “in the public interest” – a defense recognized by the Indonesian Civil Code – because at least three other publications had already published reports on the alleged transfer of funds outside of Indonesia before TIME published its article, and they had not been sued; because TIME included specific denials from Suharto and his lawyers; and because TIME clearly identified the source of the allegation regarding underpayment of taxes. The court also concluded that the reference to “Suharto Inc.” and the mansion illustration were merely metaphors and not actionable. In March 2001, an intermediate appellate court affirmed the dismissal. The decisions by the trial court and appellate court were hailed as victories for the rights of a free press in Indonesia and as welcome indications that the nation’s courts would protect critical reporting on political leaders.

Suharto then appealed to the Supreme Court of Indonesia—where the case sat for six years. In the Supreme Court, all three judges on the panel reviewing the case had been appointed by General Suharto, and the presiding judge – a retired army general – had previously stated that he owed his career to Suharto. In August 2007, the Supreme Court panel reversed the lower courts and imposed a judgment of one trillion rupiah against TIME.

While the panel’s written decision was long, it provided little rationale for ruling against TIME or for the huge damage award. Neither TIME’s responsible reporting on matters of obvious public concern nor Suharto’s failure to submit any evi-

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dence of falsity or fault seemed to trouble the Court. The panel instead seemed to focus on the dignity of a national leader, concluding that the TIME article “slander[s] the reputation and honor of the Plaintiff as the Great General of the Indonesian Army (Retired) and as former President of the Republic of Indonesia, thus the civil accountability...can be granted according to sentiments of appropriateness and fairness[.]” In addition to awarding a trillion rupiah for unspecified damage to General Suharto’s reputation, the Court ordered TIME to publish an apology to Suharto three consecutive times in its Asia, Europe and U.S. editions and in 10 other publications.

The reversal provoked intense criticism in Indonesia, where it was viewed as a serious blow to free speech and democratic reform. Outside Indonesia, many international media companies, non-governmental organizations and businesses with investments in Indonesia were also alarmed. The decision was widely perceived as a setback not only for the press but also, more generally, for the rule of law.

In February 2008, shortly after Suharto died at age 86, TIME filed a petition permitted under Indonesian law requesting that the Supreme Court review and reverse the libel judgment on grounds of manifest error. Among other things, TIME argued that the Supreme Court panel had erred by failing to find that TIME had acted without fault, by ignoring all the evidence that TIME had adhered to accepted standards of news coverage and journalistic ethics, by ignoring Suharto’s failure to offer any evidence to the contrary, by ignoring Indonesia’s Press Law and by ignoring the fact that Suharto’s reputation had already been lost.

TIME’s effort to overturn the Supreme Court decision was supported by a broad array of regional and international news organizations, journalism associations, bar associations and human rights organizations who joined together as *amici* to speak with one voice—including the Associated Press, CNN, Dow Jones, The Economist, the Financial Times, Newsweek, The New York Times, the Washington Post, Australia’s Special Broadcasting Service, Indonesia’s Tempo Magazine, the Jakarta Post, the Indonesian Press Council, the International Bar Association’s Human Rights Institute, the International Federation of Journalists, the Southeast Asian Press Alliance, the Committee to Protect Journalists, and the International Media Lawyers Association.

In their brief to the Supreme Court, *amici* noted that Indonesia has ratified the International Covenant on Civil and Political Rights and thereby agreed to construe its domestic law in conformity with the Covenant’s free speech provision, Article 19. *Amici* urged the Indonesian Supreme Court to consider examples set by courts in democratic nations throughout Asia, which, consistent with international free speech principles, have construed their own laws to preclude liability for publications on matters of public concern that are honestly believed to be true. *Amici* argued that liability was especially inappropriate in the Suharto case, since General Suharto had failed to provide any evidence that TIME published the article with knowledge of falsity and, indeed, failed to present evidence that anything in the article was even false. Last, *amici* bluntly informed the Court that the massive unwarranted award – in favor of a powerful political figure – had raised not only free speech concerns, but also widespread fears about the impartiality of the Indonesian justice system, which endangered foreign investment and economic progress.

On April 16, a different three-judge panel of the Supreme Court announced that it had granted TIME’s petition and nullified the libel judgment. The Court has not yet issued a written opinion, but, according to press reports, the presiding judge on the panel (Judge Hatta Ali) has stated that “We determined that the article wasn’t against the law. There was no violation of press ethics because the right of reply was given.” While analysis of the Court’s ruling – and its broader impact – will have to await its formal opinion, the change of course marks a landmark victory for TIME and presages a new judicial attitude toward affording meaningful protection to the press in Indonesia.

TIME magazine was represented by Robin Bierstedt and Andrew Lachow at Time Inc. in New York, Angus Emmerson at Time Inc. in Hong Kong and Todung Mulya Lubis of Lubis Santosa & Maulana in Jakarta. The amici were represented by Robert Balin and Edward Davis in the New York office of Davis Wright Tremaine LLP, Mark Stephens of Finers Stephens Innocent LLP in London and Darwin Aritonang in Jakarta, with assistance from Jens van den Brink of Kennedy Van der Laan in Amsterdam.

THE OTHER SIDE OF THE POND

Developments in UK and European Law

By David Hooper

Damian Green MP

I wrote in the [December 2008 MediaLawLetter](#) about the extraordinary attempts to arrest and threaten to prosecute the shadow immigration spokesman, Damian Green MP for making use of material which had been leaked to him by a disaffected civil servant who we now know is called Christopher Galley who is no longer employed in government service. Fortunately, the whole saga has been put to an end by Keir Starmer QC, the recently appointed Director of Public Prosecutions and a former member of Geoffrey Robertson QC's Doughty Street Chambers.

As one might expect, rather more sense came from Mr Starmer than from the members of the government showing signs of having been in power too long. What was particularly objectionable about the government's behaviour was that they were trying to circumvent the balance that had been struck between the need to protect areas of government which must remain secret and, on the other hand, the public's right to know about decisions taken on their behalf. Britain was long afflicted with a needlessly wide protection of government secrecy in the form of Section 2 Official Secrets Act 1911.

I chronicled how that Act had been abused by successive governments in my book [Official Secrets: The Use and Abuse of the Act](#). Roughly speaking, it took 25 years and a series of proposals before the Official Secrets Act was reformed in 1989. Government secrecy was, under the Official Secrets Act 1989, restricted to four principal categories which ranged from the areas of intelligence to international confidentiality obligations to law enforcement and military secrets.

What our tired government was trying to do was to use a common law offence of aiding and abetting, counselling, procuring and conspiring to commit misconduct in a public office. This drove a coach and horses through the balance struck in the Official Secrets Act 1989. It also removed the safeguard of the need to prove that those said to have committed an offence under the Official Secrets Act 1989, in the sense of being persons who were publishing the leaked information rather than actually leaking it themselves, should be shown to have caused damage by their publication of the protected information.

Mr Starmer indicated that the misconduct in public office offence required a serious departure from acceptable standards and an abuse of trust. He reminded us that we needed to have regard to the principle of freedom of speech and the right to publish information and ideas on matters of public interest. Most of the information which Mr Green had been publishing in his attempts to bring the government to account on some of the undoubted shortcomings at the Home Office, at most provided some evidence of damage to the functioning of the Home Office but it did not relate to military policing or intelligence matters. Nor were the matters particularly confidential with much of the information being known to others outside the Civil Service and having been reported in the press. Accordingly, Mr Starmer concluded that there was insufficient evidence to bring a prosecution not only against Mr Green but also against Mr Galley.

Conditional Fee Agreements

These continue to arouse controversy. Paul Dacre the Editor-in-Chief of the Daily Mail and Mail on Sunday used the opportunity of his evidence to the Culture, Media and Sports Committee of the House of Commons to attack greedy (Claimant) libel law firms, singling out for particular opprobrium Schillings and Carter-Ruck. They should, Mr Dacre suggested, clean up their act. They represented a lethal weapon in crushing press freedom and were rapacious, greedy and unscrupulous adding, for good measure, that he would be astonished if they were not also ambulance chasers. He also referred in a more general context to the disproportionate level of costs in libel litigation referring to a case where the damages had been £5,000 but the legal costs £520,000.

Lord Justice Jackson's Inquiry into Costs in Civil Litigation

This Court of Appeal judge is hoping to publish his report by December 2009. He too is focusing on the whole issue of no win no fee and the operation of CFAs. He will also be looking at the question of third party funding and he has put out a [consultation paper](#) where responses are required by 6 May 2009. The issues that he is particularly interested in are whether a

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The Other Side of the Pond: Developments in UK and European Law

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maximum recovery rate should be fixed and the operation of after the event insurance and the whole issue of cost-capping.

Cost-capping – A Setback

In the recent decision in [Peacock –v- MGN Limited](#) (2009) EWHC 769, Mr Justice Eady in fact refused to make a cost-capping order in circumstances where he considered that the law precluded him from doing so, although his inclination would have been to make such an order. It was what he described as a ding dong battle about domestic violence where he had “considerable sympathy” with the request for cost-capping.

The claimant’s costs including after the event insurance could amount to £800,000 with the total costs for both side being over £1 million. Mr Justice Eady certainly recognised that the costs implications of the CFA in this case could exert a considerable chilling effect. However, it does appear that the law has got into a certain state of disarray in that, with effect from 6 April 2009, the Costs Practice Direction, paragraph 23A has come into effect and overlooked the fact that CFAs were causing particular problems in the defamation field as noted by Lord Justice Brooke in the [Musa King](#) case which other judges have come to summarise as the blackmailing effect of CFAs.

However, the Rules Committee in their wisdom have indicated that the court should only make a cost-capping order in exceptional circumstances. Accordingly, Mr Justice Eady indicated that contrary to his inclinations in the matter, he felt inhibited by the exceptionality principle, he consoled himself – unrealistically in my view – with the fact that the costs judge could deal with any issue of disproportionality of costs.

That, with respect, simply does not provide a sufficient safeguard as challenging costs is again subject to the CFA and success fee so that the costs of challenging disproportionate costs can themselves be disproportionate. Perhaps not surprisingly, MGN have in other litigation complained to the European Court about the Operations of CFAs and various media groupings have submitted and amicus brief.

A More Cheering Case on CFAs

A rather different result was reached by a non-specialist libel judge on 25 March 2009 in the case of [Noorani –v- Calver](#) (2009) EWHC 592. This was a libel and slander action arising

out of feuds in a North of England Conservative Association. The claimant’s evidence went so badly that the case was withdrawn in circumstances which led the judge to award costs against the claimant on the higher indemnity scale. Mr Justice Coulson’s comments on the operation of CFAs however, were of considerable interest. He viewed it as a hopeless case which should never have been brought. He also commented that CFAs can inure claimants to the chilly winds of reality. As the claimant never had to reach for his chequebook he could become oblivious to the financial risks involved and in the view of the judge the conduct of libel proceedings on credit was a thoroughly bad idea.

Family Courts

On 27 April 2009 the [Family Proceedings \(Miscellaneous Amendments\) Regulations](#) came into effect. In principle these allow the reporting of family and related childcare and ancillary proceedings. The Ministry of Justice in the form of Jack Straw do not seem to have thought this through very carefully. Law firms are calling it a blackmailers charter on the basis that you call in the press to help you get more from your ex-partner before you share with the media his or her peccadilloes. The judges feel that the procedures may not be compliant with primary laws which severely restrict what can be published about what is essentially a very private area of people’s lives. One High Court family judge in the Family Division said the law could only describe the system and not the salacious detail. Guidance will now be given by the judges as to what can be reported. Another space to be watched.

Lord Hoffman

Lord Hoffman, who is one of the senior law lords and the keynote speaker at the upcoming MLRC meeting this autumn (this is, after all an English column!) made a very forthright speech to the Judicial Studies Board. Lord Hoffman has excellent liberal credentials and in the [Berezovsky](#) case had warned again the courts of this country becoming international libel policeman. He is a strong supporter of the Human Rights Act, but he had a number of telling points to make against the European Court of Human Rights which he felt was unable to resist the temptation to aggrandise its jurisdiction and to try and im-

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The Other Side of the Pond: Developments in UK and European Law

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pose uniform rules on member states and to set itself up as the equivalent of the Supreme Court in the United States. He felt that the European Court of Human Rights lacked constitutional legitimacy and was straying beyond its human rights remit when dealing with such matters as whether or not there were too many night flights at Heathrow.

Was Britain Involved in Torture of Guantanamo Bay Prisoners?

In my [February 2009](#) MediaLawLetter column I wrote about the case of [Binyam Mohamed](#) - this is a case which should be kept under continuing review. The government's case is in a state of considerable disarray. They have had to admit that they did not disclose all the relevant documents to the court and that they in effect permitted the court to be misled over the question of whether there was actual threat to the intelligence information-sharing arrangements between the UK and the USA.

The view of Lord Justice Thomas appears to be that it is inconceivable that the publication of the summary of the evidence without naming intelligence operatives would damage intelligence sharing relationships. The court has given the government one week to approach the United States government to see if they consent to the release of the summary of the evidence relating to torture, failing which the court will of its own motion issue an order. Every indication is that any such order from the English court will not make pleasant reading for the government and the court has specifically offered the Foreign Secretary the opportunity to disclose the evidence of his own motion in this intervening week.

D Notices and Anti-Terrorism

Set against a background of more ineptitude which led to the resignation of one of London's most senior policeman, Assistant Commissioner Bob Quick – coincidentally the man who appears to have thought it a good idea to arrest Damian Green MP – one saw how the UK D Notice procedure could work to protect the publishing of information which could be seriously damaging to the public interest – in a way that would be culturally alien to the USA.

The [DA notice system](#) – is a voluntary code whereby a committee of media and government representatives strikes a balance to prevent the publication of information relating to such matters as plans and capabilities for military operations to UK security and intelligence and special services. Mr Quick was in charge of an operation to arrest 12 suspected terrorist conspirators – they were in fact ultimately released without charge.

He had obviously been reading his papers in the car on his way to brief the Prime Minister. Despite the example of a number of people making the same mistake, Mr Quick managed to walk into 10 Downing Street with his papers showing the detail of the operation which was then duly photographed by the press photographers who are normally present outside 10 Downing Street.

Within a couple of hours a request had gone out to all editors not to replicate in a readable form Mr Quick's briefing note, albeit that the photo had been sold abroad where its publication could not be controlled. There was then a massive – and accelerated – police operation. The arrests were successfully carried out – albeit that the suspects are not charged although they are to be deported to Pakistan – and only a limited amount of information – and not the detailed briefing notes - was published until the arrests had been completed.

Booky-Wooky-Nooky

Readers of this column may recollect the matter of comedian Russell Brand and BBC presenter Jonathan Ross, a matter about which I wrote in the [November 2008](#) MediaLawLetter. The BBC has now been fined £150,000 by Ofcom in respect of their lewd phone calls to actor Andrew Sachs. Neither have themselves received any financial penalties as Ofcom has no power to impose them on individuals. Mr Ross is back in his job but the BBC received a roasting over the gratuitously offensive humiliating and demeaning content and the extraordinary nature and seriousness of its regulatory failures and the resulting breaches of its code. The material should never had been broadcast, it observed.

Regulatory Changes and Decisions

On 9 March 2009 a second edition of the [Editors Codebook](#) was published by the Press Complaints Commission. This has

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certainly tightened up on the guidance given in relation to privacy in the sense that it underlines that it is unacceptable to photograph individuals in private places without their consent but there is, nevertheless, a fundamental difference between the approach of the courts on privacy issues and the interpretation of public interest by the PCC.

For example, if the complainant has not complained about previous reports (the complaint of David Maclean MP) or if people set themselves up as role models, the PCC is probably likely to find that there was sufficient public interest. Of particular interest in the Codebook is the guidance given on celebrity coverage and in particular whether one can publish pictures of where the stars live and also on police ride-alongs. Their consent should be in a form which is capable of proof and needs to be reassessed in terms of public interest so that it will generally not be permissible to publish intrusive photographs if nothing was turned up in the police raid.

The PCC in its recent annual report announced that there had been an 8% increase in complaints. It dealt with of which there were 4,698 last year. They made rulings in 1420 of the cases of which 45 went to formal adjudication. There was an increase in the number of complaints about privacy particularly in relation to journalists taking part in police raids and cases where photographs had been taken without consent.

European Court Decisions

[Times Newspapers Limited-v- the United Kingdom](#)

Details of this case were given in the March edition of *MediaLawLetter*. The European Court of Human Rights lost a significant opportunity to introduce the single publication rule and publication on the internet is now determined under UK law by reference to the 19th century case of the *Duke of Brunswick –v- Harmer*. I prepared a more detailed note on this case can be supplied to anyone [emailing me](#).

The court did recognise that there could be a problem of ceaseless liability but they did not think that it arose in this case. One had the unfortunate picture of a court overwhelmed with the volume of complaints to the court simply not having the time or the inclination to grapple with the important principles involved. The upshot of the case is that in this jurisdiction media defendants should, at the very least in cases where there has been a complaint, attach a notice to the archived article

recording the fact of a libel complaint. Very often it may be prudent to at least consider taking down the article bearing in mind the likelihood of litigation and the costs involved. Certainly the law in this jurisdiction does presently favour claimants when it comes to republication on the internet and, furthermore, it seems that the English courts are leaving it to Parliament to resolve this issues.

On past form it may be sometime before the legislative change is forthcoming. Let us hope that the House of Commons Committee proves me wrong. Jack Straw, the Justice Secretary, has announced that he is to examine the chilling menace of Internet libel. It is a little odd as his government opposed the Times' argument in favour of a single publication rule which would place a cap on liability for republication on the Internet.

Disclosure of Journalistic Sources

[Sanoma v Netherlands](#)

In the case of *Sanoma Uitgevers BV v Netherlands* (31 March 2009 – Application 38224/03) the Claimant publisher of *Autoweek* complained that their rights under Article 10 had been infringed because they had been compelled to give up information which could identify their journalistic sources. Journalists had attended an illegal car race at the invitation of the organisers and taken photographs on the basis that they would be altered to ensure that the organisers' identities would remain anonymous. Police later sought disclosure of the photographs to identify a vehicle used in an unrelated crime.

Although the claimant initially resisted the request to protect the anonymity of their sources, the photographs were eventually handed over following threats to close the claimant's office and the arrest of the claimant's editor in chief (who was released without charge). The ECHR said that protection for journalistic sources is one of the basic conditions in press freedom, confirming the decision in *Goodwin v UK* (1996) and considered there had been an interference with Article 10. However, despite this, and the 'regrettable lack of moderation' in the initial actions of the police and public prosecutors, it found, by four votes to three, that the interference *was* justified, because the police did not want to use the photographs to identify the journalistic sources for prosecution, but rather to identify a vehicle used in connection with separate, serious crimes.

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The three dissenting judges added a very strongly worded opinion to the judgment, criticising the decision for merely wagging a judicial finger in the direction of the Netherlands authorities, sending out a dangerous signal to police forces throughout Europe and rendering it almost impossible for journalists to rest secure in the knowledge that, as a matter of general principle, their confidential sources and the materials obtained thereby are protected at law. Let us hope the minority view prevails.

Freedom of Information

[Tarsasag v Hungary](#)

In the case of *Tarasag v Hungary* (14 April 2009 - Application no. 37374/05) the claimant, an NGO aiming to promote fundamental rights and strengthen civil society and the rule of law, complained that the failure of the Constitutional Court to disclose a complaint concerning amendments to the Hungarian Constitutional Code amounted to an infringement of their Article 10 rights. The request was made pursuant to the Hungarian Data Protection Act.

The Constitutional Court initially refused the request on the basis that the author of the complaint, a Hungarian MP, had not given consent (though his consent had not been sought) and then ruled that the complaint did not amount to data so could not be disclosed under the act. Following appeal the Court of Appeal held that the complaint did contain data, but that the data was personal and could not be accessed without the MPs approval.

The ECHR found unanimously that there had been a violation of Article 10. The public had a right to receive information of general interest and although most case law in this area related to the role of the media, in this case the applicant could be characterised, like the press, as one of society's 'watchdogs'. The subject matter of the dispute (the constitutionality of criminal legislation) was undoubtedly a matter of public interest and the failure to disclose that information was an interference. Although the interference was prescribed by law, it was not necessary in a democratic society.

The ECHR paid particular attention to the fact that it would be fatal for freedom of expression in the sphere of politics if public figures could censor press and public debate in the name of personality rights by saying that their opinions on public

matters constituted private data which could not be disclosed without their consent, and that these obstacles to access to information may discourage the media or related fields from pursuing such matters and playing their vital role as public watchdogs.

Advertising

There have been a number of interesting developments of which space permits only a brief mention. On 26 March 2009 the Committee of Advertising Practice and its broadcasting equivalent BCAP published the result of their extensive review aimed at ensuring that the codes remained relevant and effective. This aims to produce one single broadcast code and to deal with issues relating to children and to consumer protection and the whole issue of misleading advertising and to ensure that the code is compliant with such matters as Distance Selling Regulations. At the same time the Internet Advertising Bureau, the digital marketing trade body, has published a set of good practice principled for online behavioural advertising.

Copyright

Likewise, it is only possible to mention these developments briefly but on 13 March 2009 the UK government published a discussion paper entitled [Copyright in a Digital World: What Role for a Digital Rights Agency](#) which follows up the recommendation made in Lord Carter's [Digital Britain: The Interim Report](#). At the core of these proposals is the question of how ISPs might be required to deal with persistent infringers in the digital age.

A Digital Rights Agency would deal not just with the question of enforcement but also with questions of enablement in terms of ensuring that rights can be exploited with the necessary clearances obtained. There are also moves afoot in the European parliament to establish a 70 year performance right in place of the existing 50 years which has to be approved in individual companies which might just happen in time to extend the performance rights for Sir Cliff Richard (a contemporary of Elvis Presley but a different career path) and the early Beatles music.

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

Save the Date!

MLRC London Conference 2009

October 1-2, 2009

Stationers' Hall, London

***International Developments in Libel, Privacy
Newsgathering and New Media IP Law***



Keynote Address: Lord Hoffmann, House of Lords
Speech by Justice Ruth McColl, Supreme Court New South Wales Australia
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- Libel Terrorism Protection Acts and enforcement of judgments
- The right to be left alone in public – the continuing evolution of the Princess Caroline privacy decision
- Reporting on terrorism: How has the fight against terrorism impacted reporting?
- Fair use and fair dealing in the digital media environment

For information contact Dave
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Venezuela Breached Rights of Journalists

Government Threats and Mob Violence a Violation of American Convention

By Eduardo Andrés Bertoni

Early this year, the Inter American Court found that Venezuela had breached its obligation under the [American Convention on Human Rights](#) to ensure the exercise of the freedom to seek, receive and impart information and the right to personal integrity protected under the Convention. [Rios et al. v. Venezuela](#) (Judgment of January 28, 2009) and [Perozo et al. v. Venezuela](#) (Judgment of January 28, 2009).

The Inter-American Commission on Human Rights (IACHR) brought the cases to the Court on behalf of journalists and workers of two TV stations (RCTV and Globovision) who had been the targets of threats, harassment, and verbal and physical aggression, including shootings.

In public speeches Venezuelan President Hugo Chávez and other high-ranking government officials repeatedly attacked private broadcasters as traitors, saying such things as they “transmit terrorist propaganda,” “create lies and cause panic and terror,” constitute a “fascist perversion” and report “garbage, lies, perversion, immorality.” President Chávez also encouraged violent protests against the broadcasters and defended attacks on them and on TV facilities by claiming that the people were “defending their values and principles.” In bringing these cases to the Court, the Commission also argued that Venezuela failed to properly investigate the attacks or take any preventive action.

The Inter-American Court agreed and decided for the first time that the attacks against journalists constitute a violation of Article 13 of the Convention, even if they are perpetrated by individuals with no ties to the government.

Article 13 protects freedom of thought and expression and provides in part that “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”

The basic rationale applied by the Court is that member states have an obligation under the Convention to guarantee the exercise of rights. The Court held that the effective exercise of freedom of expression is based on the existence of social conditions and practices which favor such exercise.

Freedom of expression may be illegally restricted by the State’s administrative or normative acts, or by de facto conditions which, either directly or indirectly, pose a risk to or increase the vulnerability of those who exercise or attempt to exercise this freedom, as well as by the acts and omissions of state agents or other individuals.

Under its obligation to guarantee the rights recognized in the Convention, the Court reasoned that States should not act in ways that promote, encourage, favor or increase such vulnerability and should adopt, where appropriate, any reasonable steps to prevent and protect the rights of the individuals affected, and to investigate any circumstances which may prejudice their position. *See Rios* para. 107.

The Commission also alleged that the Venezuela had violated the Convention, because of statements by high-ranking government officials, including the President of Venezuela, which heavily criticized the editorial stances of the broadcasters and threatened them with sanctions. In *Rios* (para. 139) as well as in *Perozo* (para. 151), the Court made specific reference to statements by public officials:

In democratic societies, statements by public authorities on issues of public concern are not only legitimate; they are also necessary. However, public officials are subject to certain limitations, as they are expected to reasonably verify (though not in a fully comprehensive manner), the facts on which their opinions are based, and in doing so, they should act with a greater degree of diligence than private citizens, in accordance with the responsibilities of their office, the impact that their statements may have on some sectors of the population, and to prevent the dissemination of misleading information to citizens and other interested parties. Public officials should also take into account their role as guarantors of fundamental rights, and therefore their statements may not disregard such rights nor directly or indirectly coerce or exert undue pressure on the rights of individuals who contribute to public debate by expressing their own thoughts. This special duty of care is further heightened in contexts of social conflict,

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Venezuela Breached Rights of Journalists

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disruption of public order and social or political polarization, as they pose specific risks to certain individuals or groups.

The Court found that in context some of the government statements were opinions about Globovision and RCTV participation in events that took place at a time of intense political polarization and social conflict in Venezuela. However, regardless of the situation or reasons giving rise to such statements, under the rule of law, the Court noted that conflicts must be settled according to the available domestic mechanisms and pursuant to international standards. Given the vulnerable position of the alleged victims and their relation to the media outlet in question, some of the expressions contained in the statements of the *public officials* may have been perceived as threats and had an inhibiting or self-censorship effect.

In both cases the Court found that the journalists were obstructed, blocked and inhibited from exercising their right to seek, receive and impart information and that Venezuela violated its obligation to exercise due diligence to prevent and investigate the attacks. *Rios* para. 334; *Perozo* para. 362.

Eduardo Berton is Director of the Center for Studies on Freedom of Expression (Centro de Estudios en Libertad de Expresion "CELE") at Palermo University School of Law, Buenos Aires, Argentina. He is the former Special Rapporteur on Freedom of Expression of the Organization of American States (OAS). *Debevoise & Plimpton* submitted amicus briefs in both cases on behalf of The Bar of the City of New York. The briefs are available at:

http://www.nycbar.org/pdf/report/dpny-22789364-v_English.pdf

and

http://www.nycbar.org/pdf/report/dpny_22745531_v1_Amicus.pdf

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House of Representatives Passes Bill to Limit Enforcement of Foreign Libel Judgments

Publishers Group Seeks Stronger Version

By Jonathan Bloom

On June 15, 2009, the House of Representatives, by voice vote, unanimously passed [H.R. 2765](#), a bill introduced by Rep. Steve Cohen (D-Ten.) that would amend Title 28 of the U.S. Code to prohibit the recognition and enforcement of foreign defamation judgments and certain foreign judgments against interactive computer service providers (ISPs) unless they are consistent with the First Amendment or (in the case of ISPs) with section 230 of the Communications Decency Act.

The bill also would bar recognition and enforcement of a foreign defamation judgment if the exercise of personal jurisdiction by the foreign court did not comport with due process under the U.S. Constitution. Finally, the bill provides for an award of attorney's fees to a party who successfully blocks recognition or enforcement on one of such grounds.

The Cohen bill is, for the most part, a codification of court rulings to the effect that foreign defamation judgments that are inconsistent with fundamental principles of U.S. law or public policy are not entitled to recognition and enforcement in the United States as a matter of comity. As such, it would be a welcome governmental statement of support for the First Amendment rights of U.S. speakers and condemnation of libel tourism.

The issue of libel tourism has become a hot topic over the past year. The dismissal of Rachel Ehrenfeld's declaratory judgment action against Khalid Bin Mahfouz, a wealthy Saudi businessman who obtained substantial libel judgment against her in England based on her 2003 book *Funding Evil*, helped focus attention on the national security implications of allowing individuals whose activities may pose a threat to the United States to circumvent the First Amendment, and to chill the speech of a U.S. author, by suing for libel abroad and then holding out the possibility of a U.S. enforcement proceeding.

The Association of American Publishers (AAP) explained in a February 12, 2009 statement for the record submitted to the House Judiciary Committee Subcommittee on Commercial and Administrative Law that the Cohen bill would leave U.S. authors "lacking the legal tools needed to maintain a declaratory judgment action aimed at defusing the threat of an enforcement proceeding."

Companion federal bills (entitled the "Free Speech Protection Act") introduced earlier this year in the House by Rep. Peter King (R-NY) and Anthony Weiner (D-NY) (H.R. 1304) and in the Senate by Senators Arlen Specter (then R-Pa.), Joseph Lieberman (I-CT.), Charles Schumer (D-NY), and Ron Wyden (D-OR) (S.449) would go even further by creating a damages cause of action against libel tourists that would be triggered by the mere filing of a foreign libel action – reflecting the sponsors' objective of discouraging the filing of such suits.

In addition, those bills would authorize an award of treble damages (three times the amount of the foreign judgment) where the foreign plaintiff can be shown to have initiated the foreign action part of a scheme to suppress speech in the United States.

In its February 2009 statement to the House Subcommittee and in a June 12, 2009 letter to all members of the House prior to passage of the Cohen bill, AAP expressed support for legislation stronger than the Cohen bill but less aggressive in some respects than the King/Specter bill.

Mindful of due process, Article III jurisdictional requirements, and norms of customary international law, among the changes AAP has suggested are: (1) requiring that a foreign libel judgment be rendered and some additional U.S. contacts be present before personal jurisdiction can be exercised over the foreign plaintiff; (2) limiting recoverable damages to compensatory damages as well as costs and attorney's fees; and (3) authorizing a declaratory judgment action only when the publication in question was not published in or targeted at the foreign jurisdiction.

AAP believes a bill along these lines would allow U.S. authors to alleviate the chilling effect of the outstanding foreign judgment and mitigate any adverse financial impact without interfering with legitimate foreign defamation actions or the due process rights of foreign defamation plaintiffs.

Jonathan Bloom of Weil, Gotshal & Manges LLP is counsel to the Association of American Publishers, Inc. Freedom to Read Committee.

House Bill to Limit Foreign Libel Judgment Extends Protection to ISPs

Requires Foreign Judgments Against ISPs to Comply with Section 230

As discussed in the preceding article, the House this month passed a bill introduced by Tennessee Republican Steve Cohen to limit the enforceability of foreign libel judgments. An earlier version of the bill passed the House last year.

The current version of the bill extends protection to providers of interactive computer services. Under Section 4102 (c) a foreign defamation judgment against an interactive computer service could only be enforced in the United States if the judgment was consistent with the protections provided by Section 230 of the Communications Decency Act.

The full text of the bill is reprinted below.

111th CONGRESS

1st Session

H. R. 2765

IN THE SENATE OF THE UNITED STATES

June 16, 2009

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services.

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

SECTION 1. RECOGNITION OF FOREIGN DEFAMATION JUDGMENTS.

(a) In General- Part VI of title 28, United States Code, is amended by adding at the end the following:

CHAPTER 181--FOREIGN JUDGMENTS

Sec.

4101. Definitions.

4102. Recognition of foreign defamation judgments.

4103. Attorneys' fees.

Sec. 4101. Definitions

In this chapter:

- (1) DOMESTIC COURT- The term domestic court' means a Federal court or a court of any State.
- (2) FOREIGN COURT- The term foreign court means a court, administrative body, or other tribunal of a foreign country.
- (3) FOREIGN JUDGMENT- The term foreign judgment means a final judgment rendered by a foreign court.
- (4) STATE- The term State means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Sec. 4102. Recognition of foreign defamation judgments

(a) First Amendment Considerations- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation whenever the party opposing recognition or enforcement of the judgment claims that the judgment is inconsistent with the first amendment to the Constitution of the United States,

(Continued on page 18)

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unless the domestic court determines that the judgment is consistent with the first amendment. The burden of establishing that the foreign judgment is consistent with the first amendment shall lie with the party seeking recognition or enforcement of the judgment.

(b) Jurisdictional Considerations- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation if the party opposing recognition or enforcement establishes that the exercise of personal jurisdiction over such party by the foreign court that rendered the judgment failed to comport with the due process requirements imposed on domestic courts by the Constitution of the United States.

(c) Judgment Against Provider of Interactive Computer Service- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230), whenever the party opposing recognition or enforcement of the judgment claims that the judgment is inconsistent with such section 230, unless the domestic court determines that the judgment is consistent with such section 230. The burden of establishing that the foreign judgment is consistent with such section 230 shall lie with the party seeking recognition or enforcement of the judgment.

(d) Appearances Not a Bar- An appearance by a party in a foreign court rendering a foreign judgment to which this section applies for the purpose of contesting the foreign court's exercise of jurisdiction in the case, moving the foreign court to abstain from exercising jurisdiction in the case, defending on the merits any claims brought before the foreign court, or for any other purpose, shall not deprive such party of the right to oppose the recognition or enforcement of the judgment under this section.

Sec. 4103. Attorneys' fees

In any action brought in a domestic court to enforce a foreign judgment for defamation, the court may allow the party opposing recognition or enforcement of the judgment a reasonable attorney's fee if such party prevails in the action on a ground specified in subsection (a), (b), or (c) of section 4102.

(b) Clerical Amendment- The table of chapters for part VI of title 28, United States Code, is amended by adding at the end the following:

4101.

Passed the House of Representatives June 15, 2009.

Florida Governor Signs Libel Tourism Bill

On June 25, Florida Governor Charlie Crist signed into law [HB 949](#) to limit the enforceability of foreign defamation judgments. The bill had [passed unanimously](#) in the state house and senate. See *MLRC MediaLawLetter* May 2009 at 29.

The bill is substantively the same as legislation enacted in New York and Illinois. It amends the state's foreign money judgment recognition act to make limit enforceability of foreign judgments that are not First Amendment complaint, providing in relevant part that:

An out-of-country foreign judgment need not be recognized if ... The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided the United States Constitution and the State Constitution.

The bill also amends the state's long arm statute to take jurisdiction over foreign defamation plaintiffs for purposes of obtaining a declaratory judgment on non-enforceability of the foreign judgment. The law takes effect July 1, 2009 but will apply retroactively.

California Anti-Libel Tourism Bill Getting Broad Support *Bill Will Likely Reach Governor's Desk*

By Thomas W. Newton

Legislation introduced in the California State Legislature early this year to combat libel tourism is picking up speed and will likely reach Gov. Arnold Schwarzenegger's desk soon. Sponsored by the California Newspaper Publishers Association and authored by Senate Judiciary Committee Chairwoman Ellen Corbett (D-San Leandro), [SB 320](#) would prohibit state courts from recognizing a defamation judgment obtained in a foreign jurisdiction, unless the court determines the defamation law applied in the case provided at least as much protection for freedom of expression as offered by the First Amendment and California Constitution.

The bill has received bipartisan support, passing the Senate Judiciary Committee on a 5-0 vote and the full Senate 38-0. SB 320 would amend the state's Uniform Foreign-Country Money Judgments Act, which requires, with certain exceptions, California courts to recognize a foreign-country money judgment and allows a judgment creditor to invoke enforcement procedures against a California resident or asset. SB 320 would add an exemption to the law. Senators Arlen Specter and Joseph Lieberman have introduced similar federal legislation. S. 449 would prohibit federal courts from recognizing libel judgments deemed inconsistent with the First Amendment.

Corbett's bill is intended to stop the increasingly popular practice of suing U.S. journalists and authors in libel-friendly foreign courts, and then attempting to enforce the judgment (usually obtained by default) in a California court. British libel law, for example, presumes a statement is false and places the burden of truth on the defendant. It has become a jurisdictional Mecca for the rich and famous. On the other hand, U.S. law, and especially California, places difficult burdens on plaintiffs to prove falsity and defamatory content, and requires them to clear many other tall hurdles intended to protect free expression under the First Amendment.

The New York legislature enacted protective legislation last year after Rachel Ehrenfeld – an Israeli-born writer living in the United States – was sued by billionaire Saudi entrepreneur Khalid Salim bin Mahfouz in London for her book, *Funding Evil*, which accused Bin Mahfouz of financing Islamic terrorist groups. Ehrenfeld's book was not published in London, but Bin Mahfouz was able to establish jurisdiction because 23 copies of the book were purchased there online. Ehrenfeld determined not to submit to the court's jurisdiction and Bin Mahfouz was awarded a \$225,000 default judgment.

While Bin Mahfouz has not attempted to enforce the judgment in the U.S., Ehrenfeld contends it has had an intense chilling impact on writing about terrorism. "It has not only affected me," Ehrenfeld said in an interview. "Publishers are also afraid to mention any Saudi financier of terrorism, even if the evidence is there. The intimidation factor has worked very well to silence the media."

CNPA and Corbett hope her bill will limit the exposure to California writers, diminish the chilling impact of libel tourism on aggressive reporting about important international issues, and ultimately, pressure foreign jurisdictions like Britain to change its laws to place greater protections on free speech.

While no individuals or groups have formally opposed SB 320, the California Judicial Council – the administrative arm of the courts – has met with the author and sponsor and suggested technical amendments to the bill to clarify the procedures judges will use to determine whether a foreign-court defamation judgment will be recognized. These amendments will likely be taken in the Assembly Judiciary Committee. While Gov. Schwarzenegger has not said whether he will sign the bill, staff from his Office of Policy Research has contacted CNPA and said it will recommend a support position.

Thomas W. Newton is General Counsel of the California Newspaper Publishers Association.

Libel Tourism Bill Introduced in New Jersey

Judiciary Committee Reports Out Bill to Limit Enforcement of Foreign Libel Judgments

The New Jersey Senate Judiciary Committee recently reported out a libel tourism bill designed to restrict the enforcement of foreign libel judgments. The bill, [SB 1643](#), was introduced this month by State Senators Loretta Weinberg and Robert Singer.

The current version of the bill provides in relevant part that “A foreign country money-judgment need not be recognized if ...

the cause of action resulted in a defamation judgment obtained in a foreign country, unless , prior to the collection of the judgment, a court in this State first determines that the defamation law applied in the foreign country provides at least as much protection for freedom of speech and press as is provided by the Constitutions of the United States and New Jersey.

If enacted the bill would take effect immediately.

Hawaii Libel Tourism Bill Dies in State Senate

A substantially similar libel tourism bill was introduced earlier this year in the Hawaii state legislature. [HB 130](#) would limit enforcement of foreign defamation judgments and allow for declaratory judgment actions of nonenforceability. The bill was introduced on January 23, 2009 and was passed by the House Judiciary Committee. The bill was referred to the Senate Judiciary and Government Operations Committee which did not act on it.

The bill was introduced with the support of the ACLU of Hawaii. It's [letter of support](#) cited the Rachel Ehrenfeld case and also the recent UN Nations Human Rights Committee recommendation that the UK reform its defamation law to conform to international standards. The Human Rights Committee noted:

The Committee is concerned that the practical application of [UK] libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as “libel tourism.” The advent of the internet and the international distribution of foreign media also create the danger that a State party’s unduly restrictive libel will affect freedom of expression worldwide on matters of valid public interest.

What's "Fair" In Love And War?

By David Hosp and Mark Puzella

"Should we be allowing Google to steal all our Copyrights? ...Thanks but no thanks."

-- Rupert Murdoch, quoted in "Murdoch Wants A Google Rebellion," Forbes.com April 4, 2009

Introduction

The media industry appears headed toward a showdown over the practice of news aggregation on the Internet. Two days after Rupert Murdoch articulated his distaste for Google's aggregation practices and challenged news outlets to fight back, the Associated Press took up the fight. On April 6th, Dean Singleton, AP's Chairman, announced the organization's intent to "take all actions necessary" to fight "misappropriation on the Internet." Singleton did not clearly define what he meant by "misappropriation," and there is some question whether he intended to include in the AP's sights aggregation techniques used by Google. The battle lines are forming, though.

Certain practices that might be loosely gathered under the rubric of "news aggregation" clearly run afoul of various legal constructs. Wholesale verbatim copying of articles onto independent sites undoubtedly gives rise to liability under copyright law, and at least one court has recently held that the re-writing of breaking news stories without attribution could possibly state a claim under state law "hot news" theories.

The bigger question, however, is whether the verbatim copying of headlines and ledes by news aggregators to identify hyperlinks to the original sources of the news stories is legal. This is the most prevalent online practice—the practice employed by the likes of GoogleNews, Yahoo, and many online versions of major newspaper, like the New York Times' nytimesextra.com.

Several lawsuits filed in the past year have employed a number of different legal constructs to target this type of aggregation, including trademark, unfair competition, and "hot news" theories. The central question, however, yet to be judicially determined is: Does the aggregation of third-party headlines and a ledes in connection with hyperlinks to the original source websites qualify as a "fair use" under copyright law?

The answer, if the bulk of applicable precedent is followed, is that it should. Based on the factors enumerated in 17 U.S.C. Sec. 107, and on the manner in which they have been interpreted by courts in the past, it will be difficult for the AP, Rupert Murdoch and others to make a dent in the most prevalent news aggregation practice. If liability is to be found, it will likely require a departure from established precedent, or legislative action on current U.S. copyright law.

Fair Use Factors

Section 107 of the Copyright Act codified the common law concept of "fair use," and lists four factors to be considered in determining what use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four factors are nonexclusive, and courts may theoretically allow other considerations to weigh on the determination of what is fair if they deem necessary or appropriate to effectuate the purpose of the statute's intent. As a practical matter, however, these factors provide the fundamental structure according to which courts make their determinations. With respect to the use of headlines and ledes in news aggregation, while there is clearly some room for argument, each of these factors likely weighs in favor of a finding of fair use.

The Character of the Use

Courts typically consider three factors when examining the purpose and character of an alleged infringer's use: whether the use is (a) transformative, (b) commercial, and (c) in good faith. It is likely that each of these considerations favors a finding of fair use.

A use is considered transformative if it serves a different purpose from the original. Providing a link and a lede in aggregating news links should be deemed transformative because the function is to help users *find* news. In a number of previous cases, search engines' use of entire copyrighted images in

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miniature form (known as "thumbnails") was deemed transformative because, "a search engine transforms the image into a pointer directing a user to a source of information." This is the exact purpose for which a news aggregator uses headlines and ledes.

News producers would argue that the use of a headline and lede is a "substitute" because they embody the "essence" of the original article, and some readers may be satisfied enough and never click through to original site. Previous cases, however, have found that even the use of essentially the *entire* work is transformative in the context of directing the public to the original website.

In addition, while most news aggregators are undoubtedly "commercial" websites, where the use is made in connection with one of the enumerated fair use categories such as news reporting, there is nevertheless a "strong presumption" that the use is productive. Even without this presumption, verbatim linking may not be deemed commercial under the fair use analysis because the critical "commercial use" question is whether the user stands to profit from exploitation of the copyrighted material *without paying the customary price*. News aggregators do not avoid paying the "customary price" because the articles excerpted are typically available for free to consumers.

Finally, while the good faith of the use is also relevant, lack of permission is beside the point as long as the defendant's use meets the standards of fair use. As a result, it is likely that on the balance of decided case law, the first fair use factor weighs in favor of a finding of fair use.

The Nature of the Copyrighted Work

Courts consider some works closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. When a copied work is factual as opposed to fictional or creative, a court is more likely to find fair use.

News reporting is fact intensive and generally entitled to the bare minimum of copyright protection. While news producers could argue – and likely support with testimony – that it takes creativity to select the words to use and that writing headlines and ledes is an "art." However, this likely could not overcome the well established legal principle that as news arti-

cles are entitled to *minimal* protection. As a result, the second factor should also weigh in favor of a finding of fair use.

The Amount of the Work Used

If a "use" copies only as much as necessary for the intended use, then the third factor will not weigh against fair use. Courts have previously held that use of an entire photographic image, though reduced in size, was "fair" in light of the purpose of an Internet search engine. One court has noted that it is necessary in directing users to original content to take enough "to allow users to recognize the image and decide whether to pursue more information" from the original website.

In the scenario outlined here, news aggregators provide only the smallest part of the claimed copyrighted content sufficient to identify the work and tell the reader what it is: the headline and lede. The amount taken is much less than the "entire works" considered in the context of thumbnails, and taking less would likely not allow users to recognize the subject of the article and decide whether to pursue more information from the link to the copyright holder's website.

Similarly, courts have found that even copying of entire works should not weigh against a fair use finding where the new use serves a different function from the original, and the original work can be viewed by anyone free of charge. News aggregators point users to the location of original news articles, which can be viewed by anyone free of charge. As a result, the third factor should also weigh in favor of a finding of fair use.

The Commercial Impact of the Use

A court must also consider whether a challenged use, if it became widespread, would result in substantially adverse impact on the potential market for the original work. Courts have noted that whether the use is a "substitute" informs whether the value of the original is affected. As discussed above, the use of a headline and lede is likely not a "substitute" because it serves a different purpose: directing the Web user to the source of the original. In addition, although there is a presumption of likelihood of market harm where the challenged use is "commercial," the presumption "does not apply to transforma-

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tive uses because market substitution is at least less certain, and market harm may not be so readily inferred. Thus, content providers would likely have to demonstrate an actual market impact, and allegations of "theoretical" harm would likely be rejected.

It is likely that any asserted commercial harm in the context of news aggregation would necessarily be speculative. Nearly all original content producers give their news articles away for free on their own websites, and will be hard pressed to claim that their "market" for such free access has been adversely impacted. In addition, because news aggregation is likely to increase the traffic metrics used by advertisers to measure website marketability – such as unique monthly visitors and page visits – proving harm would be difficult.

News aggregation likely increases web traffic metrics for two reasons. First there are users who click on the link and visit the original content producer's site, thus increasing the unique monthly visitors. Once there, some percentage of users also may choose to return to the site directly and perhaps even on a regular basis. Second, by repeatedly linking to the original content producer's website, the news aggregator gives the site the benefit of its "Google Juice." Google operates, in part, by tracking how often a site is linked to and by whom. This metric quantifies (by way of a proprietary algorithm) whether a site is considered authoritative. News aggregators thus boost the original content producer's ranking on Google. This increased exposure is so highly desirable that an entire industry has developed around what is called Search Engine Optimization.

Moreover, a Court likely could take into account the fact that, absent circumvention by the aggregator, the original web-

site often has the ability to prevent linking, either through the use of robots.txt coding or by denying access for referrals from particular aggregation websites.

Because it is likely that any harm to the commercial value of the original new site's content is likely to be speculative, at best, the fourth factor will also likely weigh in favor of a finding of fair use.

Conclusion

The aggravation felt by the AP and by some newspaper owners like Rupert Murdoch is understandable. The news industry in general, and newspapers in particular, are facing its most challenging time in history. Newspaper circulation and advertising revenue is down significantly and the industry has not yet determined a practical way to effectively monetize news content on the Internet. As a result, bankruptcies, closures, and layoffs seem to be everywhere. Some drastic action must be taken if the ability to produce news content is to remain an economically viable business. However, absent a significant departure from established copyright law, legal action against news aggregation websites is not likely to lead to the profession's salvation.

David Hosp and Mark Puzella are partners in Goodwin Procter LLP who focus their practices on copyright and trademark litigation. They have been trial counsel in several widely followed copyright matters, including the Cablevision RS-DVR case and the recent GateHouse Media v. New York Times news aggregation litigation.

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In the [April 2009](#) issue of the *MediaLawLetter* we published an opinion article on news aggregation and fair use. In “What’s “Fair” In Love And War?” David Hosp and Mark Puzella of Godwin Procter argued that established copyright law protects online sites that republish the headline, lede and hyperlink to an original source. David Tomlin of The Associated Press has written an opposing view on the application of fair use law to aggregation.

Little Is “Fair” in Love and War

By David Tomlin

David Hosp and Mark Puzella tried to show in their April *MediaLawLetter* article that a court would probably find that unlicensed aggregation of news headlines and lede paragraphs on a Web site is fair use under the Copyright Act. Their analysis goes wrong at every turn.

What “Fair Use” Means

Their first mistake is ignoring the most significant passage in Section 107 of the statute, the overture that describes a fair use as one made “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”

This language expressly confines fair uses to those in which the taker of a protected work does not merely copy and republish it but adds social value by creating original expressive content or context so that the new whole serves one of the specified purposes. Only then is the infringement entitled to the four-factor analysis that follows. Compiling unauthorized and unembellished copies of others’ works as news aggregators do cannot satisfy this prerequisite.

Purpose and Character of the Use

Hosp and Puzella ignore the problem and skip straight to the first fair use factor. They say news aggregators win on the “purpose and character” question because they somehow “transform” copied headlines and ledes into news links and because such use is not commercial since online news is generally “free to consumers.” Good faith is dismissed as immaterial.

Hosp and Puzella are wrong on all counts. Aggregating headlines and ledes does not change the purpose and character of their use in any way. They remain news content, published without permission for the same purpose intended by the rightful owner. Appending links to additional news content does not magically remove the curse of the unlawful taking.

Nor does it help, as Hosp and Puzella seem to think, that courts in readily distinguishable cases have found that displaying works in search engine results is fair use. News aggregations are not search engines. They are finished products packaged, marketed, displayed, monetized and consumed as news pages. Hosp and Puzella cite no case that addresses any aggregator Web site, let alone one purporting, as many news aggregators do, to corner an entire global content category.

Hosp’s and Puzella’s argument that aggregations can’t be commercial because most news published online is free to consumers misses the point entirely. News may be free to consumers, but it is not free to publishers. Aggregators’ displays ape the main news and section front pages of good faith publishers who create or pay for content. Copyright law reserves to the content owner the exclusive right to control its display, and whether the audience pays is neither here nor there.

Free-riding news aggregators cannot pretend to be “good faith publishers,” and Hosp and Puzella address this uncomfortable truth by wishing it away.

Nature of the Copyrighted Work

Hosp and Puzella claim to believe that the law provides only the scantiest protection to news reporting. They imply that news articles are little more than compilations of facts and therefore barely even copyrightable.

In fact, news content that consists of an unadorned accumulation of facts is the exception, not the rule. The vast majority of ledes and headlines are highly creative and expressive distillations not only of facts but ideas, analyses, hypotheses and arguments. Composing them calls for an agile mind and all the craft of highly skilled expository writing.

Notwithstanding Hosp’s and Puzella’s unsupported assertion, there is no “well established legal principle” that banishes journalism to the margins of what copyright law protects. On the contrary, courts have found the reverse in a variety of cases.

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Amount and Substantiality of the Portion Used

Hosp and Puzella argue that if a use “copies only as much as necessary for the intended use, then the third factor will not weigh against fair use.” This is not true for uses that are unfair to begin with, as unlicensed news aggregations clearly are.

The argument also misstates the essence of the court’s inquiry on the “amount” fair use factor, which must concern itself not just with the quantity but also the “substantiality” of the taking. Courts have found the taking of an entire work to be “fair” in some cases, but they have declared the taking of only a tiny fractional part to be unfair in others.

Headlines and ledes painstakingly crafted to encapsulate the hearts of the stories they tell are just the kind of takings that are much less than the whole but nevertheless highly substantial. News aggregators acknowledge as much by selecting them for compilation.

Effect Upon Potential Market or Value

Hosp and Puzella repeat here their misguided argument that since news content owners generally display their works without charge to their audiences, they cannot show any market harm from others’ unauthorized displays.

But copyright law does not specify how a content owner must extract commercial benefit from his works. Most news publishers have exercised their exclusive rights to display their works online at no charge to users in order to engage and build their audience. The audience in turn is an opportunity for advertisers. Displays supported by ad revenue are entitled to the same copyright protection as displays supported by subscriber revenue.

Legitimate news publishers are now struggling in plain public view to replace their shrinking print revenues with new streams from digital distribution and display. It defies common sense to argue, as Hosp and Puzella do, that publishers suffer no commercial harm when aggregators copy the most substantial portions of their works, often within seconds of their first appearance on the Internet, and sell advertising against them just as they, the rightful owners, seek to do.

Hosp and Puzella also ignore the plight of news wholesalers whose business is licensing their original content to good faith

publishers. The commercial harm that follows when unlicensed aggregators appropriate and publish without paying the license fee is self evident.

Hosp and Puzella speculate that a court in a news aggregation case would blame a victim for failing to block scraping by aggregators. Copyright law imposes no such burden on a content owner, any more than a burglary victim can’t press charges if he failed to lock his door.

The Value of News Collections

As they rush to the wrong judgment on the four factors, Hosp and Puzella make a more fundamental logical error. They apply their fair news analysis as if a news aggregation were an individual work and as if the taking under discussion were of a single headline and lede from a single news article.

In fact aggregations are continuously updated headlines and lede paragraphs from hundreds, even thousands, of articles. While each individually protectable item has beneficial usefulness by itself, its market value is multiplied by its inclusion in a collection.

This enhanced value is what prompts consumers to buy newspapers, tune in to newscasts, and visit Web sites operated by real news publishers. Consumers know they are likely to find what interests them among the contents of a collection. This is exactly the value proposition that unlicensed news aggregators wrongfully appropriate for themselves.

Conclusion

Every copyright lawyer knows that fair use analysis of the unauthorized use of a single work can be highly subjective and the outcome in any particular case difficult to predict. But in a copyright case against a news service that copies and aggregates unlicensed news headlines and ledes, the outcome is far easier to predict. A calculating stranger who times his surprise arrival for the dinner hour, after the groceries are bought, the cooking done and the table set, is not entitled to share the meal.

David Tomlin is Associate General Counsel of The Associated Press.

Fourth Circuit Affirms Summary Judgment for Plagiarism Detection Service

Digital Database a Fair Use; Important Implications For New Media

By Justin E. Klein

In a recent published decision, the United States Court of Appeals for the Fourth Circuit unanimously affirmed a district court decision granting summary judgment in favor of iParadigms, LLC, operator of the Turnitin® Plagiarism Detection Service, and dismissing a complaint for copyright infringement brought by four high school students based upon the archiving of their class assignments in the Turnitin system. *Vanderhuy v. iParadigms*, Nos. 08-1424, 08-1480 (4th Cir. April 16, 2009) (Wilkinson, Motz, Traxler, JJ.).

The Fourth Circuit decision has important implications for new media because, in finding that the classroom paper archiving at issue fell under the fair use exception to copyright infringement, the Fourth Circuit, like the Ninth Circuit decision in *Perfect 10 v. Google* (involving “highly transformative” thumbnail images in a search engine), recognized that the use of a copyrighted work could be transformative “in function or purpose without altering or actually adding to the original work.”

Background

Turnitin is a proprietary technology system, which evaluates the originality of written works in order to prevent plagiarism. The Turnitin system allows educators at schools and universities to check – via an online system, rather than manually – whether written works submitted by students are original. Schools and academic institutions make the choice about whether to use the Turnitin system.

Once a student work is submitted to Turnitin, the Turnitin system makes a “fingerprint” of the work by applying mathematical algorithms to its content. Using the digital fingerprint made of the student’s work, the Turnitin system compares the student’s work electronically to content available on the Internet (both currently and archived instances), student papers previously submitted to Turnitin, and commercial databases of journal articles and periodicals. The Turnitin system then produces an Originality Report for each submitted student work, which identifies the percentage of a student’s paper which is not original. It is then up to the student’s teacher or instructor to evaluate the Originality Report and address any issues with the student.

The Turnitin system then digitally archives the student’s submitted work – if requested by the participating school – so that the

work becomes part of the database used by Turnitin to evaluate the originality of other student’s works in the future. If a participating school determines that it does not want Turnitin to archive Student papers, then no archiving occurs.

It was the decision by plaintiffs’ respective school systems to elect to archive in the Turnitin system that caused plaintiffs, among others, to campaign against their respective school system’s policies implementing Turnitin and the archiving of student submissions. After failing to convince the school systems to change their policies, in the spring of 2007, plaintiffs filed suit in the United States District Court for the Eastern District of Virginia claiming that the archiving of their papers was a copyright infringement.

In the lower court, iParadigms defended the lawsuit and moved for summary judgment on two separate grounds, arguing: (1) that plaintiffs’ claims were precluded because they entered into a “valid contractual agreement,” containing an applicable limitation of liability clause, when they clicked “I agree,” accepting the terms and conditions of the use of the Turnitin web site; and (2) that the only act of copyright infringement alleged by plaintiff – the digital archiving of their student papers – constituted fair use under 17 U.S.C. § 107. As to the infringement claim, the lower court granted iParadigms’ motion for summary judgment and dismissed plaintiffs’ claims on both grounds.

iParadigms also asserted counterclaims against plaintiffs including, *inter alia*, claims against one plaintiff for violating the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, and the Virginia Computer Crimes Act (“VCCA”), Va. Code Ann. § 18.2-152.3, based upon plaintiff A.V.’s unauthorized use of an enrollment identification and password provided by plaintiffs’ counsel in order to access iParadigms’ computer services to submit his paper to a college where he was not enrolled. The archiving of the paper at issue in the counterclaims served as the basis for plaintiff A.V.’s claim for copyright infringement.

The lower court granted plaintiffs’ motion for summary judgment on iParadigms’ two computer fraud counterclaims. In dismissing the CFAA and VCCA claims, the lower court held that iParadigms’ alleged consequential damages responding to the improper use of the college password, did not come within the “economic damages” and “any damages” required under the CFAA and the VCCA respectively.

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Fourth Circuit Affirms Summary Judgment for Plagiarism Detection Service

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The Appeal

On appeal, the Fourth Circuit affirmed the lower court's findings on each of the fair use factors. On the first factor, the purpose and character of the use, the Fourth Circuit held that the "archiving of plaintiffs' papers was transformative and favored a finding of 'fair use'" because "iParadigms' use of these works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism."

In resolving the first factor, the Fourth Circuit: (1) recognized that commercial use can still be a fair use; and (2) rejected plaintiffs' argument that iParadigms' use of their works was not transformative because the archiving process did not add anything to the work. Specifically, the Fourth Circuit, citing to the Ninth Circuit decision in *Perfect 10 v. Google*, stated that "[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature" and held that "iParadigms' use of plaintiffs' works had an entirely different function and purpose than the original works; the fact that there was no substantive alteration to the works does not preclude the use from being transformative in nature."

With respect to the second fair use factor, the nature of the works, the Fourth Circuit affirmed the lower court's finding that the factor was neutral because even though the papers at issue were fictional and poetry and thus came "within the core of creative expression," "iParadigms' use of the works in the case—as part of a digitized database from which to compare the similarity of type-written characters used in other student works" was unrelated to any creative component in the works. In reaching its determination on this factor, the Fourth Circuit rejected plaintiffs' argument that iParadigms' use of plaintiffs' papers undermined plaintiffs' right to first publication.

In addressing the third fair use factor, the amount and substantiality of the portion used in relation to the work as a whole, the Fourth Circuit affirmed the lower court's determination that although iParadigms used the entirety of plaintiffs' works to perform the plagiarism detection service, the fact that iParadigms' use was transformative rendered the third factor neutral. The Fourth Circuit rejected plaintiffs' argument that the lower court improperly considered the transformative nature of the use in the third factor analysis and recognized that an overlap exists between the first and the third factor in the fair use analysis.

Finally, in resolving the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work," the Fourth Circuit held that its focus was not on "whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but [upon] whether the secondary use usurps the market of the original work." The Fourth Circuit also recognized that "the analysis of whether the disputed use offers a market substitute for the original work overlaps to some extent with the question of whether the use was transformative."

In its analysis, the Fourth Circuit rejected most of plaintiffs' arguments as implausible in light of how the Turnitin system functions. However, the Fourth Circuit did address plaintiffs' only plausible argument, *i.e.*, did iParadigms' archiving, which arguably prevents plaintiffs from selling their papers to so-called "paper mills" such as www.ibuytermpapers.com, affect the marketability of plaintiffs' papers. The Fourth Circuit rejected this argument because (1) plaintiffs testified that they would not sell to cheat sites; and (2) no "market substitute was created by iParadigms, whose archived student works do not supplant the plaintiffs' works in the "paper mill" market so much as merely suppress demand for them, by keeping record of the fact that such works had been previously submitted." Thus, the Fourth Circuit affirmed the lower court's determination that the fourth factor favored iParadigms.

In analyzing all four factors together, the Fourth Circuit held that iParadigms' archiving of the papers was a fair use and affirmed the dismissal of plaintiffs' copyright infringement claim on that basis. Because the Fourth Circuit affirmed on fair use, the Fourth Circuit declined to address the question of whether the terms of the Clickwrap Agreement created an enforceable contract between plaintiffs and iParadigms.

The Fourth Circuit also reversed and remanded the dismissal of iParadigms' counterclaims for violations of the CFAA and the VCCA holding that the district court had construed "economic damages" under the CFAA and "any damages" under the VCCA too narrowly when it determined that iParadigms' alleged consequential damages were not cognizable under the statutes.

On May 12, 2009, the Fourth Circuit denied plaintiffs' petition for rehearing and petition for rehearing en banc.

James F. Rittinger, Joshua M. Rubins, and Justin E. Klein, of Satterlee Stephens Burke and Burke LLP in New York City represented iParadigms, LLC. Robert A. Vanderhye in McLean, Virginia represented plaintiffs.

Court Dismisses Claim that *Swing Vote* Infringed Plaintiff's Movie Treatment

No Substantial Similarity Between Movie and Treatment

By John Lynch

In a recent decision by the Eastern District of New York, Judge Joseph Bianco dismissed a copyright infringement claim against the creators, producers and distributors of last summer's movie *Swing Vote*. The plaintiff Bradley Blakeman, a political commentator and former Deputy Assistant to President George W. Bush, claimed that *Swing Vote*, the story of a lone voter who must break the tie in a deadlocked presidential election, infringed his copyrighted treatment for a movie that would feature the behind-the-scenes machinations of a presidential campaign. *Blakeman v. The Walt Disney Company, et al.*, 2009 WL 1285106 (E.D.N.Y. May 11, 2009).

The court found that any alleged similarities in the works are non-protectible *scenes a faire* that would be expected in any work concerning a fictional U.S. presidential election, and that the average observer would not consider plaintiff's treatment and *Swing Vote* to be substantially similar. In these circumstances, the court found that dismissal is warranted regardless of the lack of discovery on issues such as access, since no amount of discovery would change the fact that the works at issue are not substantially similar.

Background

As alleged in the complaint, in the Spring of 2006, Blakeman sent a treatment and an "amplification" titled "Go November" to defendant Kelsey Grammer and Grammer's production company, defendant Gramnet Productions. Subsequently, Blakeman met with Grammer and defendant Steven Stark, a Gramnet employee, in Hollywood to discuss Go November and a potential role therein for Grammer as a Republican President running for re-election.

The Go November amplification described the story as the "ANIMAL HOUSE of politics" where "[t]he likeable, moral President is running against a slick charismatic challenger. But the real battle is between the President's tough 'do anything to

win' campaign team and the challenger's idealistic young team that is ready to fight back with every trick they can muster." As the court described it, the movie *Swing Vote* "follows the journey of Bud Johnson, a recently laid-off single father, convicted felon, recreational drinker and resident of the fictional county

of Texico in New Mexico, struggling to raise his precocious, civic-minded

... no amount of discovery would change the fact that the works at issue are not substantially similar.

daughter Molly. Bud unwittingly becomes the focus of two presidential campaigns when a voting machine malfunction on Election Day casts him as the deciding vote in the race."

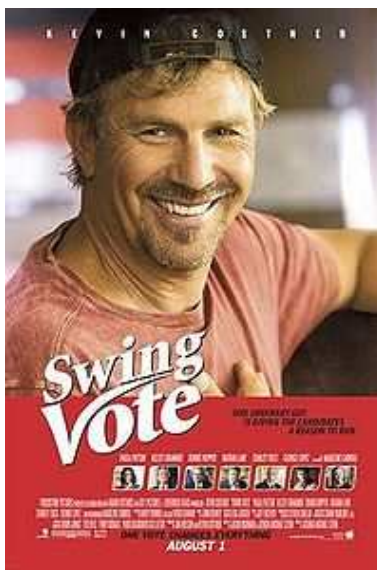
Swing Vote stars defendant Kevin Costner in the lead role of Bud Johnson. The film was produced by Costner's production companies, defendants *Swing Vote – The Movie Productions LLC* and *Treehouse Films, LLC*, and defendant Robin Jonas. The *Swing Vote* screenplay was co-written by defendants Jason Richman and Joshua Michael Stern, who also directed. Grammer played the role of the Republican President running for re-election. *Swing Vote* was distributed by Disney-related entities.

All of the defendants moved to dismiss the copyright infringement claim for failure to state a claim under FRCP 12(b)(6) on the ground that the works did not share probative similarities sufficient to establish that defendants had actually copied plaintiff's treatment, or, alternatively, that the works were not substantially similar with respect to protectible elements, thus precluding as a matter of law a claim of unlawful appropriation.

Defendant urged that such a conclusion can be reached on a motion to dismiss because the required analysis can be undertaken through a review of the respective works referred to in the complaint without need for discovery.

At oral argument, plaintiff's counsel conceded that nothing beyond a review of the respective works was required to determine substantial similarity. And, while the court acknowledged that copyright claims can be dismissed on a 12(b)(6) motion

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Court Dismisses Claim that *Swing Vote* Infringed Plaintiff's Movie Treatment

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where a comparison of the works reveals no substantial similarity, “in an abundance of caution,” the court converted the motion into one for summary judgment.

The Decision

The court declined to address whether the works lacked probative similarity so as to preclude a finding of actual copying, and moved directly to the question of substantial similarity of protectable elements, the lack of which would thwart the claim for copyright infringement even if probative similarities existed in the works as a whole. With respect to substantial similarity, the court concluded that “the main themes and plot of the respective works are entirely different.”

The court contrasted Go November's self-styled “Animal House” sensibility and its plot's emphasis on “dirty tricks” involving vandalism, trespass, voter fraud, bribery, file snooping and sexual liaisons with opposing campaign staffers with *Swing Vote's* focus on the relationship between Bud Johnson and his daughter and his “personal journey ... from irresponsible oaf to concerned citizen.”

The court reasoned that “[t]o say that these movies are substantially similar because of the common theme of a Presidential election would be as irrational as saying the movie “Animal House” is substantially similar to “Rudy” or “Good Will Hunting” because the movies all focus on college life.”

The court noted that aside from similarity in the works' respective final scenes, none of the dozens of scenes described in plaintiff's treatment appear in *Swing Vote*, none of Go November's characters remotely resemble the three main characters in *Swing Vote*, and there is no similarity in the works' structure, sequence or pace.

The court took pains to address, and in turn reject, each of the similarities in the works asserted by plaintiff. Regarding alleged similarities in the works' characters – specifically the shared “Reagan-type” republican President and his liberal democratic challenger and their scheming political strategists – the court “note[d] that these characters . . . are hardly protected expressions of an idea, but rather ‘stock characters,’ and thus, not protected elements of a copyrighted work as *scenes a faire*.” The court also characterized depictions of “acts of questionable morality undertaken by political campaigns in an effort to prevail in an election” non-protectible *scenes a faire*, and found

that, in any event, the respective immoral acts in each work that plaintiff pointed out would be recognized by an “ordinary observer” as fundamentally different from each other.

The court rejected plaintiff's allegation that the works shared similar structure, sequence and pace, noting that the few scenes that plaintiff asserts are similar (primarily those involving the machinations of the candidates' campaigns) are broken up by and interspersed among lengthier scenes devoted to the relationships between Bud, his daughter, a local television reporter and their respective friends and co-workers, with 90 of the film's 120 minutes devoted to these relationships and only 30 minutes devoted to the candidates' campaigns.

In additions, the court found that the scenes depicting the main characters' interrelationships are qualitatively more influential on *Swing Vote's* structure, pace and sequence than the secondary themes driven by the political characters.

Regarding the works' closing scenes – in *Swing Vote*, Bud enters the voting booth but his decision is not revealed, and in Go November a random, unidentified voter enters the booth, and his choice is likewise not identified – the court found that there were marked differences between the two, given Bud's unique role as the singular decision-maker in the election, and that the closing scenes were not particularly material to either works' overall plot.

Finally, the court rejected plaintiff's suggestion that it apply Ninth Circuit law, which plaintiff contended dictates a lower standard of proof for substantial similarity where a high degree of access is shown. (Defendants had conceded access only for purposes of their motion to dismiss.) The court found that it was bound to apply Second Circuit law to a copyright infringement claim, regardless of plaintiff's assertion that a “choice of law” analysis might dictate application of California law because most of the alleged acts underlying the claim occurred there. The court additionally concluded that “plaintiff would still lose under the Ninth Circuit standard because the works at issue here lack any concrete or articulable similarities of protectable elements.”

John Lynch is a partner at Pryor Cashman LLP as of June 1, 2009. Mr. Lynch and John Burleigh of Jacobs deBrauwere LLP represented the defendants. Bradley Blakeman was represented by Todd Rubenstein of Abrams, Fensterman, Eisman, Greenberg & Formato.

Bing's Video Preview Feature Stretches Fair Use – But Too Far?

By Mark S. Puzella

Microsoft recently made some waves by re-releasing and re-branding its search engine technology under a new name, “Bing.” Bing brings with it a slew of improvements and new features intended to make it competitive with the world’s top search engines. Rumors abound that Google immediately ordered a high level strategy assessment of Bing, suggesting that the search leader believes Microsoft’s search offering may have finally become a worthy competitor.

One of the flashy features touted by Bing is the provision of video “previews” directly on the search results page. Most other search engines provide only a single still frame of a video accompanied by some descriptive text, requiring the user to click the associated link to see the video in its entirety. On Bing’s search results page, however, simply passing the mouse cursor over a video thumbnail causes it to spring to life, playing a partial clip of the original that even includes the original sound. Thus without even clicking on the thumbnails the users can see short clips of the original video that can assist them in finding the particular video they are looking for.

This feature might give Microsoft a slight edge in its fight for relevance in the search space, but could it also run afoul of “fair use” doctrine? In recent years the doctrine has been forced to rapidly evolve and adapt to new technologies and Internet practices. There can be little doubt that Bing’s video previews push the concept of “fair use” in ways that are untested. But, while there are plausible arguments on both sides of the issue, if courts follow established precedent, it is most likely that Bing’s video previews are a fair use.

Fair Use Factors

Fair use is a common law doctrine that was codified in 17 U.S.C. § 107. That section provides that when assessing whether a use falls within the realm of fair use, four factors are to be considered: (1) the purpose and character of the use, including whether it is of commercial or nonprofit nature; (2) the nature of the copyrighted work, with factual works receiving less protection than artistic ones; (3) the

amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use on the potential market for or value of the work.

Courts have found that none of these factors is determinative in and of itself, but instead, each must be considered in relation to the others, and to the purposes of copyright itself, “[t]o promote the Progress of Science and useful Arts” and to serve the welfare of the public.

In a number of cases courts have found that search engine results containing thumbnails—versions of original images that are substantially reduced in both size and detail—of copyrighted images fall clearly within the bounds of fair use. See, e.g., [Kelly v. Arriba Soft Corporation](#), 336 F.3d 811 (9th Cir. 2003).

In doing so they have provided a roadmap for how courts are likely to apply the four factors of fair use in similar situations. For instance, the fact that search engines reproduce the copyrighted works for commercial gain is not determinative where there has been a substantial transformation of the work.

Similarly, the artistic, rather than factual, nature of images and videos has only limited importance where the market for the work has not been harmed. To examine whether functioning video previews fall within fair use, we follow the courts’ lead, and focus on the factors they tend to consider the most determinative: how transformative the new use is, the amount used in relation to the original, and the effect on the market.

Transformative Nature of Video Preview Clips

In cases involving thumbnails in search results, courts have placed heavy emphasis on whether use of the thumbnails is “transformative” in the sense that it changes the purpose or character of the original work by adding new expression or meaning. Although this is most directly related to the “purpose and character” prong of the fair use doctrine, it strongly influences the court’s view of each of the other factors.

In the seminal case of [Campbell v. Acuff-Rose Music Inc.](#), the Supreme Court plainly stated its view, saying that “[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that

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Bing's Video Preview Feature Stretches Fair Use – But Too Far?

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may weigh against a finding of fair use.” 510 U.S. 569, 579 (1994). If the new use serves a substantially different function than the original use, then courts tend to find that the new use is transformative. In the case of search results containing thumbnails, whereas the original work of an artist serves the function of artistic expression, the purpose of a thumbnail in search results is to improve access to information on the Internet. The work is no longer a *picture*, but a *pointer*, and therefore the use is transformative.

The question then is whether the provision of video and sound are—compared to provision of simply a single still frame—still a transformative use. Plaintiffs would argue the use is not transformative because a user could identify the desired content from a still image and it is unnecessary (and thus not transformative) to add movement and sound, i.e., more of the original work. However, defendants have a good argument that the addition of movement and sound ultimately makes the search more efficient and is thus more transformative.

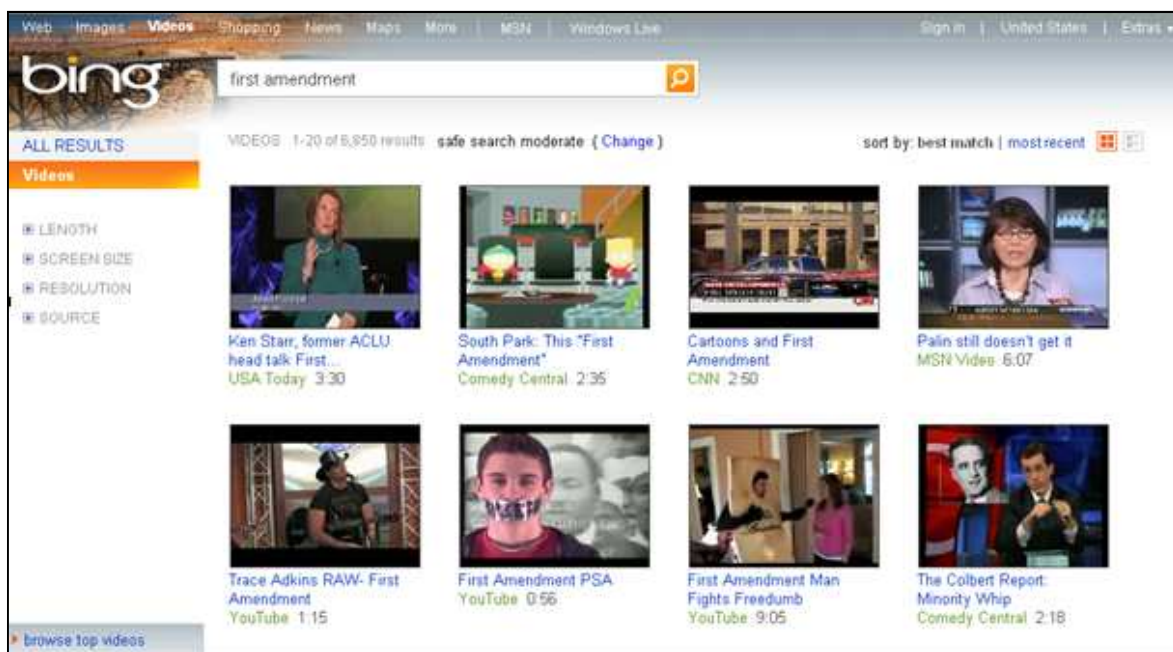
Stated another way, the addition of movement and sound makes a better pointer. A few seconds of video is likely to help further assist the user to find the video sought. For exam-

ple, imagine that a user is searching for a particular episode of a show. The user might be at a loss to distinguish twenty different images each showing a single still frame from different episodes. However, a few seconds of video—containing a snippet of dialogue or a flash of a prop or an actor's changing expression—might quickly identify for them which episode they are viewing. Once identified, the user could then click through and get the original content directly from the copyright owner.

While a reduced size partial clip may include a part of the original artistic expression, if its primary and overriding function is to improve identification and location of the original, then courts are likely to find the use to be transformative.

Amount And Substantiality of the Portion Used

When considering the amount and substantiality of the portion used the court will not simply look at the fraction in use but will focus on how the amount relates to the transformed purpose of the use. For example, in *Kelly v. Arriba Soft Corp.*, the court noted that “[i]t was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating [website]. If Arriba only copied part of the image, it would be more difficult to identify



it, thereby reducing the usefulness of the visual search engine.” 336 F.3d 811, 822 (9th Cir. 2003).

Plaintiffs have a strong argument that a video clip, even reduced in size and duration, can easily express much of the artistic intent of the original work: for example, the setup and punch-line of a joke, or the melody of a song. But while this is clearly true, a thumbnail too can communicate the artistic effect of an original image. Indeed one could

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Bing's Video Preview Feature Stretches Fair Use – But Too Far?

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easily imagine a court finding that Bing's use involves *less* use of the original, because, whereas thumbnails only reduce the size of an image, the video previews reduce the size of the image, as well as the duration of the video and the quality of the sound. In other words, a thumbnail image is smaller version of an entire work, whereas Bing's video previews are a smaller version of less than the entire work. To the extent that less of the original work is reproduced it buttresses the claim that the function is not to communicate the artist's expression, but rather to locate particular videos.

Effect Of Use On The Market

The underlying purpose of the Copyright Act is to encourage creative expression by allowing authors to capitalize on their creative works. To the extent that the "use" defeats this purpose by denying the author of a work to reap financial benefits, the use is not likely to be deemed "fair." Ultimately, whether video previews qualify as fair use will hinge in large part on the court's perception of how they will impact the market for the original content. Although a presumption of market harm exists for cases where the intended use of an image is for commercial gain, that presumption is not available where the court has found a work transformative, because where a work is transformative market substitution is less certain.

It is not clear how video previews would harm the market for the original content. Consider, how often does a user want to hear just 15 randomly selected seconds of a five minute music video? Or 60 randomly selected seconds of a half hour sitcom? These are not normal Internet user interests, and therefore video previews probably would not supply a substitute for the original videos. Furthermore, even if video previews have some harmful effect, that does not mean that they have a *net* harmful effect.

Presumably, Bing is only indexing that content which it can reach by crawling the web, and thus is only providing content that is otherwise freely available to users. If so, users would have little reason not to follow the links to the full size and complete video. Thus, rather than serve as a substitute, and thereby reduce viewership and advertising

revenues, Bing is likely to drive viewership by helping users find the links to the videos they want, subsequent to which they will click on the provided link and get the full version directly from the content owner.

Ultimately, whether Bing harms or helps the market for original video content is likely to be a highly factual determination that will depend in large part on how the service is used. Will users watch video previews for their entertainment value, or simply to help find the videos they are seeking? As a result, any litigation may turn, at least in part, on competing analyses of click-through and other user metrics.

Conclusion

Ultimately the court will consider all of these factors in light of what "promotes the purposes of copyright and serves the interests of the public." [*Perfect 10, Inc. v. Amazon.com, Inc.*](#), 508 F.3d 1146, 1166 (9th Cir. 2007). There "is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." *Id.* Thus, the courts will likely look at this issue, not only with an eye towards what has been done in the past, but also with consideration for where copyright law is and should be moving.

Will allowing video previews in search results substantially inhibit the development of quality video content? Will it substantially improve access to content, thereby enriching the experience of consumers? As content owners continue to challenge search engines on fair use, courts seem to be increasingly interpreting the traditional fair use factors with reference to these questions. Although there are arguments on both sides, it seems that Bing's video preview function is likely within the bounds of fair use.

Mark Puzella is a partner in Goodwin Procter LLP who focus his practice on copyright and trademark litigation. He has represented parties in several widely followed copyright matters, including the Cablevision RS-DVR case and the recent GateHouse Media v. New York Times news aggregation litigation. He thanks summer associate Isaac Kriegman for his assistance with this article.

Second Circuit Rejects Non-Use Defense to Keyword Ad Cases

By Mark Sableman

The Second Circuit's decision earlier this month in [*Rescuecom Corp. v. Google, Inc.*](#), No. 06-4881, 2009 WL 875447 (April 3, 2009) has significantly changed the landscape for keyword-based advertising, by holding that trademark claims based on search engine results page advertisements can no longer be dismissed on the basis that they don't involve cognizable "use in commerce" of trademarks.

This one appellate decision essentially wipes clear all of the decisions that had relied on lack of "use in commerce" to dismiss keyword-based advertising trademark infringement claims – because all of those decisions had come from district courts within the Second Circuit. Now that the Second Circuit has ruled, consistently with decisions from courts in the rest of the country, keyword-based advertising claims should almost always get past the motion to dismiss stage. Put another way, the search-engine results page ads that reportedly make up 97% of Google's revenue are now fair game for trademark infringement claims.

Background

The case presented the basic facts of a keyword advertisement trademark infringement claim. The plaintiff, Rescuecom, objected to the sale of Google Adwords ads keyed to an Internet user's use of the RESCUECOM trademark in a search. Adwords is Google's program which places context-relevant ads on its search results pages (to be distinguished from AdSense, its program which places ads on third-party websites).

Google's first-line defense was a "no trademark use" defense that had been accepted by many district courts within the Second Circuit, based on the circuit's decision in *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 1005), which involved pop-up contextual ads.

In *1-800 Contacts*, the defendant's software which had been placed on user computers generated context-relevant pop-up ads. When the user's web activity indicated an in-

terest in eye care products, for example, the software would put a pop-up ad on the user's screen, advertising one of the eye care products providers in its database.

In *1-800 Contacts*, the Second Circuit addressed a claim by the owner of the mark 1-800 CONTACTS and the related website located at www.1800contacts.com, which claimed that the pop-up software provider infringed its trademark, by displaying pop-ups advertising other eye care providers when the Internet user typed in the web address "1800contacts.com." The Second Circuit rejected the claim, holding, among other things, that there had been no actionable "use in commerce" of 1-800 Contact's trademark. (The phrase "use in commerce" is found in the Lanham Act sections that authorize trademark infringement claims.)

While the decision disclaimed any direct application to keyword-based ads, it clearly gave comfort to search engines by suggesting that "internal" use of a mark might not qualify as "use in commerce" and thus might not support infringement claims.

Based on *1-800 Contacts*, and two other decisions involving pop-up ads, all of the keyword ad cases decided by district courts within the Second Circuit have taken the position that keyword-based ads aren't actionable, because the "internal" connection between the keyword term and the resulting ad doesn't qualify as "use in commerce." Interestingly, almost all of the decisions outside the geographic bounds of the Second Circuit took the opposite view.

With this background, Rescuecom's appeal attracted great attention. Had the Second Circuit affirmed the district court's dismissal of Rescuecom's claims, it would have confirmed the deep split between courts on whether keyword claims could even meet the apparent threshold "use in commerce" requirement. A reversal, as occurred this month, essentially represented the end of that defense. Google fought hard for the "no use" theory, and a number of supporting organizations, including Electronic Frontier Foundation and Public Citizen, supported it through amicus briefs.

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Second Circuit Rejects Non-Use Defense to Keyword Ad Cases

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Second Circuit Decision

The Court's analysis was surprisingly simple. Initially, in a unanimous panel decision written by Judge Pierre Lalav, the Court noted the deliberateness of Google's use of trademarks as keys for its Adwords ads. Google actively encourages its advertisers to use their competitors' trademarks as well as generic terms as keywords. The court pointed to Google's "Keyword Suggestion Tool," a program that recommends keywords, including competitors' trademarks, to potential advertisers.

Because the case arose on a motion to dismiss, the court deferred to plaintiff's allegations of consumer confusion,

noting the reasons why Rescuecom felt that the

the court rejected the argument that because we permit product placements in the physical world, keyword based ads should be permitted as well...

Adwords ads keyed to its RESCUECOM trademark infringed this mark. Rescuecom claimed that Adwords ads, particularly those placed above the organic search listings, could be interpreted by users as part of Google's normal organic search results. While the Adwords ads are labeled, usually with the phrase "Sponsored Listings," Rescuecom alleged that consumers might not recognize or understand the label.

Thus, the case properly alleged a likelihood of confusion. The issue for decision was whether it alleged trademark "use in commerce" – that supposedly key element found lacking in *1-800 Contacts*. The Second Circuit had two paths for tackling "use" – the easy way (by distinguishing *1-800 Contacts*) and the hard way (by construing the meaning and intent of the "use in commerce" language of the Lanham Act). It chose to take the easy path in the decision proper, and to address the more difficult path in an appendix.

The court found two distinctions between *1-800 Contacts* and *Rescuecom*. First, the pop-ups in *1-800 Contacts* had been triggered by website addresses, not standalone trademarks, and that distinction supported the *1-800 Contacts* conclusion that trademarks per se had not been "used" by the pop-up provider. Apparently the court viewed the pop-up provider's technique as akin to using a consumer's

street-address destination as a clue for the products or services he or she desires, and then displaying ads keyed to that interest. Trademarks are involved only in the coincidental case where the address reflects the trademark, so there is no real "use in commerce" of a trademark. By contrast, in *Rescuecom*, "what Google is recommending and selling to its advertisers is Rescuecom's trademark."

An alternative, and perhaps stronger, distinction related to how ads were placed in the pop-up situation. In *1-800 Contacts*, WhenU had not promised to place a specific ad in response to a specific use of a term (or website address) by the user. Rather, use of a website address would simply prompt a randomly generated ad from an advertiser within the particular category associated with that address. For

example, when a user typed in

"1800contacts.com," WhenU's software randomly generated a pop-up relating to one of its clients in the eye care category.

Thus, the Second Circuit noted in *Rescuecom*, in the WhenU situation, "the trigger to display the ad was not based on the defendant's sale or recommendation of a particular trademark." WhenU engaged in no "use or display" of anyone's trademarks to its advertisers. By contrast, in keyword advertising, "Google displays, offers, and sells Rescuecom's mark to Google's advertising services when selling its advertising services." Indeed, in the court's view, Google's use of the Keyword Suggestion Tool emphasized its "use" of the trademark.

Google and its amici had strongly argued, based on *1-800 Contacts*, that mere internal use of a mark did not constitute trademark use. This argument had some real appeal, particularly when the transaction is viewed from the consumer's perspective, because the Internet user never sees the connection made between his search term and the Adwords ads that appear on Google's search results page. But the Second Circuit dismissed this argument as one that "overreads the *1-800* decision." The court focused more on Google's interaction with its advertiser than the user's interaction with the results page: Google clearly recommended

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Second Circuit Rejects Non-Use Defense to Keyword Ad Cases

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to its Adwords customer that it use a trademark as a search term, and the court found that to constitute sufficient trademark use.

The court pointed to other problems with the theory that mere internal use of a mark could not support a trademark infringement claim. What if Google had sold the top place in its organic listings to an advertiser, and never labeled that placement as an ad? What if a search engine agreed to divert searches for a trademark directly to website of a competitor of the trademark owner? If, under Google's theory, all mere internal use of trademarks were exempt from infringement claims, then there would be no remedy for such abuses.

Finally, the court rejected the argument that because we permit product placements in the physical world (for example, store brand products displayed next to name brand products), keyword based ads should be permitted as well, as a kind of Internet analog of product placement. Physical world product placements get no "magic shield" from liability, the court held; they are permitted merely because they are viewed as "benign," not creating any likelihood of confusion, not because no trademark "use" is recognized.

The result of the Second Circuit's distinctions between *1-800 Contacts* and *Rescuecom*, may surprise some Internet users. Pop-up ads like those of WhenU and Claria (formerly known as Gator) – which many consider deceptive, partly because consumers who downloaded the WhenU or Claria software as part of other transactions didn't realize what they were getting into – escape trademark liability. By contrast, Adwords ads on Google search results pages – some of the best known and understood features of the Internet – face potential trademark liability.

The Second Circuit's appendix in *Rescuecom* on the issue of what Congress meant by the "use in commerce" requirement of trademark infringement actions deserves some

comment. While the appendix was not necessary to the Court's decision, the court obviously recognized that district courts had misunderstood the phrase, and felt some responsibility to set them straight.

Many trademark scholars had criticized the "no use" decisions as misunderstanding the statute. But while the appendix sides with the scholars and backs off of "use" as a requirement for infringement claims, it also highlights the fundamental lack of clarity of the "use in commerce" statutory language, and suggests that Congress should clarify it. In the meantime, the Second Circuit's analysis in its appendix may discourage other applications of the "no-use" argument, including a recent extension of that defense to cases alleging infringement through website metatags.

After rejecting Google's no-trademark-use defense, the Second Circuit noted the obvious fact that its holding dealt

only with the no-use defense, not the merits of the case. *Rescuecom* must still prove that con-

sumers are misled when its competitors' Adwords ads appear on search results pages responsive to a search for "Rescuecom."

Developing such proof of consumer confusion, of course, may present an even more daunting task for plaintiffs than overcoming the non-use defense. Among other things, plaintiffs seeking to prove consumer confusion are likely to employ consumer surveys, and/or argue based on the controversial "initial interest confusion" doctrine. Barring an en banc reversal, *Rescuecom* means that the era of motions to dismiss in these cases is over. The era of battles over surveys and other evidence (or the lack thereof) of consumer confusion is about to begin.

Mark Sableman is a partner at Thompson Coburn LLP in St. Louis, MO. Google was represented by Michael H. Page, Kecker & Van Nest, LLP, San Francisco, CA. Rescue.com Corporation was represented by Edmund J. Gegan, Syracuse, NY.

Rescuecom must still prove that consumers are misled when its competitors' Adwords ads appear on search results pages...

Illinois Court Considers Whether Shield Law Applies to Online Posters

Prosecution Allowed to Obtain ID of Two Posters Who Discussed Murder Case

In an interesting decision, an Illinois trial court denied in part a newspaper's motion to quash a grand jury subpoena seeking the identity of pseudonymous posters to the newspaper's website. [Alton Telegraph v. Illinois](#), 08-MR-548 (Ill. Cir. Ct. May 15, 2009) (Tognarelli, J.). The newspaper sought to protect the identity of the posters under the state shield law, arguing the posters were "sources" of information covered by the statute.

The court gave serious consideration to the newspaper's argument, but concluded that "unsolicited" and "voluntary" postings to an online forum designed to elicit public comment are outside the scope of the shield law. Alternatively, even if the shield law applied, the court found that the state was entitled to identifying information about some of the posters because their comments were relevant to a first degree murder prosecution and the state had exhausted all other available sources to obtain the information.

Applying this standard, the court quashed the subpoena for the identity of three posters on relevance grounds, finding their comments to be mere "conversation/discussion" about the murder case. But the court ruled the newspaper had to disclose identifying information about two posters who made factual statements about the murder victim.

Background

In September 2008, the *Alton Telegraph* published an article about the arrest of Frank D. Price for beating his girlfriend's five year old son to death. The online version of the article was comment enabled and numerous people posted comments and opinions to the piece. Several days later, Price was indicted for first degree murder. Prosecutors then subpoenaed the newspaper for information on the identities of five pseudonymous posters.

Pncbme discussed the defendant's drug use and relationship with the victim's mother.

iohn 3418 wrote about defendant's prior criminal history, including an arson.

Cstyle wrote that the victim's mother was an enabler of a "drug slinging, alcohol guzzling, and child beating man."

Purlpebutterfly described how other children had suffered because of defendant's conduct.

Mrssully wrote that she saw the child with two black eyes a week before his death and appeared to have information regarding prior incidents of abuse.

The *Telegraph* filed a motion to quash under the Illinois Reporter's Privilege Act, 735 Ill. Comp. Stat. 5/8-901, *et seq.* The statute shields from disclosure the identity of confidential and non-confidential sources. A "source" is broadly defined as "the person or means from or through which the news or information was obtained." The protection can be divested only if a court finds that "all other available sources of information have been exhausted and disclosure of the information is essential to the protection of the public interest involved." 735 ILCS 5/8-907 (2001).

At a hearing held in December 2008, the newspaper argued that the pseudonymous posters were "sources" within the meaning of the shield law because:

the moment the persons at issue posted comments on the *Telegraph's* web site, the newspaper had obtained information from them that it could use however it deemed appropriate at its editorial discretion. As a result, these persons plainly constitute "sources" under the Shield Statute, irrespective of whether the *Telegraph* ever used or incorporated the information it obtained from them in a separate news story.

[Telegraph's Renewed Motion to Quash.](#)

Circuit Court Decision

Noting this to be an issue of first impression in Illinois, the court reasoned that the online posters were not "sources" for two reasons. First, the court found it significant that the comments were not used to create the article.

Here, it is clear that the "reporter" did not use any information from the bloggers in researching, investigating,

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Illinois Court Considers Whether Shield Law Applies to Online Posters

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or writing the article. In fact, none of the comments were written until after the article was published. Comments were then made between various bloggers, between themselves, without comment, input or discussion from the reporter, it would not appear that the bloggers were “sources” for the Telegraph news article.

Second, the court noted the “unsolicited, public nature of the online comments” and concluded that such voluntary statements in “a forum designed to elicit citizen’s opinions” are not within the scope of the shield law.

However, the court went on to find that even if the shield law did apply, prosecutors were entitled to the identity of some of the posters.

The Telegraph has an interest in protecting its online blogger’s identities while the State has an interest in prosecuting someone who has allegedly murdered a child. The Telegraph’s interest, while not negligible, does not go far enough to serve the larger purpose of the reporter’s privilege, It cannot be said that forcing The Telegraph to reveal what information it has about voluntary, unsolicited online commentators, in this case,

will make the public unwilling to express their opinions or to provide information during the course of a reporter’s actual investigation, in future cases, nor does it deny the public the right to receive complete unfettered information in this and future instances.

Under this standard the prosecution was entitled to obtain identifying information about two of the posters -- purplebutterfly and mrssully. These individuals had “relevant information about defendant’s prior conduct, his propensities for violence, and relationship with the child.” Moreover, the court accepted that the prosecution had no practical alternative to obtain their identification from other sources. Prosecutors had interviewed over 100 people and re-interviewing these people would be prohibitive in both cost and time, the court concluded.

At the time of this writing, *The Telegraph* was working to stop the disclosure of posters whose identities were not ordered by the Circuit Court and to resolve the litigation short of appeal.

The Alton Telegraph is represented by John Bussian, The Bussian Law Firm, Raleigh, NC; and Thomas Scott Steward and Noel Smith of Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC, St. Louis, MO.

UPCOMING EVENTS

	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31	1	2	3

MLRC London Conference
*International Developments in Libel, Privacy
Newsgathering and New Media Law*
October 1-2, 2009

MLRC Annual Dinner
November 11, 2009

First Amendment Speakers Bureau
Upcoming MLRC Institute Events

*Feel free to e-mail us with any questions regarding
MLRC’s upcoming events @ MediaLaw@MediaLaw.org*

Prosecutor in Nevada Subpoenas Newspaper for Identity of Online Posters

Sought ID's of Over 100 Posters Who Commented on Tax Evasion Case

Earlier this month, a federal prosecutor in Nevada issued a grand jury subpoena to the Las Vegas Review-Journal seeking the identity of over 100 online posters who left comments on the newspaper's website about a high-profile federal tax evasion case. The newspaper's editor, Thomas Mitchell, disclosed the subpoena in an [opinion column](#) published on June 7th in his paper.

The subpoena came in response to a May 26th [article](#) about the upcoming criminal tax evasion trial of Robert Kahre. Kahre, a Las Vegas construction company owner, came up with the novel and potentially illegal tax avoidance strategy of paying workers in gold and silver coins and calculating their payroll taxes at zero based on the face value of the coins.

The article elicited over 100 comments in its first week online, including many expressing anti-government and anti-tax sentiments. Examples include: "This man was doing a good thing for his clients and this country, end the fed!" "Just another tactic for the government to have TOTAL control of their "workers". GOLD and SILVER are legal tender coins. The Federal Reserve must be abolished. Its ok for the gov. to make fake money though." One poster even wrote: "I have not filed in over 30 years.... I am not allowed by my religion to commit perjury so I don't file, let alone the FACT that it is voluntary anyway. "

After publicity about the subpoena, the prosecutor significantly narrowed the subpoena to only two posters. One poster wrote that the jury "should be hung" if they convict Kahre. The other poster wrote that he would bet "quatloos" (a fictional currency on Star Trek) that one of prosecutors would not reach his next birthday.

The Las Vegas Review-Journal removed these posts for violating the site's terms of use and said it would comply with the subpoena. However, the Nevada ACLU moved to intervene on behalf of the posters to quash the subpoenas. The ACLU's motion argues that these posts do not constitute real threats and are therefore an abuse of the grand jury process.

india wrote on June 26, 2009 09:50 AM:

be advised that comments that may remotely be construed as hostile to government positions, especially with regard to tax and monetary policy, have no constitutional protection. expect punitive investigation, detention, trumped charges, life and death in legal hell.

John Galt wrote on June 26, 2009 08:38 AM:

15 quatloos for the suffering of "Christopher Maietta, the Justice Department prosecutor in the current trial of Las Vegas businessman Robert Kahre"

Trekie and IRS agent wrote on June 24, 2009 12:02 AM:

Dear Star Trek fan,

But can a IRS thug not also be a Star trek fan?

Cop and goveremnt agent are allowed to lie to Americans. They do it all the time. Like they say "EVERYONE knows" and "EVERYONE files" and use lies like "fair share" and "good citizens" when talking about "taxpayers".

The fact is that if you pay income taxes you are not a "good citizen" you are just a slave. You don't pay for roads or the military or salaries of teachers or schools or health care. You pay for an artificially created debt that goes to the bankers. You are a slave. A voluntary slave. A serf. You are in bondage.

Am I clear?

Texas Becomes Number 37 in States that have a Reporter's Privilege

By Laura Lee Prather

On May 13, 2009, Texas became the thirty-seventh state to enact a reporter's privilege. The law was signed by Governor Rick Perry that day and became effectively immediately. Texans have tried for decades to get a law like this on the books. In recent history, legislation was proposed during the last three sessions.

In 2005, the major accomplishment was getting the broadcast and the print media to speak with one voice on the issue and to both support the measure. In 2007, the bill would have passed but for a last minute point of order killing the bill on a technicality. The 2009 session, however, proved that the third time was indeed a charm.

The bill that was proposed the last three sessions is a qualified privilege patterned in large part after the Department of Justice Guidelines. In 2007, there were two chief opponents to the legislation – law enforcement and the business community. During the last session, we were able to negotiate with the business community to alleviate their concerns about disclosure of trade secrets and other information they deemed to be “private” or “proprietary” in nature.

Ultimately the business community groups signed a letter to the Legislature indicating they no longer opposed the bill. Unfortunately, despite repeated efforts, there were no fruitful negotiations with the prosecutors last session. Indeed, it was the former District Attorney from Houston (who was since been indicted) who actually supplied the point of order that killed the bill in 2007.

The 2009 legislative session proved to be different. During the interim, we suffered some setbacks, with our House sponsor being defeated in a primary election and the uncertainty of who would carry the legislation in the House this time. Luckily, our long-time sponsors in the Senate – Senator Rodney Ellis (D-Houston) and Senator Robert Duncan (R-Lubbock) remained steadfast supporters of the legislation and agreed to sponsor the bill again in 2009.

The newspapers and the broadcasters also continued to work hard to better educate people through grass roots efforts and the establishment of a very informative website – www.freeflowact.com. The website gives examples of demonstrated need for the law, shows what laws have been adopted in other states and when their laws were enacted,

provides editorials on the issue, and has a section on subpoena abuse and prosecutorial misconduct.

Ultimately we were able to find a new sponsor in the House Representative, Trey Martinez-Fischer from San Antonio. Still, for other reasons, the start of the 2009 session was a rocky one. There was a change in the leadership in the House of Representatives, and Texas' long-time Speaker of the House (Rep. Tom Craddick) was ousted at the beginning of this session. This meant that the make up of all of the committees and committee chairmanships changed – including the committee our bill would be heard before.

HB 670 was heard by the House Judiciary and Civil Jurisprudence committee this time around, and there were only three returning members of the committee who had heard the issue in previous sessions. We were concerned that the learning curve would be detrimental to our cause. What we did not anticipate was the strength of the new chairman of the committee – Chairman Todd Hunter (R-Corpus Christi).

From the beginning, Chairman Hunter worked to have the bill heard early – which is key in Texas because our Legislature only meets five months out of every two years. Chairman Hunter also put tremendous pressure on the prosecutorial community to sit down and have a meaningful discussion and negotiate with the media on the bill. He made it clear that the train was leaving the station, and they could either get on board or not. As a result of Chairman Hunter's tenacity and dedication, we had four different negotiation sessions with the prosecutors – the final one lasting more than thirteen hours. In the end, we had a bill that everyone could agree upon, and the bill sailed through the House and the Senate with unanimous votes on third reading.

The bill is a qualified privilege, and during the negotiations with the prosecutors, we separated it into two different sections. The civil section has a three prong test one must overcome in order to require a reporter to testify or produce materials. The party who issues the subpoena must establish by clear and convincing evidence that: (1) they exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) the information sought is essential to the maintenance of the claim or de-

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Texas Becomes Number 37 in States that have a Reporter's Privilege

fense of the person asking for it. In the civil arena, the same test applies whether one is seeking confidential or nonconfidential information or published or unpublished information.

The criminal section, on the other hand, is separated into three parts with different tests applying to different matters. The first part deals with confidential sources, the next with work product and nonconfidential sources, and the third with published information. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere.

Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. With regard to unpublished materials in the criminal setting, the same three part test as the civil arena applies. Published materials are not covered by the statute

so one would look to common law with regard to those materials.

In addition to the foregoing, there are three unique and interesting twists to the Texas law. First, with regard to criminal subpoenas, the elected district attorney is required to sign all subpoenas issued to journalists. Second, again with regard to criminal subpoenas, the subpoenaing party is required to pay the journalist a reasonable fee for the journalist's time and costs incurred in responding to the subpoena. Last, the law added a provision to make broadcasts self-authenticating, like newspaper articles, so that a reporter will not have to be put on the stand solely for the purpose of authenticating a broadcast tape.

It has been a monumental undertaking to get this law passed in Texas, and there are many people who have helped make this quest a reality. We thank all of those who have assisted in the effort and each of the lawmakers who voted in favor of passing a law that will benefit all Texas citizens – the Texas Free Flow of Information Act.

Laura Lee Prather is a partner in the Austin, Texas office of Sedgwick, Detert, Moran & Arnold LLP.

WHITE PAPER ON THE REPORTER'S PRIVILEGE

In 2004, the MLRC Institute published the Media Law Resource Center White Paper on the Reporter's Privilege, a series of articles that assess the history of the reporter's privilege and the arguments and empirical rationales that support it.

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Georgia District Court Denies Effort by Journalism School Dean to Compel Disclosure of Confidential Source

Plaintiff Failed to Exhaust Alternatives and Show Information Necessary

By Tom Clyde

On April 30, 2009, the district court for the Northern District of Georgia overturned a troubling order issued by a Magistrate Judge that had required a former *Atlanta Journal-Constitution* journalist to disclose the identity of a confidential source. *Soloski v. Board of Regents of Univ. System of Ga.*, Case No. 06-cv-3043 (N.D. Ga.).

The controversy over the confidential source arose in an unusual context. The party moving to compel disclosure was none other than a former journalism school dean. Professor John Soloski previously ran the University of Georgia's Grady College of Journalism and Mass Communication and is currently a tenured faculty member there.

Nevertheless, in connection with a lawsuit claiming that the University violated his constitutional rights when it found that he had breached the University's sexual harassment policy, Soloski noticed the deposition of former *Journal-Constitution* reporter Kelly Simmons. Soloski made clear that he intended to compel her to reveal the confidential source or sources who alerted her that an investigation was underway, which allowed her to break the first news story on the University's inquiry into Soloski's conduct.

In response to the subpoena, Simmons invoked Georgia's statutory reporter's privilege, O.C.G.A. § 24-9-30 – a privilege that has never been overcome in connection with a confidential source since its passage in 1992. However, on January 30, 2009, U.S. Magistrate Judge Christopher Hagy issued an order denying the *Journal-Constitution's* motion to quash Simmons' deposition.

On April 30, 2009, however, U.S. Senior District Judge Marvin Shoob vacated the Magistrate's Order and granted the motion to quash, finding that Simmons was protected by Georgia's statutory privilege. Pursuant to Fed. R. Civ. P. 72 (a), Judge Shoob was authorized to set aside the Magistrate Judge's Order if it was "clearly erroneous or contrary to law." Judge Shoob found clear error in at least two respects: (1) the Magistrate Judge's finding on exhaustion of alternative sources, and (2) the Magistrate Judge's finding

on the "necessity" of the identity of the confidential source to the case.

Plaintiff Failed to Exhaust Alternative Means

In reversing the Magistrate Court's order, Judge Shoob concluded that it was error to find that Soloski had made reasonable efforts to use alternative means to determine who spoke with Simmons about the then-ongoing investigation. Judge Shoob determined that Soloski had failed to depose the vast majority of the individuals interviewed as part of the investigation, including Soloski's accuser.

The court noted that by failing to depose Soloski's accuser, "who arguably had the greatest interest in publicizing the investigation, plaintiff clearly failed to 'beat the bushes' to identify Ms. Simmons' source." *Slip op.* at 7, n.1 (quoting *Price v. Time Inc.*, 417 F.3d 1327, 1348 (11th Cir. 2005)).

The court was particularly critical of Soloski's reliance on a stipulation entered into with the defendants. The stipulation stated that the depositions of several University administrators had established that the identity of the source "could not be reasonably obtained other than by asking Ms. Simmons directly." The court explained:

[T]he duty to exhaust reasonable alternative sources of information is not one that the parties can simply "stipulate" away. Nor is the Court required to accept a self-interested stipulation that is patently false.

Slip op. at 8.

The court then denied Soloski's request that he be allowed to conduct the necessary depositions, finding that to grant the request would require reopening discovery at a very late stage in the case.

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Georgia District Court Denies Effort by Journalism School Dean to Compel Disclosure of Confidential Source

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Identity of Source Not Necessary to Case

Judge Shoob also rejected the Magistrate Judge's conclusion that the identity of the source was "necessary to the proper preparation of . . . [his] case." *Id.*

Although Simmons had been alerted to the ongoing investigation by a confidential source, the existence of the investigation was thereafter confirmed in an on-the-record statement by a University Provost. Moreover, Soloski himself then also spoke to Simmons about the lack of merit in the allegations that prompted the investigation.

Plaintiff's contention in issuing the subpoena to Simmons was that he needed to know the identity of her initial source to support an invasion of privacy claim. He claimed he had an actionable expectation of privacy under University rules that the investigation would be kept confidential by University officials until it reached a conclusion.

Judge Shoob, however, concluded that the identity of the initial source was *not* necessary to his privacy claim because the on-the-record confirmation of the investigation by a University official gave him an independent basis to allege a privacy violation if such a cause of action existed under Georgia law (an issue the Court did not reach). The court explained:

[R]egardless of whether Ms. Simmons' original source was a University official, [the Provost's] confirmation of the existence of the investigation would have constituted a separate and independent violation of the non-disclosure policy. Thus, the source of the original tip is, at best, redundant and unnecessary evidence.

Slip op. at 9.

The court emphasized that the article in which Soloski's privacy was allegedly invaded only reported that the investigation was ongoing based on the University's confirmation. All other details about the investigation were provided by and attributed to Soloski himself. Given the narrow scope of the story, the court concluded that the Provost's admitted confirmation of the existence of the investigation "already provides all the evidence plaintiff needs to prove his claim." *Slip op.* at 10.

Is The Case Over?

Dean Soloski's lawsuit has been marked, so far, with both successes and failures. In a prior order, Judge Shoob found that Soloski was entitled to the issuance of a writ of mandamus to the University requiring it to clear his employment record. The court found that the University's conclusion that he had committed sexual harassment was a gross abuse of discretion. Nonetheless, the court has otherwise dismissed all his claims for money damages. The invasion of privacy claim is the only claim left in Soloski's case that remains unresolved. At this juncture, the parties are participating in a mediation to determine if the case can be resolved.

Peter Canfield, Tom Clyde and Lesli Gaither of Dow Lohnes PLLC in Atlanta represent The Atlanta Journal-Constitution and reporter Kelly Simmons. Plaintiff John Soloski is represented by Brandon Hornsby and Austin Perry of Atlanta, Georgia. The University of Georgia is represented by Bryan K. Webb of Athens, Georgia, and Annette Marie Cowart of the Office of the State Attorney General.

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Supreme Court Rejects Appeal Over Fleeting Expletives

Expletives Must Be Deleted – At Least for Now

By Jerianne Timmerman

On April 28, the Supreme Court, in a 5-4 ruling, upheld a Federal Communications Commission decision that the airing of even an isolated or fleeting expletive during live programming on broadcast television violated the agency's indecency rules and could subject stations to substantial fines. *FCC v. Fox Television Stations, Inc.*, No. 07-582 (April 28, 2009).

The Court's decision, however, was based on administrative law and avoided deciding whether the FCC's recent, stricter indecency policies violate the First Amendment. What is most clear from the Court's narrow and splintered decision is 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 very near future.

The FCC's Reversal on Indecency Enforcement

Federal law prohibits the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464. Over thirty years ago, the Supreme Court, by a slim 5-4 majority and stressing the narrowness of its decision, 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, particularly to children, of the broadcast media.

Following *Pacifica*, the FCC for decades adhered to the position that fleeting expletives were not actionable under its indecency rules. In 2004, however, the FCC reversed course, concluding that even the fleeting use of certain expletives was actionably indecent and profane. In two cases applying this stricter indecency standard, the FCC found that the fleeting use of "fuck" and "shit" in live broadcast

programming (two *Billboard Music Awards* shows on the Fox network) was indecent and profane. Fox appealed this order to the Second Circuit Court of Appeals.

Appeals Court Reverses FCC's Reversal

The Second Circuit overturned the FCC's new indecency policy on the airing of fleeting expletives. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). In a 2-1 decision, the appeals court found that the FCC had failed to provide a reasoned analysis for its about-face on the treatment of fleeting expletives, and, thus, the agency's new policy was arbitrary and capricious under federal administrative law.

The court refrained from deciding the constitutional challenges raised by

... the fundamental First Amendment issues implicated by the FCC's regulation of allegedly indecent programming ... will be receiving substantial judicial attention in the very near future.

broadcasters. However, the court engaged in a lengthy discussion of the constitutional questions 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 indecency regulatory regime.

Supreme Court Reverses Second Circuit

In a ruling narrowly focused on administrative law issues, five Justices (Scalia, Roberts, Kennedy, Thomas and Alito) reversed the Second Circuit, finding that the FCC's altered indecency policy was not arbitrary and capricious under the Administrative Procedure Act (APA) and *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). In particular, the majority concluded that there was no basis in the APA or in *State Farm* for requiring agencies to provide a more substantial explanation for their actions that change prior policy, or for subjecting agency changes to more searching judicial review. The Court found that the Second Circuit

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had erred in relying in part on its precedent interpreting the APA and *State Farm* in this manner.

The majority noted that an agency must “display awareness that it *is* changing position,” and may in some cases need to account for prior factfinding or certain reliance interests created by a prior policy. Opinion of the Court at 11. However, an agency need not demonstrate to a court that the reasons for a new policy “are *better* than the reasons for the old one.” *Id.* It “suffices that the new policy is permissible” under the relevant statute, that there are “good reasons for it,” and that the “agency believes it to be better.” *Id.* Under these standards, five Justices found that the FCC’s new indecency policy passed muster.

Finally, the majority declined to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties. The Court found that the lawfulness of an agency action “under the Constitution is a separate question” from the APA’s arbitrary and capricious standard, and should be “addressed in a constitutional challenge.” *Id.* at 12.

Concurrences and Dissents -- The “Long Shadow” of the First Amendment

Because the Second Circuit did not definitively rule on the constitutionality of the FCC’s order, the majority declined to address the constitutional questions raised by broadcasters. Notably, however, the majority opinion appears untroubled by the constitutional ramifications of the FCC’s policy. *See, e.g.*, Opinion of Court at 25-26 (indicating that it was “conceivable” that the FCC’s “orders may cause some broadcasters to avoid certain language that is beyond the Commission’s reach under the Constitution,” but that would be determined “soon enough,” and, in the meantime, “any chilled references to excretory and sexual material” was at the periphery of First Amendment concern; also stating that the FCC “could reasonably conclude that the pervasiveness of foul language,” and the “coarsening” of entertainment in other media such as cable, “justify more stringent regulation of broadcast programs;” *etc.*). In contrast, First Amendment concerns were front and center in several of the concurring and dissenting opinions.

Contrasting Concurrences

Most interestingly, Justice Thomas, while concurring in the Court’s opinion on the administrative law issues, strongly expressed his doubt about the continuing validity of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *Pacifica* – the two cases that support the FCC’s assertion of constitutional authority to regulate broadcast programming. According to Justice Thomas, the justifications relied on by the Court in these two cases (spectrum scarcity, unique pervasiveness and accessibility to children) to justify intruding into the First Amendment rights of broadcasters lack any basis in the Constitution.

Moreover, even if the Court’s disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, “dramatic technological advances have eviscerated the factual assumptions underlying these decisions.” Thomas Concurring Opinion at 4. Justice Thomas argued that broadcast spectrum is significantly less scarce than it was decades ago, and traditional television and radio are no longer the “uniquely pervasive” media forms they once were. *Id.* at 5. For these reasons, the Justice stated that he was “open to reconsideration of *Red Lion* and *Pacifica* in the proper case.” *Id.* at 6.

Also interestingly, Justice Kennedy – the Court’s most consistent First Amendment advocate – authored a concurring opinion that focused solely on administrative law issues. Specifically, his concurrence addressed the “question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced,” and concluded that the answer depended on the circumstances (*e.g.*, whether the agency has substantial data and experience to inform the new rule or whether it must rely on predictive judgments; whether the agency’s prior policy was based on factual findings; whether there are reliance interests in the prior policy). Kennedy Concurring Opinion at 1-3. He declined to join the portion of the majority opinion that addressed the dissenting arguments of Justices Stevens and Breyer.

Justice Kennedy had also said very little during the oral argument in the *Fox* case. With regard to the constitutional questions, his opinion merely states that “as this case comes

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to us from the Court of Appeals, we must reserve judgment on the question whether the [FCC's] action is consistent with the guarantees of the Constitution." *Id.* at 5.

Differing Dissents

In a separate dissent, Justice Stevens – the only current Justice who also heard the *Pacifica* case – found two flaws in the Court's reasoning. First, he faulted the majority for concluding "that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation." Stevens Dissenting Opinion at 1. Because the "FCC's shifting and impermissibly vague indecency policy" imperils "broadcasters and muddles the regulatory landscape," it made "eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course." *Id.* at 3-4.

Second, according to Justice Stevens, the majority incorrectly assumed that *Pacifica* decided that the term "indecent," as used in 18 U.S.C. § 1464, permitted the FCC "to punish the broadcast of *any* expletive that has a sexual or excretory origin." *Id.* at 1. He noted that *Pacifica* was narrow in two critical respects – it "did not decide whether an *isolated* expletive could qualify as indecent" and "certainly did not hold that any word with a sexual or scatological origin, however used, was indecent." *Id.* at 5. Justice Stevens explained that "customs of speech" refute the FCC's claim that use of the words "fuck" and "shit," in any context and in any form, "*necessarily* describes sex or excrement." *Id.* He found a "critical distinction" between using an expletive to describe a sexual or excretory function and using such a word for an entirely different purpose, such as to express emotion. "One rests at the core of indecency; the other stands miles apart." *Id.* at 6.

Because the FCC "failed to demonstrate an awareness that it has ventured far beyond *Pacifica*," Justice Stevens found the agency's policy to be arbitrary and unlawful. *Id.* at 7. Significantly, Justice Stevens specifically noted his disagreement with Justice Thomas "about the continued wisdom of *Pacifica*," but acknowledged that "changes in technology and the availability of broadcast spectrum . . . certainly counsel a restrained approach to indecency regula-

tion, not the wildly expansive path the FCC has chosen." *Id.* at n. 5.

In another separate dissent, Justice Ginsburg wrote that the FCC's "bold stride beyond the bounds" of *Pacifica* exemplified arbitrary and capricious decision-making, noting the impossibility of hiding the "long shadow the First Amendment casts over what the Commission has done." Ginsburg Dissenting Opinion at 1. She also observed that the *Pacifica* decision, "however it might fare on reassessment," was "tightly cabined . . . for good reason." *Id.* at 2-3. She further cautioned that if "the reserved constitutional question reaches this Court," it "should be mindful that words unpalatable to some may be 'commonplace' for others, 'the stuff of everyday conversations.'" *Id.* at 3, quoting *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting).

A third dissenting opinion was written by Justice Breyer, and he was joined by Justices Stevens, Souter and Ginsburg. This lengthy dissent found that the FCC had failed to explain adequately why it changed its fleeting expletive policy; specifically, the agency's explanation did not discuss two critical factors.

First, the FCC "said next to nothing" about the relation between its changed policy and the "First-Amendment-related need to avoid 'censorship.'" Breyer Dissenting Opinion at 7-8. Justice Breyer found this particularly important because the "FCC had *explicitly* rested its prior policy in large part upon the need to avoid treading too close to the constitutional line." *Id.* at 8. Second, the FCC failed to consider the potential impact of its new policy on local broadcasting coverage, and especially on smaller non-network affiliated and public service broadcasters and their coverage of live, local events. *See id.* at 11-14. This dissent further stressed that explaining a change requires more than setting forth reasons why the new policy is a good one, but additionally requires the agency to answer the question, "Why did you change?" *Id.* at 3.

Given the FCC's failure to justify its change, Justice Breyer found the agency's altered fleeting expletive policy was arbitrary and capricious. He also noted that the doctrine of constitutional avoidance would have similarly led him to remand the case to the FCC, stating that the Court had "often applied that doctrine where any agency's regulation relies on a plausible but constitutionally suspect interpretation of a statute." *Id.* at 21.

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Implications of the Court's Decision

As a matter of administrative law, the Court's decision will tend to make it easier for agencies to reverse course on policies and change regulations. This could conceivably lead to a less stable and less predictable regulatory environment for regulated entities.

Some commentators have expressed reservations about the decision. In particular, commentators noting that congressional delegations of authority to agencies should be construed narrowly have argued that it is appropriate to require agencies to provide more complete or thorough explanations when they alter course, including an explanation for the policy change in addition to an explanation for the new policy itself.

With regard to the constitutional questions, the *Fox* decision only postpones the time that a court will consider whether the FCC's indecency enforcement policies comport with the First Amendment. The *Fox* case now returns to the Second Circuit, which will address the First Amendment issues directly and which has already indicated in dicta its skepticism about the constitutionality of the fleeting expletive policy.

Likely Return of Indecency to the Supreme Court

There are several cases before the appeals courts that could reach the Supreme Court. First, of course, the *Fox* case – however decided by the Second Circuit on remand – will very likely be appealed to the Supreme Court by one or more parties.

Another indecency case is awaiting a decision in the Second Circuit. On February 5, the court heard oral argument in ABC's appeal of the FCC's decision finding indecent an episode of *NYPD Blue* briefly showing a woman's buttocks.

On May 4, the Supreme Court ordered the Third Circuit to reexamine, in light of the *Fox* case, its 2008 ruling in favor of CBS, which had vacated the FCC's imposition of fines over Janet Jackson's "wardrobe malfunction." This case is complicated by additional questions as to whether CBS could be held liable for the actions of performers at the Super Bowl halftime show under various theories of respondeat superior and vicarious liability.

One or more of these cases is likely to reach the Supreme Court in a posture requiring the Court to address the First Amendment issues raised by the FCC's indecency regulatory regime. As discussed above, the *Fox* decision

shows that the Court is obviously splintered on these issues. At least one of the five Jus-

ices that voted to uphold the FCC's policy on administrative law grounds appears highly skeptical of the constitutional basis for the FCC's action.

To complicate any prognostication about the Court's future actions, Justice Souter is unlikely to be on the Court when it next considers the FCC's indecency policies. And Justice Kennedy – the most consistent First Amendment supporter on the Court – was noticeably reticent about expressing his views on the constitutionality of the FCC's indecency policies or the continuing validity of *Pacifica*.

As Justice Ginsburg aptly observed, the Supreme Court's decision in *Fox* "does nothing to diminish" the First Amendment shadow over the FCC's altered indecency policy. Ginsburg Dissenting Opinion at 1. It will take further decisions by one or more appeals courts and the Supreme Court before the situation is in any way clarified. As they say on TV, please stay tuned for the next episode.

Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters. Carter G. Phillips, Sidley Austin LLP in Washington, D.C. argued the case for Fox Television. Solicitor General Gregory Garre argued for the FCC. A transcript of the oral argument is available [here](#).

the Fox decision only postpones the time that a court will consider whether the FCC's indecency enforcement policies comport with the First Amendment.

Senators, Publishers, and Aggregators “Link Up” for Hearing on the “Future of Journalism”

By Bruce D. Brown and Clarissa K. Pintado

On May 6, 2009, the Senate Committee on Commerce, Science and Transportation held a Subcommittee Hearing on “The Future of Journalism” which, for the first time, allowed for thoughtful, moderated debate among key players in the news and search engine industries over what role, if any, the government should have in addressing challenges posed to print media by the digital information age.

Panelists present included James Maroney, Publisher and Chief Executive Officer of the Dallas Morning News; David Simon, author, television producer, and former Baltimore Sun reporter; Marissa Mayer, Vice President of Google Inc.’s Search Products and User Experience; and Arianna Huffington, Co-Founder and Editor in Chief of The Huffington Post. Other witnesses were Steve Coll, former Managing Editor of the Washington Post; and Alberto Iburgüen, President and Chief Executive Officer of the John S. and James L. Knight Foundation.

Senator John Kerry (D-Mass.) began by welcoming the panelists and audience to the “brave new world” of journalism, a reference that underscored a common theme of the hearing: that it is not just the newspaper industry but the very fabric of American democracy that is at stake as old economic models for the press wither. The consequences of newspapers being swept away to make room for blogs, aggregators, and iPhones have become ever more tangible over the past year as local newspapers across the nation—The Rocky Mountain News, The Seattle Post-Intelligencer, The San Francisco Chronicle, The Boston Globe—have closed or are on the brink of extinction. Regional newspapers are beginning to look like an “endangered species,” Sen. Kerry said. Quoting the legendary newspaper publisher Joseph Pulitzer, he went on to say that “our Republic and its press will rise or fall together.” For many of the panelists, the meeting was a long-overdue opportunity to present evidence of injustices in the online environment. For others, such as Arianna Huffington and Marissa Mayer, however, it provided a platform for journalistic Darwinism: “endangered species” must either evolve or die off.

There was consensus among the panelists that for journalism to survive, a government bailout is not the answer as it would jeopardize the independence of journalism. Several

panelists argued that the traditional newspaper business model, based on circulation and advertising revenue, is antiquated and cannot save the industry online. Huffington proposed a hybrid model, much like the Huffington Post’s, based on a “new link economy”—one that would be partially for-profit and partially non-profit, and pointed to successful examples such as the Voice of San Diego and the Center for Investigative Reporting. Huffington and Mayer were resolute that it is the newspapers’ responsibility to adapt to the 21st century by making their web-pages more engaging.

Senator Ben Cardin (D-Md.), the first witness to testify, has recently proposed another business model in his Newspaper Revitalization Act (S. 673). This bill would allow newspapers to be treated as non-profits under section 501(c)(3) of the Internal Revenue Code of 1986, and therefore exempt from taxes. Newspapers that agreed to the terms would not be allowed to make political endorsements, but would be allowed to freely report on all issues, including political campaigns. The measure is designed to help local newspapers as opposed to large newspaper conglomerates.

Questioning from Sen. Kay Bailey Hutchison (R-Texas) brought out some of the flaws in these models when she asked Maroney how newspapers could continue to do in-depth reporting without sufficient revenue coming from the Internet. He argued that it was unrealistic that a non-profit or hybrid model could support the newsgathering operations of many of the newspaper’s bureaus. (The Dallas Morning News, Maroney asserted, requires an annual investment of about \$30 million for newsgathering.) The clear implication of Maroney’s testimony is that the hybrid model may work for companies that don’t need to pay directly for investigative journalism. Coincidentally (or not), it is the companies that do not pay for newsrooms that rely on the ones that do for their content, but neither Huffington nor Mayer was pressed on this point.

Fair use was obviously a point of contention. In support of aggregators, Google’s Mayer argued that they are increasing business for newspapers by directing traffic to news websites. But both Kerry and Maroney noted that when Americans do read news, it is in “snippets”—no longer in full article form—and it is often from blogs which republish content without linking to the original article. Maroney stated that the atomization

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Senators, Publishers, and Aggregators “Link Up” for Hearing on the “Future of Journalism”

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of news consumption is not just “down to the article level,” as Mayer contended, but is now “down to the first four lines of the article.” “They’re making plenty of money off of those first four lines,” he said. Maroney pointed to the reaffirmation of the “hot news” doctrine in a recent Associated Press case in New York as an example of a legal stick that could give publishers a fair return for their labors.

In addition to forms of temporary tax-relief and reasonable compensation for content, Simon and Maroney’s path forward relied on a relaxation of the antitrust laws that were created at a time when the public feared the power of media monopolies, a stark contrast from today’s fear of losing the industry altogether. Simon maintained that newspapers “butchered” themselves when they flung themselves recklessly into the Internet, and Maroney agreed that the “horse has been out of the barn for 10 years. To try to bring it back one newspaper website at a time will not work. If the Dallas Morning News today put up a paid wall over its content, people would just go to the Fort Worth Star Telegram.” In both of their views, industry-wide collaboration on pricing is essential to survival.

Mayer argued that Google generates approximately \$5 billion annually for publishers through Google AdSense. She stressed the option of “opt-outs” for copyright holders by using a robot.txt file that enables websites to be bypassed before being consumed in the cache of Google, Yahoo and other search giants. The amount of advertising dollars moving from news sites to aggregators was not discussed nor was the possibility of future agreements between aggregators and newspapers.

A May 21 Financial Times interview with Eric Schmidt, Chairman and Chief Executive Officer of Google, did not exactly open any doors to this possibility. Schmidt was asked about the prospect of Google News sharing revenue, generated specifically from newspaper stories, with the newspapers who produced them. Echoing Mayer’s statement at the hearing, he replied that the value that Google “provides to the partners is the traffic.” Later in the interview he admitted, however, that Google News is dependent on the production of newspaper website content: “If the people who are producing that [content] are getting laid off, it’s really a tragedy for both,” he said.

Alberto Ibarguen and Steve Coll proposed other models for the future of journalism. Ibarguen suggested congressional actions that would support the transition to online news in several ways, mainly by creating affordable digital access for every

American. He stressed the importance of the public interest. “If the future of democracy is online then we must ensure that everyone is online.” To do so, he said that role of publicly-subsidized media must be strengthened.

Similarly, Coll recommended that the federal government use “arms-length” initiatives and reinforce the already existing bridges with the media. Some of these bridging policies would involve making technology accessible to the public, for example through the stimulus legislation that, if implemented properly, he believes could lead to greater access to broadband technology thereby providing a more level broadcast and publishing playing field for disadvantaged and rural communities. Greater reform and investments in the Corporation for Public Broadcasting and the National Endowment of the Humanities were other bridge-strengthening actions suggested by Coll. He also argued that the FCC’s current “public service” requirements could be altered to allow stations to satisfy those requirements through contributions to a fund that would be used to support reporting on public institutions and public issues. In addition, Coll supported Sen. Cardin’s News Revitalization Act.

After more intense questioning from Sens. John Thune (R-SD.), Maria Cantwell (D-Wash.), Bill Nelson (D-Fla.), Senator Claire McCaskill (D-Mo.), and Mark Pryor (D-Ark.), among others, Sen. Kerry ended the meeting with a promise for future discussion:

Life changes, the marketplace changes, business models change...But I want to guarantee that it doesn’t leave behind that precious difference that we have in our country from almost every other place on the planet—that unbelievable ability of a couple of beat reporters on the police beat in Washington to hold the President of the United States accountable for a crime.

The hearing clarified many of the positions of the represented entities and provided a stepping stone towards future dialogue and the preservation of journalism.

Bruce D. Brown is a partner and Clarissa K. Pintado is a case assistant at Baker & Hostetler LLP in Washington, D.C. To see the written testimony of the witnesses and a webcast of the hearing visit: <http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.ByMonth>

Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230

By Tom Curley and Steven Zansberg

In a finely-parsed opinion, the Ninth Circuit recently held that Section 230 immunity does not preclude a promissory estoppel claim in which it was alleged that Yahoo explicitly promised to remove offensive website content but failed to do so. *Barnes v. Yahoo!, Inc.*, No. 05-36189, 2009 WL 1232367 (9th Cir. May 7, 2009) (O’Scannlain, Graber, Callahan, JJ.).

The decision, the most recent by the Ninth Circuit to interpret Section 230 of the Communications Decency Act, 47 U.S.C. § 230, was a partial victory for Yahoo. The court held that the plaintiff’s “negligent undertaking” claim arising out the same facts was precluded by Section 230. However, the panel held that Section 230 did not bar a promissory estoppel claim because liability was not predicated upon Yahoo’s conduct as a “publisher” but instead upon Yahoo’s alleged failure to keep a promise voluntarily entered into.

Background

Barnes v. Yahoo arose out of circumstances that are not atypical of Section 230 claims: the plaintiff alleged that someone vindictively appropriated her identity by posting a fake profile of the plaintiff that subjected her to harassment and reputational injury. Specifically, plaintiff Cecilia Barnes alleged that her ex-boyfriend posted profiles of her on Yahoo which “contained nude photographs of Barnes and her boyfriend, taken without her knowledge, and some kind of open solicitation, whether express or implied is unclear, to engage in sexual intercourse.”

According to the Ninth Circuit’s decision, Barnes further alleged that the ex-boyfriend “conducted discussions in Yahoo’s online ‘chat rooms,’ posing as Barnes and directing male correspondents to the fraudulent profiles he had created. The profiles also included the addresses, real and electronic, and telephone number at Barnes’ place of employment. Before long, men whom Barnes did not know were peppering her office with emails, phone calls, and personal visits, all in the expectation of sex.”

Barnes claimed she attempted to get Yahoo to remove the profiles, including by “mail[ing] Yahoo a copy of her

photo ID and a signed statement denying her involvement with the profiles and requesting their removal.” Nevertheless, Barnes alleged she was unable to get Yahoo to remove the fake postings.

Specific Promise Alleged

Ultimately, a day before a local television news program was to air a report on Barnes’ predicament, “Yahoo broke its silence; its Director of Communications ... called Barnes and asked her to fax directly the previous statements she had mailed. [The Director] told Barnes that she would “personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.”

Barnes alleged she “relied on this statement and took no further action regarding the profiles and the trouble they had caused,” according to the Ninth Circuit’s decision. “Approximately two months passed without word from Yahoo, at which point Barnes filed” suit. The profiles have since been removed.

While Barnes’ complaint was “somewhat unclear” as to the specific legal theories she pursued, the Ninth Circuit construed the complaint to allege two distinct causes of action under Oregon law: (1) negligent undertaking and (2) promissory estoppel.

As to the negligent undertaking claim, its elements were defined by the Ninth Circuit (quoting section 323 of the *Restatement (Second) of Torts*) as follows: “One who undertakes, gratuitously or for consideration, to render services to another ... is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care ... if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.”

As to the promissory estoppel claim, its elements were defined under Oregon law as (1) a promise; (2) which the promisor could reasonably foresee would induce conduct of the kind which occurred; (3) actual reliance on the promise; (4) resulting in a substantial change in position by the plaintiff.

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Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230*(Continued from page 49)*

Under either theory, the predicate for liability was that Yahoo allegedly broke a promise made by its Director of Communications to remove the offending profiles, a promise Barnes relied upon to her detriment in otherwise taking no further action on her own behalf. As the complaint put it, while Yahoo “may have had no initial responsibility to act, once [Yahoo,] through its agent, undertook to act, [it] must do so reasonably.”

Parsing Section 230

Yahoo moved to dismiss the complaint on the basis that Section 230 was an affirmative defense to Barnes’ claims. The trial court granted the motion, dismissing the complaint in its entirety on the basis of the immunity conferred by Section 230. *See Barnes v. Yahoo!, Inc.*, No. Civ. 05-00926-AA, 2005 WL 3005602 (D. Or. Nov. 8, 2005).

On appeal, the Ninth Circuit’s analysis focused closely on the language of Section 230. In relevant part, Section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

The statute defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”

Here, there was no dispute that allegedly Barnes’ ex-boyfriend – as distinct from Yahoo was the “provider” of the objectionable content. Similarly, there was no dispute that Yahoo is an “interactive computer service” within the meaning of Section 230.

Removing (or Not Removing) Content is What a Publisher Does

The focus of the Ninth Circuit’s inquiry was whether the two legal theories asserted by Barnes sought “to treat Yahoo as a ‘publisher or speaker’ of the indecent profiles in

order to hold Yahoo liable.” The court appeared to have little trouble concluding that Barnes’ negligent undertaking claim was barred by Section 230.

The court held: “[T]he duty that Barnes claims Yahoo violated derives from Yahoo’s conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because *such conduct is publishing conduct* that we have insisted that section 230 protects from liability ‘any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.’” (emphasis added).

But, while the factual predicate for liability was essentially the same under either legal theory, and the elements of the theories overlapped, the court reached a different result with respect to Barnes’ promissory estoppel claim. It concluded that Barnes’ theory of recovery under promissory estoppel would *not* “treat Yahoo as a ‘publisher or speaker’

under” Section 230 and therefore the claim was not barred.

Barnes’ theory of recovery under promissory estoppel would not “treat Yahoo as a ‘publisher or speaker’ under” Section 230 and therefore the claim was not barred.

Noting the apparent incongruity of this result, the court posed the rhetorical question -- “How does this analysis differ from our discussion of liability for the tort of negligent undertaking?” -- and then proceeded to answer it. The court reasoned:

Promising is different because it is not synonymous with the performance of the action promised. That is, whereas one cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it at the same time. Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the

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Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230*(Continued from page 50)*

conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle.

The court acknowledged that the broken promise specifically at issue was “to take down third-party content from its website, which is quintessential publisher conduct.” But, according to the court, Section 230 “creates a baseline rule: no liability for publishing or speaking the content of other information service providers. *Insofar as Yahoo made a promise with the constructive intent that it be enforceable*, it has implicitly agreed to an alteration in such baseline.” (emphasis added).

In this regard, the Ninth Circuit’s reasoning was somewhat reminiscent of the Supreme Court’s approach in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), in which the Court held that the First Amendment did not preclude a promissory estoppel claim predicated upon a newspaper’s broken promise to a confidential source that his name would not be published.

As the Supreme Court put it, while the First Amendment generally precludes the punishment for the publication of truthful information lawfully obtained, the tort of promissory estoppel (a law of “general applicability”) “requires those making promises to keep them. The parties themselves ... determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self imposed.”

Seventh Circuit Influence

In any event, the Ninth Circuit in *Barnes v. Yahoo* did not cite to nor rely on *Cohen v. Cowles Media*, but instead it relied, *inter alia*, on decisions of the Seventh Circuit in which that Circuit expressed some doubt about the expansiveness of the protection that Section 230 provides, a view not widely followed by other courts.

For example, in its decision, the Ninth Circuit stated: “Looking at the text [of Section 230(c)], it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content ... ‘Subsection (c)(1) does not mention ‘immunity’ or any synonym.’” (quoting *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008)).

More troubling is the court’s gratuitous (not argued) finding that Section 230 is an “affirmative defense” that cannot properly be raised in the context of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a view that is squarely at odds with numerous cases both within the Ninth Circuit and elsewhere.

Conflict with *Zeran v. AOL*?

Most significantly, in its result, the Ninth Circuit’s decision arguably conflicts with several decisions in which courts have held that an unfulfilled promise to retract a publication (or a third-party’s posting) could not be the basis of liability because of the language of Section 230.

For example, in *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997), the plaintiff alleged that he was the victim of a hoax and that, when he contacted America Online to demand that highly offensive internet postings falsely attributed to him be removed, he was allegedly “assured” by a “company representative ... that the posting would be removed from AOL’s bulletin board.” *Id.* at 329.

The plaintiff in *Zeran* brought suit alleging that AOL was negligent in failing to act quickly enough to remove the postings and in preventing any further similar postings. The Fourth Circuit affirmed dismissal of the complaint, holding that it was clear that the plaintiff sought “to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability – the publisher’s role.” *Id.* at 332-33.

In *Barnes v. Yahoo*, the district court relied upon *Zeran* in dismissing Barnes’ complaint. The district court concluded that “regardless of the particular label attached to the claim” – *i.e.*, promissory estoppel or negligent undertaking – Barnes “was seeking to hold the service provider liable based on injuries allegedly resulting from the dissemination of third-party content.” Thus, Barnes’ claim, just as in *Zeran*, “necessarily and impermissibly sought to treat the service provider as ‘publisher’ of that content.”

Other courts have also rejected claims predicated upon a broken promise or false representation of some kind, claims sounding both in tort and contract law. *See, e.g.*, *Green v. AOL*, 318 F.3d 465 (3d Cir. 2003) (Section 230 bars claims arising out of America Online’s alleged failure to enforce membership agreement in not protecting plaintiff

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Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230

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from offensive speech); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 41 (Wash. App. 2001) (Section 230 bars claims premised on allegation that Amazon “promised to remove” content challenged by plaintiff but website “failed to do so”); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007) (Section 230 bars claims arising out website’s failure to verify ages of participants in dating service, despite website’s representation that it screened for minors), *aff’d on other grounds*, 551 F.3d 412 (6th Cir. 2008); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Texas 2006) (rejecting under Section 230 claims arising out website’s failure to adhere to promise that it verified business listings prior to publication).

Indeed, the very impetus for Congress’ passage of the Communications Decency Act, and of Section 230 in particular, was its declared intention to overturn the result in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). (The *Barnes* panel’s decision acknowledged this legislative history.) Notably, in *Stratton Oakmont*, the trial court had treated Prodigy as “publisher” in large part because of a “stated policy,” as set forth in its “content guidelines,” that “notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards . . . will be removed when brought to Prodigy’s attention.” (emphasis added).

Ironically, under the *Barnes* holding, this policy would appear to give rise to a claim for promissory estoppel by a Prodigy member, a claim that would be excluded from Section 230’s protection, precisely because the *Stratton Oakmont* court had also found the Prodigy policy “was in part influenced by its desire to attract a market it perceived to exist consisting of users of a ‘family-oriented’ computer service.” Thus, in the words of the Ninth Circuit, the policy of mandatory removal of an offending posting upon notice to Prodigy may represent an “outwardly manifested intention to create an expectation on the part of another.”

Conclusion

Of course, it is far from clear at this early juncture (assuming no subsequent appellate proceedings alter the court’s ruling) what impact the decision in *Barnes v. Yahoo* will have on judicial interpretation of Section 230, let alone its impact on attempts by would-be plaintiffs to surmount Section 230’s still-

considerable protections for publishers of third-party content on the Internet.

For its part, the Ninth Circuit indicated that the potential for liability on a promissory estoppel claim could be readily avoided: “a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.” In other words, if you promise to do anything, either in writing or orally, be sure to disclaim any intention to be bound by that promise.

The practical effect of that advice, however, may be to make websites reluctant to interact with individuals complaining about offensive content because of the fear that a potential promissory estoppel claim, regardless of the merit of such a claim, will survive a preliminary motion.

Another, more generalized message emerges from the panel’s decision in *Barnes v. Yahoo!, Inc.*, issued a little more than a year after the *en banc* ruling in *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008): as Professor Eric Goldman aptly put it on his blog, “it’s . . . overwhelmingly clear that a number of Ninth Circuit judges are hankering for the opportunity to take their whack at 47 U.S.C. [§] 230.”

Yahoo has filed a [petition for rehearing](#) asking the panel to delete from its opinion the dicta describing Section 230 as an “affirmative defense” that cannot be raised in the context of a motion to dismiss. Public Citizen, the Center for Democracy and Technology, the Citizen Media Law Project, and the Electronic Frontier Foundation have asked for permission to submit a [brief](#) in support of Yahoo.

Tom Curley is partner in the Washington, D.C. office of Levine Sullivan Koch & Schulz, LLP and Steven Zansberg is a partner in the firm’s Denver office. Patrick J. Carome, Wilmer, Cutler, Pickering, Hale and Dorr LLP, Washington, DC, argued the cause for the defendant-appellee and filed the brief; Samir Jain and C. Colin Rushing, Wilmer, Cutler, Pickering, Hale and Dorr LLP, Washington, DC, and Reginald Davis and Eulonda Skyles, of Counsel for Yahoo!, Inc., Sunnyvale, CA, were also on the brief. Thomas R. Rask, III, Kell, Alterman & Runstein LLP, Portland, OR, argued the cause for the plaintiff-appellant in the Ninth Circuit and filed briefs. Denise N. Gorrell, Kell, Alterman & Runstein LLP, Portland, OR, was also on the briefs.

Tennessee Court Rejects Effort to Limit Anonymous Internet Speech Relating to Criminal Proceeding

By Elizabeth Spainhour

In April 2009, the Criminal Court for Knox County, Tennessee, denied motions to prohibit or limit anonymous Internet commentary about a capital murder proceeding. *Tennessee v. Cobbins*, Capital Case Nos. 86216 A, 86216 B, 86216 C, 86216 D.

The case, involves a confluence of constitutional issues. The court's order denying the motions to restrict media coverage illustrates the conflict between the First Amendment right of the media to cover criminal proceedings and the Sixth Amendment right of criminal defendants to receive a fair trial. It also involves threatened prior restraints on media coverage and the First Amendment right to engage in anonymous speech on the Internet.

Background

Tennessee v. Cobbins is a capital case that involves four defendants who have been charged in the deaths of two people. The charges against the defendants include allegations of carjacking, rape, and murder—the *Cobbins* case has generated significant attention and bears the classic signs of a “sensational” case.

In February 2009, defendants' counsel filed motions seeking to prohibit or otherwise restrict anonymous online comments about the criminal proceeding that are posted on websites published by local newspapers and broadcasters. The defendants argued, among other issues, that anonymous posters would be less likely to make inflammatory, potentially prejudicial comments if those comments were publicly attributed to the posters by name.

The *Knoxville News Sentinel* and WBIR-TV, Knoxville, Tennessee, moved to intervene in the *Cobbins* case and oppose the motions to

prohibit or limit the anonymous speech. Both

media companies operate websites that allow interested parties to post anonymous comments on their respective websites.

The Knox County Criminal Court used the familiar three-part test from *Nebraska Press Association v. Stuart*, 427 U.S.

539 (1976), to determine whether, in this case, a prior restraint on protected speech would be justified. *Nebraska Press Association* requires the court to determine (1) the nature and extent of pretrial publicity, (2) whether alternative measures would be likely to mitigate the effects of unrestrained pretrial publicity, and (3) how effectively a restraining order would operate to prevent the threatened danger. The court in the *Cobbins* case found that the balance weighed against entry of a prior restraint:

In this case, the publicity has been extensive, detailed, and arguably misleading at times from a legal perspective. The relief sought currently is not the complete bar of media coverage of the proceedings, but rather a bar to the sharing of ideas between citizens who read or listen to the local media reports concerning this case, who wish to make anonymous public comment on the same in the media internet forums. This Court has already granted alternative measures to mitigate the effects of unrestrained pretrial publicity by granting a change of venire to those defendants who have made the request; therefore, the juries who will hear and decide the charges will not be from the local media coverage area. The relief sought also would not necessarily effectively operate to prevent the threatened danger. Counsel asserts that the restraint is necessary to ensure the effective representation of the defendants. Only two media outlets intervened in these proceedings. The internet is not restricted to use by the media alone. Private citizens have access to and utilize the internet everyday to freely discuss and exchange ideas whether on the internet forums of the two media outlets or otherwise.

defendants' counsel filed motions seeking to prohibit or otherwise restrict anonymous online comments about the criminal proceeding

Considering all the factors, this Court cannot find that disabling the internet

forums of the media internet sites would be an appropriate restraint.

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Tennessee Court Rejects Effort to Limit Anonymous Internet Speech Relating to Criminal Proceeding

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Tennessee v. Cobbins, Capital Case Nos. 86216 A, 86216 B, 86216 C, 86216 D, Order Denying Motions to Restrict Media Coverage at 5 (Apr. 14, 2009).

In striking the balance between the First Amendment rights of the media intervenors and Internet posters and the Sixth Amendment rights of the accused, the court considered the well established First Amendment interests in anonymous speech. The court recognized that “[t]he right to speak anonymously was of fundamental importance to the establishment of our Constitution.” *Id.* at 6 (quoting *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001)). Moreover, the right to speak anonymously applies with equal force to speech on the Internet. Indeed, “the ‘ability to speak one’s mind’ on the Internet ‘without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.’” *Id.* (quoting *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)). The court held that as long as anonymous commenters posting comments about the *Cobbins* proceeding do not engage in unlawful conduct, “they should be free to anonymously participate in online forums.”

In addition to the fair trial argument, the attorneys for at least one of the four *Cobbins* defendants also argued that the online commentary posed a threat to the attorneys’ safety and, therefore, jeopardized their client’s right to effective assistance of counsel. Counsel for this defendant asked the court to allow each attorney who so requested to withdraw from the case if the court declined to limit the online commentary. Ultimately, the court determined that the speech “did not rise to a level which would require allowing counsel to withdraw at this time.”

The Knox County Criminal Court’s Order Denying Motions to Restrict Media Coverage is available online from the *Knoxville News Sentinel* at <http://web.knoxnews.com/pdf/041509carjack-baumgartner-comments.pdf> and WBIR-TV at http://www.wbir.com/pdf/04142009_thomas_ruling.pdf.

Elizabeth Spainhour is a Communications and Media attorney at Brooks Pierce in Raleigh, North Carolina. WBIR-TV was represented by Thomas McAdams and C. Scott Taylor of Bernstein, Stair & McAdams LLP in Knoxville, TN. The Knoxville News Sentinel was represented by Richard L. Hollow, Hollow & Hollow LLC, Knoxville, TN.

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First Circuit Rejects Webcasting of Hearing in High Profile File-Sharing Case

Local Rules and Judicial Conference Policy Bar Any Broadcasting

On mandamus review, the First Circuit this month held that webcasting of federal civil court hearings in Massachusetts is forbidden by local court rules and the Judicial Conference policy on cameras in courts. *In re Sony BMG Music Entertainment et al.*, No. 09-1090, 2009 WL 1017505 (1st Cir. April 16, 2009) (Torruella, Selya, Lipez, JJ.).

The Court, in an opinion written by Judge Bruce Selya, flatly rejected District Court Judge Nancy Gertner's view that she had discretion to allow webcasting, calling her ruling "unprecedented and palpably incorrect." The Court also rejected any First Amendment-based extension of the right of physical access to courtrooms to the broadcasting of court proceedings. Judge Selya noted that "emerging technologies" may change the way information about court proceedings is imparted, but current rules forbid broadcasting whether over the air or Internet.

Judge Lipez issued an interesting concurring opinion in which he agreed that the current rules strictly forbid broadcasting of civil trial proceedings, but added that:

this inescapable legal conclusion does not discredit the policy concerns that animated, at least in part, the district court's decision. Indeed, in my view, there are no sound policy reasons to prohibit the webcasting authorized by the district court. Therefore, this case calls into question the continued relevance and vitality of a rule that requires such a disagreeable outcome. *In re Sony* at *9.

Judge Lipez concluded that the rules and policy forbidding broadcasting "should all be reexamined promptly." *Id.* at *10.

The motion for webcasting was brought by [Joel Tenenbaum](#), a student at Boston University, who is being sued by the Recording Industry Association of America (RIAA) for downloading songs from a file-sharing server. Tenenbaum is represented Harvard Law School Professor Charles Nesson and the Berkman Center for Internet and Society. Tenenbaum filed for a Motion to Permit Audio-Visual Coverage by the Courtroom View Network of a hearing on his motion to add counterclaims against plaintiffs as part of his constitutional challenge to the damages provisions of the Digital Theft Deterrence Act. Following the First Circuit's decision in this case, Professor Nesson announced he would ask for a stay of proceedings pending federal court action to amend the

rules on camera coverage.

In January, Judge Gertner granted the motion, finding that the "[t]he public benefit of offering a more complete view of these proceedings is plain, especially via a medium so carefully attuned to the Internet Generation captivated by these file-sharing lawsuits.... Under the circumstances, the particular relief requested ... is uniquely appropriate." See *Capitol Records, Inc. v. Alaujan*, 593 F.Supp.2d 319 (D. Mass. 2009).

In so ruling, Judge Gertner interpreted Massachusetts Local Rule 83.8(a) as giving judges discretion to allow broadcasting. Local Rule 83.3 provides in relevant part:

(a) Recording and Broadcasting Prohibited. Except as specifically provided in these rules *or by order of the court*, no person shall take any photograph, make any recording, or make any broadcast by radio, television, or other means, in the course of or in connection with any proceedings in this court, on any floor of any building on which proceedings of this court are or, in the regular course of the business of the court, may be held.... (emphasis added).

Focusing on the words "or by order of the court," Judge Gertner held she had discretion to allow webcasting because "[a]s written, this residual clause does not carry any limitation; instead, it assigns the decision to permit recording or broadcast to the discretion of the presiding district court judge."

The First Circuit disagreed, holding that the exception "by order of the court" refers only to orders relating to the preservation of evidence, the perpetuation of records, and ceremonial, or naturalization proceedings – items mentioned in other subsections of Local Rule 83.3. "Given the structure of the rule as a whole, it is logical to conclude that the phrase "by order of the court" does not create a free-floating bubble of discretion but, rather, is confined to those situations set out in subsection (c)."

Professor Charles R. Nesson represented respondent Joel Tenenbaum. Jonathan Sherman, Dean Kawamoto and Melissa Felder, Boies, Schiller & Flexner LLP, represented Courtroom View Network, as amicus curiae. Petitioners were represented by Daniel J. Cloherty, Victoria L. Steinberg, Dwyer & Collora, LLP; and Eve G. Burton, Timothy M. Reynolds, Laurie J. Rust, and Holme Roberts & Owen, LLP.