

MULRC *Media Law Resource Center*
MEDIA LAW LETTER

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2009:3

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THE OTHER SIDE OF THE POND: Developments in UK and European Media Law

Single Publication Rule in the UK; Cost Capping in Libel Cases; PCC and Privacy and More

By David Hooper

Although this is traditionally a quiet time in the media law field with most of the courts closed in August, there have been a couple of very significant developments. The first is the publication by the Ministry of Justice (MoJ) on 16 September 2009 of a consultation paper entitled *Defamation and the Internet: the Multiple Publication Rule*. The consultation is scheduled to end on December 16, 2009 and any submissions – on an area of considerable interest to American media organizations – should be in by that date. The consultation paper and an explanation of how submissions are made is available [here](#).

Important Changes in Libel Law

In essence, the consultation paper addresses the lack of a single publication rule as a result of the 19th century case of *Duke of Brunswick –v- Harmer* [1849] 14 QB 185 which gave birth to what the consultation paper calls the “multiple publication rule.” The extraordinary upshot of that was that a case, where the Duke sent out his butler to acquire a copy of a book published 17 years previously and His Grace was able to sue on a fresh act of publication for libel, now governs the downloading of material from the internet. In England, each act of downloading is a fresh act of publication which means that material stored in archives can be accessed by third parties and this access can be sued upon years after the original publication.

The consultation paper considers what limitation period for defamation actions should be appropriate in the light of a recommendation by the English Law Commission in its 2002 report "*Defamation and the Internet: A Preliminary Investigation, Scoping Study Number 2, December 2002*" which, rather surprisingly, had recommended that the limitation period should be changed from the existing period of one year from the *date of publication* to 3 years from the *date of knowledge* of the allegedly defamatory material with a ten

year longstop (another cricketing term) from the date of publication. That recommendation would have proved to be something of an open sesame for Claimants who would no doubt have produced heart-rending accounts of how they came not to learn about the libel.

The preliminary view of the Ministry of Justice does *not* favour extending the limitation period of one year. If the multiple publication rule were retained, the limitation period should not, they feel, be extended from of one year. If a single publication rule were to be introduced, they consider that the arguments for extending the limitation period beyond one year are not strong, but they seek views on whether a “date of publication” or “date of knowledge” approach should be used and whether the latter should be accompanied by a ten-year longstop from the date of publication.

The Ministry of Justice will also consider whether the statutory defence of qualified privilege under Schedule 1 and Section 15 Defamation Act 1996 should be extended to online archives outside the one year limitation period for initial publication. This statutory qualified privilege comes in two forms. In its first form which would cover matters such as fair and accurate reporting of court proceedings, the Claimant is not entitled to any statement by way of explanation or contradiction. In its second form, however, which would cover matters such as reports of certain public meetings, the Claimant is entitled to have a reasonable statement by way of explanation or contradiction – *not* an apology – published which is in effect a form of a statutory right of reply. If the Defendant fails to publish such a statement on request, it may lose its defence of qualified privilege.

Just as the courts have been attracted by the idea of online archive copies of disputed articles carrying, where appropriate, a note of objection, so the Ministry of Justice may be attracted by the suggestion that if a publisher refuses or neglects to update the electronic version of the article on request with a reasonable letter or statement by the Claimant by way of explanation or contradiction, the defence of qualified privi-

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lege would be lost and the publisher of the material in the online archive could be liable to be sued for defamation outside the one year limitation period.

The consultation paper notes there is no statutory definition of what constitutes an online archive and for these purposes it should be taken to encompass electronic versions of traditional archives such as those maintained by newspapers as well as blogs and other electronic discussion forums. The paper notes that each hit on a webpage creates a new publication potentially giving rise to a separate cause of action. The paper also notes that the fact that each separate publication is subject to a limitation period of one year from the date that the material is accessed was upheld by the House of Lords in *Berezovsky –v- Michaels* [2000] 1 WLR 1004 and by the Court of Appeal in *Loutchansky –v- Times Newspapers Limited* [2002] 1 All ER 652.

Attempts to persuade the English courts – or for that matter the European Court of Human Rights in the *Loutchansky* appeal - to follow the US decision of *Firth v. State of New York*, [98 N.Y.2d 365](#) (2002), have so far failed. The English courts - and for that matter the European Court of Human Rights - have ducked the issue of the problems thrown up by a multiple publication rule. Deciding issues of online publication by reference to man servants buying copies of books or for that matter by what was displayed on a notice board in a tennis club in the 1930s was always bound to give rise to problems. The courts have tried to get around this by saying that as there were only limited acts of publication, damages would be modest, but that is not the point. There are clearly freedom of speech issues and so often in English libel cases, the legal costs in fact dwarf the damages.

It is recognized by the MoJ and the Law Commission that after a lapse of time it may be extremely difficult for Defendants to mount an effective defence because records and witnesses are no longer available. They also note that it is a relatively simple matter to place a note on the archive which may considerably lessen the impact of the defamation in that if a warning notice were placed alongside the relevant archive material, this could reduce or remove the possibility of further proceedings being brought. The paper examines the arguments in favour of a multiple publication rule and the po-

tential injustices to Claimants if it were abolished. It also makes the interesting point that if the single publication rule were to be adopted it might be necessary to consider whether there was a need to strengthen the Press Complaints Commission and Ofcom Codes. The Ofcom Code being a statutory obligation does not extend to the internet whereas with the PCC the obligation to correct inaccurate and misleading material would appear to extend to newspaper archives.

One of the questions (number 5) specifically asks “*if a single publication rule were introduced, do you consider that the approach taken in the United States in respect of what constitutes a new publication of hard copy material would be workable? If not, what changes should be made?*” The conclusion of the MoJ is that the limitation period should not be extended beyond one year. The jury is still out on whether a single publication rule will be introduced, but there seemed to be indications that the MoJ are tilting in the direction of the single publication rule.

The MoJ, however, still has an open mind as to whether the limitation period should run from the date of publication or date of knowledge. If it were to run from the date of knowledge that could be a charter for stale claims to be brought. Media Defendants should press for a single publication rule and a one year limitation period.

Readers should consider whether the organizations which they represent and which may, whether they like it or not, be “publishers” of potential defamatory material in the United Kingdom, want to make representations on the subject. If so, put the date December 16, 2009 in your calendar.

Cost Capping in Libel Cases

An important change which comes into effect on October 1 is a one year cost capping pilot scheme for libel and malicious falsehood claims. In all claims started after this date parties are required to exchange and file costs budgets before every Case Management Conference. The court must manage the litigation so that the costs are proportionate to the value of the claim and the representational issues at stake and so that the parties are on an equal footing. The court must decide at each Case Management Conference whether the

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In England, each act of downloading is a fresh act of publication which means that material stored in archives can be accessed by third parties and this access can be sued upon years after the original publication.

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costs proposed are reasonable. If they do so, those costs are likely to be allowed on assessment at the conclusion of the case. Only if there are exceptional circumstances, will courts allow the recovery of costs which they consider are unreasonable. Parties are required to confirm to each other every month that costs are on budget.

On the face of it, this should like good news, but it does depend on an interventionist approach by libel judges to the question of costs – something which has been rather lacking hitherto with Claimants being able to recover surprisingly large levels of fees. The scheme does not extend to privacy or confidence claims. One other problem is that by the time that the Case Management Conferences start, the Claimant could already have run up a six figures sum in costs. Much will depend on how tough the libel judges are willing to get on the question of costs. What the court will allow for costs tends to start with what the Claimant's solicitors seek with that being trimmed down slightly. If it did not take Claimant's solicitors long to work out that the more they ask, the more they get and that 80% of a very large sum is better than 80% of a large sum. However, the regime is meant to bring libel costs under control and if costs capping issues reach the Court of Appeal, one can expect some fairly strong pressure to bring the level of costs down.

Recoverability of ATE Premiums

Another change taking effect on 1 October 2009 is that the Civil Procedure Rules in two significant regards alters the rules about the recovery of After the Event (ATE) insurance premiums. In “publication proceedings,” that is to say defamation, malicious falsehood or claims for breach of confidence involving publication to the public at large, the Claimant's ATE premium will not be recoverable where a case is resolved without proceedings having been issued if an admission of liability leading to settlement was made by the Defendant within 42 days of being notified of the ATE. The rules also require that a Defendant should be told about the ATE “as soon as possible” even before the proceedings are issued. Unless the court orders otherwise, “a party cannot now recover an ATE premium if they have not given notice as soon as possible.”

It seems that the government had wanted to implement a 42 day window during which a Defendant could admit liability without having to pay a Claimants ATE premium. Claim-

ants' lawyers were said to be under pressure from insurers to take out the ATE premium at the very outset if they wished to be able to obtain cover. Furthermore, one also found that they were taking out multiple premiums which meant that at £8,000 a throw the costs could be enormous, even if the matter was very promptly settled. However, the 42 day period does not apply where all proceedings are issued but is limited only to costs only proceedings.

It seems therefore that to obtain benefit from this rule change, it will be important to settle a dispute before proceedings are issued and that may involve admitting liability within 14 days of the receipt of the letter of claim or seeking to persuade the Claimant not to issue proceedings. The more aggressive Claimant lawyers may therefore as a matter of policy, issue proceedings at the first available moment. It remains to be seen how this works in practice as one may find that the courts will look with disfavour on ATE policies being taken out prematurely. This is clearly a welcome development but the question is how tough a line the courts will take in relation to cases which are settled within 42 days where the claim was issued within that period.

Welcome to the Supreme Court

After 133 years sitting as the Appellate Committee of the House of Lords, the highest court in the United Kingdom will now be known as the Supreme Court. It has moved out of the Houses of Parliament, where it sat rather uncomfortably constitutionally, to the other side of Parliament Square. Now, after a £60 million refurbishment and a carpet designed by the artist Sir Peter Blake, best known to lawyers of a certain age as the designer of the sleeve for *Sergeant Pepper's Lonely Hearts Club Band*, the Supreme Court opens for business on October 1 operating under the Supreme Court Rules SI 2009/1603.

Privacy

On July 2, 2009 the Press Complaints Commission published new guidance on payments to parents for material about their children. This was raised out of some unsavoury stories about which particular pubescent child had fathered a 15 year old's baby. The unlikely 13 year old candidate who was later proved not to be the baby's father received (with his family) payment for their story. The PCC has now recom-

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mended that editors should ask whether the payment alone might tempt parents to discuss matters about their child which would not be in the child's interests and might on occasions even lead them to exaggerate or fabricate material. Above all, they had to ask whether the payment was in the child's interest. One sensed that the PCC thought that these stories fell the wrong side of the line.

Reality TV raises various privacy issues. Sky One in its series *Road Wars* had featured the arrest of a Mr Billy Johnson who was the worse for drink and was arrested on suspicion of causing criminal damage to the door of what he thought was his home, but in fact was a flat which in his sober moments he might have realised belonged to someone other than himself. Ofcom, (Broadcast Bulletin Issue 139) however, considered that Mr Johnson did not have a legitimate expectation of privacy in circumstances where he was filmed committing an offence for which he was subsequently fined and where his actions were not of a sensitive or private nature i.e. kicking down the front door.

Different considerations might have arisen if the programme had identified where Mr Johnson lived, but as he had gone to the wrong flat there was rather less of a problem than it might have been!

There was also an interesting decision by the PCC on June 22, 2009 in its adjudication against the Scottish Sunday Express. The paper, in an article headlined "*Anniversary Shame of Dunblane Survivors*" commented on how the survivors of a terrible shooting tragedy at the Dunblane School in 1996 who were now turning 18, had "*shamed*" the memory of the deceased with "*foul-mouthed boasts about sex brawls and drink-fuelled antics*". To write the story the newspaper had accessed what appeared on these youths' social networking sites and they claimed that the information was publicly accessible. The PCC, however, felt that publication of this material represented a serious error of judgment bearing in mind that the individuals concerned were not public figures and had done nothing to attract media scrutiny.

Recent regulatory developments include the publication of an updated handbook by the Information Commissioner's Office entitled "*Privacy Impact Assessments*" designed to help organisations address the risks to personal privacy before implementation of new initiatives and technologies and considers, amongst other things, the question of how risks of losing data should be addressed and ensuring that privacy

safeguards are built into systems at the outset rather than bolted on as an inadequate and expensive afterthought.

New guidance was on July 22, 2009 introduced by CAP (Committee of Advertising Practice) and BCAP (Broadcasting Committee of Advertising Practice) on advertisements for video games and films giving guidance as to matters such as content and context, age related products and time of broadcast.

France

Two interesting developments in France. The first is that the National Assembly has approved a bill allowing internet access to be cut off for one year for copyright piracy plus a fine of up to €300,000. Apparently one in three French people admit to online piracy. The proposal is supported by the President, but concerns have been raised about the possibility of surveillance to monitor internet use.

The second development in France is no less alarming. It concerns what is essentially an allegation of slander against Dominique de Villepin who was Prime Minister of France from 2005 to 2007. Remembering perhaps the Elf Oil scandal, he was unwise enough to believe forged documents which appeared to show substantial pay-offs to various French political figures in relation to the sale of frigates through accounts operated by a Luxembourg bank.

Rather than this simply being a slander case, Villepin finds himself facing charges of complicity in slander, use of forged documents and possession of goods obtained by breach of trust and fraud. He faces a prison sentence of up to five years and a fine of up to €48,000, if found guilty. President Sarkozy, forgetting for a moment his Gallic courtesy, appears supportive of the prosecution chillingly observing in language reminiscent of World War Two that the authorities should "hang whoever did this on a butcher's hook".

Villepin seems equally to have no love lost for his former colleague who he refers to as "the dwarf". The trial is with a fine historical sense taking place in the courtroom from which Marie Antoinette was despatched to the guillotine.

Italy

Unbelievably, the behavior of Italy's Prime Minister Silvio Berlusconi is even worse. He is currently suing La Repubblica for libel objecting to questions they have raised

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about his relationship with several women of the 18 year old model variety, questions which also seem to have been raised by Mrs Berlusconi. La Repubblica have launched an online petition in defense of press freedom which has attracted more than 420,000 signatures. A public demonstration is scheduled to take place in Rome at the beginning of October. The petition is available [here](#).

Berlusconi is also threatening to sue Nouvel Observateur in France for its story "*Sex, Power and Lies*" and also El Pais in Spain which published pictures of naked guests at a Berlusconi villa in Sardinia. Berlusconi's behavior is all the more unattractive in that he wields immense media power in Italy which is remorselessly used to attack his enemies.

A seven year battle with the Economist ended with a Milan court dismissing his charges of libel. The Berlusconi press with no obvious irony, had accused the London editors of the Economist of being drunk with power. In reality the state of the press in Italy gives rise to a number of serious concerns.

Schadenfreude Corner

In case any readers missed it, the death has been announced of Sheikh Khalid bin Mahfouz, he was the man who sued Rachel Ehrenfeld in respect of her book "*Funding Evil*"

as well as 40 other writers and publishers. Judgment had been obtained against Ms Ehrenfeld despite the very limited publication in this jurisdiction by the Sheikh's well-oiled libel machine. Rachel Ehrenfeld's [obituary](#) of the Sheikh in Front Page gives a new dimension to the concept of revenge being a dish best served cold.

In the United Kingdom it is normally the Attorney General seeking fines to be imposed on the media for shortcomings such as contempt of court. It was unusual therefore to find on 22 September Baroness Scotland, the present Attorney General, being fined £5,000 for what was described (by her) as an "*administrative technical error*."

She had fallen foul of legislation she had helped steer through the legislature, in that she had not kept records of matters about her employee's immigration status, such as her passport, when she employed a Tongan housekeeper called Loloahi Tapus. Baroness Scotland had acted in good faith, but was nevertheless fined £5,000.

Indeed employing illegal immigrants may have a resonance with American readers recollecting various failed presidential appointments. Indeed, New Yorkers may recollect Attorney Generals who have been bitten kerbside by the very legislation they helped to create.

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

MLRC Events Fall 2009

WEDNESDAY, NOVEMBER 11*

MLRC Annual Meeting

2:30 - 3:30 p.m.

RSVP to arussell@medialaw.org

MLRC Forum

3:45 - 5:45 p.m.

RSVP to jwunsch@medialaw.org

MLRC Dinner

Reception: 6:00 p.m. / Dinner 7:15 p.m.

* All events at the Grand Hyatt, 109 East 42nd Street, New York, NY

THURSDAY, NOVEMBER 12

2010 NAA/NAB/MLRC Conference Planning Meeting

8:00 - 9:00 a.m.

Sonnenschein, Nath & Rosenthal, 1221 Sixth Avenue, New York, NY

RSVP to jwunsch@medialaw.org

2009 DCS Annual Lunch

12:00 - 2:00 p.m.

Proskauer Rose, 1585 Broadway, New York, NY

FRIDAY, NOVEMBER 13

MLRC Board of Directors/DCS Executive Committee Joint Meeting

Time: 12:15 - 2:00 p.m.

Location: NY Times, 620 Eighth Avenue, New York, NY

RSVP to Ellen Herb at herbe@nytimes.com

Newspaper Publisher Plaintiff Pulverised In Libel Claim

Judge Eady's Exclusion Of Evidence Ruled Manifestly Unjust

By David Hooper

Tom Bower the author and journalist has spectacularly won the libel action that Richard Desmond proprietor of Express Newspapers and equally well-known as the one-time publisher of pornographic magazines foolishly brought for a fleeting mention about his being bested in a libel action brought by the convicted felon and fellow newspaper proprietor Lord Conrad Black who was himself also the subject of a Bower unauthorised biography.

It was far from clear why Desmond thought the paragraph about him in Bower's biography of Black *Dancing on the Edge* could be said to be defamatory of him. It was thought that Desmond may have been getting his retaliation in first against Bower's as yet unpublished but unflattering biography of Desmond *Rough Trader*, which I have read and hope will be published in the USA. It presents an astonishing picture of how and why unsuitable individuals such as Desmond seek the power and influence of being newspaper proprietors in the UK. It has a riveting account of Desmond's brushes with distinctly unsavoury New York lowlife.

The issue was whether Desmond used his papers to settle personal scores and whether in a business dispute with Black he had been "ground into the dust."

It was difficult to discern any libel. There was no love lost between Black and Desmond, but on the principle that my enemy's enemy is my friend Desmond rushed to Black's US jail by private jet to try and get his evidence. Desmond was not admitted into the jail, although a statement from Black was later produced at the trial. It led Bower's counsel to quip that there was one newspaper proprietor trying to get into jail and another was trying to get out!

In any event the jury did not think much of Desmond's complaint nor of the quality of his evidence and threw out Desmond's case leaving him with a bill estimated at £1.25 million which leaves one with the impression that his highly priced lawyers Schillings must have been working at a substantial discount on their normal rates.

The British press relished the discomfiture of a very wealthy newspaper proprietor whom one of the witnesses had put on a par reputation-wise with Robert Maxwell. Not surprisingly Desmond's own papers took a more sanguine view

of the outcome quoting Desmond as apparently thinking the exercise had been worth it for setting the record straight.

After the case the jurors were lining up to embrace Tom Bower asking him to sign copies of his Conrad Black book and to promise to send them copies of *Rough Trader*, his forthcoming book on Richard Desmond – the real *casus belli*. The ruling which overturned Mr Justice Eady's exclusion of crucial defence evidence seems to have been the turning point in the jury seeing through Desmond and rejecting his evidence. It was the moment in the case where Bower's counsel Ronald Thwaites QC moved from believing that Bower would win to knowing that he would win.

The jury was able to hear the tape of Desmond's threats against Jafar Omid, Managing Director of Pentagon Capital Management, a hedge fund. Desmond wanted Omid to pay back his son £75,000 which included a juicy 50% profit whereas Mr Omid argued that the Desmonds had to be treated like anyone else in these turbulent financial markets.

Desmond's tirade came straight from a *Sopranos* script. Evidently forgetting that the trading conversations of financial services companies have to be recorded, Desmond menaced "I am the worst fucking enemy you'll ever have," and in good Soprano-speak said "don't go on because you are going to aggravate me, just send me a cheque back or we are not going to be friends. In fact we are going to be enemies." Not surprisingly, Bower wanted this tape played to the jury and when it was, it swung the case in his favour. The more so because a Desmond newspaper had written an article attacking Omid three days later when he had not coughed up the £75,000.

In subsequent litigation Desmond admitted that his comments had prompted journalists at his paper, the Sunday Express, to run the article about the otherwise obscure Omid – in effect precisely the sort of conduct Bower was alleging.

Bower's counsel, Ronald Thwaites QC, in caustic exchanges with Mr Justice Eady showing that there is no love lost between the two, argued that this showed how Desmond could be motivated by a personal desire for revenge and could use his control of his newspapers as a weapon and that this was relevant similar fact evidence of Desmond's propen-

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sity to behave in the way that Bower described in relation to his spat with Conrad Black.

Surprisingly, Mr Justice Eady refused to allow the tape to be played and to permit a witness summons requiring Mr Omid to testify about these threats. Nor would Eady allow the “P” word (pornographer) to be used at the trial. Consequently there was a flurry of applications to the Court of Appeal resulting in Eady’s rulings being overturned with the respected Judge being savaged by one Lord Justice of Appeal after another. *Desmond v. Bower*, [2009] EWCA Civ 667 (July 6, 2009)

Having read both Bower’s book on Conrad Black and the, as yet, unpublished book on Desmond, I believe that the jury reached entirely the right decision and that a verdict in favour of Desmond would have been a travesty. However, such is the unsatisfactory nature of libel litigation that it could have been very different if Eady’s rulings had stood. The Desmond case shows just how unfair and unjust British libel litigation can be and what a lottery it is.

Desmond had seized upon a very inconsequential reference to him in one paragraph of a 300 page book. Intriguingly he had ignored a more serious allegation, namely that in an earlier case a judge had considered his evidence to be unreliable. The hair-splitting nature of libel litigation ironically had bitten Desmond when the first trial of his libel action was abandoned owing to legal howlers in the opening presentation of the case by his lawyers unexpectedly departing from their previously stated case. Desmond may argue with his lawyers about who foots the bill for that particular mishap.

It was not an auspicious start for a QC whose first major libel case this was. Their problem was that at the last moment they tried to beef up their case against Bower, while surprisingly in the adrenalin of the moment overlooking the need to adhere to their pleaded case- a matter about which our courts are very strict. The first jury had to be discharged and a re-trial ordered.

Mr Justice Eady unexpectedly took the view that the taped conversation was not sufficiently relevant to the issues in the case and that in any event the application to play the tape was too late. Mr Justice Eady, an unquestionably fair-minded and highly-experienced libel judge, finds himself presiding over a system where case management of issues can triumph over the presentation of a rounded picture to the jury. Layer after layer of Bower’s defence had, in earlier legal skirmishes, been peeled off with the result that Desmond could choose

his battlefield and the jury would not see what Bower contended was the dark side of Desmond. The judge was concerned to stop satellite litigation and the introduction of issues outside of the core libel. However, such decisions on admissibility run the very real risk that the jury will not see the true picture and of significant injustice. The jury needed to hear this evidence. And the Court of Appeal agreed. Lord Justice Pill spoke of the decision being “*plainly wrong.*” Although the Court of Appeal should allow an experienced judge a “*generous ambit within which a reasonable disagreement is possible,*” Lord Justice Hooper felt Mr Justice Eady’s decision to exclude the evidence of the telephone call was “*wrong*” and that not to allow it would “*risk the possibility of a miscarriage of justice.*”

The Court of Appeal felt that the defendant’s QC Mr Thwaites was not to blame for making his application at a late stage. The Court considered that the threshold of whether the judge’s decision exclude the evidence was “*manifestly unjust*” had been breached. Lord Justice Wilson also felt that the judge’s decision to exclude the evidence and not to grant a witness summons to require Mr Omid to give evidence was “*plainly wrong.*”

This they felt was not just a discretionary case management decision where the Court of Appeal should not interfere with the decision of an experienced judge simply because they might have decided the point differently, but rather it was a decision which gave rise to a real risk of a miscarriage of justice.

There is plenty in Shakespeare about the importance of protecting reputation – ironically some of the best quotes come from the villainous Iago in *Othello* – but the courts should not forget fairness to defendants.

If you claim that your reputation has been damaged, the jury should be allowed a proper and proportionate snapshot of your reputation and the way you have lived your life. Libel courts would do well to remember that fairness to defendants is an important part of freedom of speech and the other side of the coin of the proper protection of reputation.

David Hooper is a partner with Reynolds Porter Chamberlain LLP in London. The defendant Tom Bower was represented by barristers Ronald Thwaites QC, Ely Place Chambers, and Alexandra Marzec, 5RB, and solicitors Wiggin LLP. Plaintiff was represented by barristers Ian Winter QC, Cloth Fair Chambers, and David Sherborne, 5RB, and solicitors Schillings.

THE OTHER SIDE OF THE POND: Developments in UK and European Media Law

Google Not Liable for Search Results; Access to Courts; Regulatory Developments

By David Hooper

Google's Search Engine Is Not a Publisher

The recent decision of Mr Justice Eady in [*Metropolitan International Schools Limited –v- Designtecnica Corporation, Google UK Limited and Google Inc*](#) established that Google, as a facilitator of internet searches, could not be liable in libel if the search results contained material that is defamatory. The case involved a claim by the provider of adult learning courses against an Oregon-based corporation which ran a site on which had been posted a number of defamatory criticisms of the courses and the way in which students were treated.

Google was only sued in respect of defamatory search results, not for linking to the first defendant's website. The issue, which Mr Justice Eady was asked to decide, was whether Google Inc had any liability in defamation in respect of the "snippets" which appeared on screen in response to the user's search request. He concluded that Google was not in a defamation sense the publisher of the content of the search results, but rather that Google was simply a facilitator for provision of search services.

Mr Justice Eady analysed how the system worked noting particularly that in the delivery of a response to a particular search request, there was no human input by Google nor did Google have any control over the search terms used nor in any meaningful way did Google authorise or cause the actual snippet to appear on screen. The judge considered the practicalities of the situation and recognised that there could be a very real practical problem in filtering out objectionable material bearing in mind that it could reappear if a slightly different search terms were used.

The judge, while appreciating that analogies only work so far, compared the situation to seeking to fix a library catalogue with responsibility for the contents of a book in the library containing defamatory content. The real remedy the claimant had was – if at all – against Designtecnica, and seeking to impose liability on Google was "*a hopelessly inadequate substitute.*"

Furthermore, the actions of Google in providing this search facility did not amount to an act of publication. The case also provides an interesting discussion of the Electronic Communications (EC Directive) Regulations 2002 and notes the efforts of the European Commission to encourage member states to provide proper protection for search engines. The judge also noted the protection provided to search engines in countries such as Austria, Spain, Portugal, France and Holland.

The Judge also considered expert evidence from Patrick Carome regarding the position in the United States, but the decision was based on the judge's conclusion that the actions of Google did not amount to publication under English law and that in this regard English law was in conformity with the law of the European Union.

Reporting Proceedings In Family Courts

As previously noted in this column, changes to the family proceedings rules came into effect on 27 April 2009. The presumption is now that journalists can attend such proceedings, but they are likely by virtue of Section 12 Administration of Justice Act and Section 97(2) Children's Act to be severely restricted in what they can report about the detail of the cases. The press are only likely to be excluded under Rule 10.28 (4) of the Family Proceedings Rules if it is necessary to bar them in order to protect children, parties or witnesses or for the orderly conduct of proceedings.

This has not gone down a treat with celebrities and other high-profile figures. Princess Diana's brother, Earl Spencer, and his estranged wife both wanted to bar the press from proceedings where their finances were to be discussed. The courts made it very clear that the mere fact that they would prefer not to be subject to exposure and comment was not sufficient to ban the press – [*Spencer –v- Spencer*](#) (2009) EWHC 1529.

In another case re [*Child X \(Residents and Contacts – Reporting Restrictions\)*](#) (2009) EWHC 1728, the President of

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the Family Division, Sir Mark Potter, had to deal with a case where a celebrity and his estranged partner sought to argue that it was necessary for the protection of their child for the press to be banned altogether. They were particularly concerned about the foreign press who were not subject to the discipline of the English courts. Sir Mark Potter rejected the apparent attempt to secure a greater degree of privacy for the children of celebrities. He stated that the new rules gave the press a presumptive right to attend family court proceedings and that the media should only be excluded if it was necessary in the interests of the child concerned or for the orderly conduct of the proceedings. On the particular facts, however, he was persuaded that the press should be excluded because the medical treatment of the child could be adversely affected if the press were present while details of the child's medical treatment were given.

The judge criticised the fact that the original order prohibiting reporting *contra mundum* was made without proper steps being taken to notify the Respondent contrary to Section 12 (2) Human Rights Act 1998. It appears that the lawyers for the Applicant failed to draw the judge's attention to the appropriate procedure laid out in the President of the Family Division's Direction of 18 March 2005 for the service of such applications on national news media via the Press Association's CopyDirect. This oversight did not, however, prevent the lawyers from producing a characteristically triumphalist press release about the outcome of the case. There is a limit owing to the nature of the subject matter of such proceedings as to what can be reported in such cases, but the significant feature is that the courts have set their face against secret justice and have underscored the need for such applications to be notified to the media so that the media will be aware of the existence for such orders and will have the opportunity of challenging them.

Changes in Irish Libel Law

After many years of discussion, wide-ranging changes to the law of libel in Ireland was passed on 23 July 2009 and are likely to come into effect in September 2009. Very appropri-

ately, a Reynolds defence is being introduced – appropriate because the Reynolds defence gets its name from a former Irish Prime Minister who had sued for libel in England. In Ireland the defence will be known as one of fair and reasonable publication on a matter of public interest. Although there was controversy about the retention of blasphemous libel, the changes in the law seem to be radically for the better.

It will now be possible to pay money into court without an admission of liability in order to expedite the settlement of the case. There will also be many of the changes which were introduced in England by the Defamation Act 1996 such as reducing the limitation period to 1 year and introducing a defence of an offer of amends. Previously it was a nightmare trying to settle cases in Ireland.

One salutary change will be that judges can now give guidance on the level of libel damages. This is not a moment too soon as in November 2006 a media figure, Dennis O'Brien, had been awarded damages of €750,000 against Mirror Group even though an earlier award of €317,343 in the first trial had been overturned by the Irish Supreme Court as disproportionate.

To cap it all, a communications consultant called Monica Leech has very recently been awarded €1.872 million against Independent Newspapers for a series of article suggesting that she was having an affair with a former environment minister, Martin Cullen. Why the false allegation of sex with Mr Cullen should carry such a high price tag is beyond comprehension. Nevertheless, the trial court ordered immediate payment of €750,000 damages plus €100,000 costs pending the appeal. It is much to be hoped that Irish libel awards in future are more proportionate and sensible.

In one important regard Irish law does seem to be moving ahead of English law in its proposed introduction of a single publication rule which will apply to publication on the Web - something the English courts have set their faces against. Plaintiffs will also have to verify their assertions on affidavit with potential perjury penalties, if they do not tell the truth.

The new reforms also envisage more applications being made before trial on matters such as what the defamatory

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The judge, while appreciating that analogies only work so far, compared the situation to seeking to fix a library catalogue with responsibility for the contents of a book in the library containing defamatory content.

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words mean. The result will be that there will be less element of ambush in Irish libel actions.

A Check On The Growth Of The Law Of Privacy And Confidentiality

In two decisions the courts have made it clear that they will look very critically at claims that material should not be published on the grounds of confidentiality. In [*Napier –v- Pressdram*](#) (2009) EWCA 443. the Court of Appeal upheld the decision of Mr Justice Eady who had refused to prevent the satirical magazine *Private Eye* publishing details of successful disciplinary proceedings against the senior partner of a law firm on the basis that there was no duty of confidentiality in such proceedings and that the claimant, who ironically was a former president of the Law Society, had failed to pass the interim restraint order test as to his prospects of success under Section 12 (iii) Human Rights Act 1998.

Equally, in [*Author of a Blog –v- Times Newspapers Limited*](#) (2009) EWHC 1358, a police officer was unable to prevent the Times publishing the fact that he was the author of a blog called “*Night Jack*” where he expressed his opinions on social and political matters relating to the police and justice system. Evidently it was embarrassing for him to be exposed as a result of the *Times*’ own detective work, but the court held that blogging was a public activity and did not have the necessary quality of confidence nor did the author have a reasonable expectation of privacy.

Data Protection Act Claim No Substitute for Libel or Injurious Falsehood Claim

In [*Quinton –v- Pearce*](#) (2009) EWHC 912, Mr Justice Eady held that the Data Protection Act 1998 does not afford parallel remedies alongside defamation and malicious falsehood claims so that in effect, when those fail, one cannot use a claim under the Data Protection Act 1998 as a long stop. I should explain to American readers that the term long stop (back up) comes from cricket and it would take too long to explain it to you if you have not got the point! The case concerned a dispute between two local Council candidates relating to planning applications. The disputed leaflet had been held not to be defamatory nor malicious.

Reporting Restrictions and Contempt of Court

A radical difference between the USA and the UK is that we do not allow the media to report the views of individual jurors. In [*Attorney General –v- Times Newspapers Limited and Seckerson*](#) (2009) EWHC 1023, the *Times* was fined £15,000 with £27,426 costs for what was generally viewed as a very balanced report indicating that two jurors, who were not named, were questioning the verdict and expert evidence in relation to a conviction for manslaughter in a controversial shaken baby case. This was held to breach Section 8 Contempt of Court Act 1981 which is an absolute offence without – most unsatisfactorily – the sort of public interest defence that does exist elsewhere in the Contempt of Court Act such as Section 5. Permission to appeal to the House of Lords is being sought.

Open Justice

[*Attorney General’s reference number 3 of 1999*](#) (2009) UKHL 34. An alleged rapist had, on the order of the trial judge, been acquitted because the judge was persuaded that the DNA sample identifying him should have been destroyed under the provisions of the Police and Criminal Evidence Act 1984. The Attorney General had appealed this acquittal and secured a ruling that the judge did in fact have discretion to allow the DNA material to be used. Under the rules relating to such appeals, the case had been anonymized. The BBC wished to name the alleged rapist in a programme on double-jeopardy. It was argued that his privacy rights were engaged and that the BBC should not be allowed to name him. The House of Lords, however, took the view that a trial is a public event and that in reality this had nothing to do with the accused’s private life and that the BBC should be entitled to use his name if they wished to do so. It was not private information and the trial was held in public.

A Libel Decision by Mr Justice Andrew Nicol

In [*Archidiacono –v- Miller*](#), Mr Justice Nicol struck out a claim on the basis that the emails sent regarding the closure of a day care club by councillors which falsely suggested that the manager was on police bail on fraud and false accounting

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charges, whereas in fact she had simply been questioned on the subject, were covered by qualified privilege.

The Singh Fair Comment Decision

Much has been written about the libel case brought by the British Chiropractor Association (BCA) against Dr Simon Singh, including by the present writer. Dr Singh had written a piece entitled “*Beware of the Spinal Trap*” in the comments section of the *Guardian*. He evidently considered that chiropractors made claims as to the efficacy of their treatment which they could not deliver. However, his observation that the BCA was “*the respectable face of the chiropractic profession*” and that it “*happily promotes bogus treatments*” was a remark too far.

Mr Justice Eady felt that it was an allegation of fact which would have to be justified – that is to say proved to be true. I would suggest that a more liberal interpretation and slightly less forensic of the facts would have found this to be fair comment.

While the fact that the article was in the comment column in the *Guardian* is not conclusive, it was not without significance. Singh was writing about the BCA as a whole and was not criticising any particular practitioners. He was clearly expressing his opinion and it is most unfortunate that a use of a possibly careless phrase was held to convert this into an allegation of fact. Slightly different wording could so easily have underscored the fact that this was indeed an expression of opinion and therefore defensible as fair comment.

Mardas and the International Herald Tribune

The Court of Appeal has refused leave to appeal against the decision of Mr Justice Eady in [Mardas –v- New York Times Company](#) [2008] EWHC 3135 (QB), reinstating a libel claim by a former associate of the Beatles who complained that an article accused him of being a charlatan and a liar and having caused a rift between the guru Maharishi Yogi and the Beatles back in 1968. See [MLRC MediaLawLetter December 2008](#) at 27.

The upshot is that US defendants are liable to be sued for libel in the UK in respect of internet hits which may be measured in the 20s or 30s and a significant number of which may be attributable to the hawk-eyed lawyers at Schillings or

Carter-Ruck. The courts are therefore not applying a liberal view of the abuse of process decision in the *Jameel* case.

Legal Costs in the UK

Lord Justice Jackson has produced his [preliminary report on civil litigation costs in the UK](#) which runs to 663 pages. It would appear that conditional fee agreements are here to stay, although the judge does seem to think that the premiums for After the Event insurance are too high and suffer from lack of competition in the market. Phase 2 is for there to be consultation on his preliminary proposals and views. Phase 3 will take place in September – December 2009 with his final report expected in December 2009.

Libel Trends

The annual survey by Sweet and Maxwell shows there were 78 reported libel cases in the year to May 31, 2009, an increase of 32% on the previous year’s 59. Growth areas seem to be new media and claims by businesses.

Regulatory Developments

On 15 June 2009 Ofcom set out [consultation proposals](#) for the revision of its broadcasting code. It will need to deal with such matters as the implementation by the UK of Audio-Visual Media Services in accordance with AVMS Directive 2007/65/EC which must be transposed into national law by 19 December 2009. At the same time (16 June 2009) the government’s final report on [Digital Britain](#) was published dealing with such matters as the Universal Service Broadband Commitment, making it easier for rights holders to bring civil actions against suspected illegal file sharers and the potential tie-up between Channel 4 and BBC Worldwide. Interestingly, despite its crucial impact on IP and IT, it ran to a mere 238 pages, one third of Lord Justice Jackson’s report.

The European Parliament has voted to extend the copyright term for the protection of sound-recordings to 70 years – something which the UK government had declined to do – sticking to the existing 50 years and which the [Gowers Review](#) on the operation of the law of copyright had not supported. Good news then for the Beatles and the Rolling Stones as they collect their bus passes and winter fuel supplements.

Irish Defamation Act 2009 Finally Enacted

By Karyn Harty and Lesley Caplin

The [Defamation Act, 2009](#) has been signed into law in Ireland. The new provisions affect causes of action arising after 23 July 2009.

The Act introduces a number of important procedural changes and some changes to the substantive law, including the replacement of the separate torts of libel and slander with a unified tort of defamation. Particularly welcome for media organisations are the introduction of an offer to make amends procedure and the reduction of the limitation period from 6 years to 1 year.

Defendants will no longer have to admit liability to pay money into court. Plaintiffs will be able to opt for a speedy statutory declaration that they have been defamed and both plaintiffs and defendants will be able to seek summary disposal. Pre-trial applications will be much more common under the new regime. Overall media defendants should find greater scope to encourage settlement and will be able to apologise without the apology constituting an admission of liability.

In relation to damages, many commentators have heralded the new provisions as a solution to high libel damages and it has been widely anticipated that juries will now receive guidance on figures. However on its face the Act goes no further than what is currently allowed. As matters stand the parties and the judge may address the jury on damages, but may not refer to specific figures or ranges of damages.

Submissions tend to involve general statements regarding the scale of damages that would be appropriate given the evidence. There is nothing in the Act that gives the green light to the parties or the judge putting specific figures to the jury or making comparisons with damages in other cases and whether the Irish courts will follow the *John v. MGN* line of authority and permit counsel or judges to suggest figures to juries and make comparisons with other awards, will depend on the Supreme Court and whether it is prepared to dilute the central role that the jury has traditionally enjoyed in the assessment of damages.

The Act does expressly permit the Supreme Court to substitute a figure for damages on appeal. This may go some way to resolving the anomalies associated with trial judges' inability to give guidance to juries on appropriate levels of damages. Until now the Supreme Court has declined to substitute a figure, preferring to send the matter back for retrial.

In *O'Brien v. MGN*, the Court having set aside an award of IR£250,000 as disproportionate, on retrial the jury awarded the plaintiff €750,000, with a further appeal then inevitable. Unless steps are taken to address the backlog of cases in the Supreme Court, where an appeal takes 3 years to get on for hearing, it may take some time before there is clarity on this issue. With the high water mark of damages now set at €1,872,000 in *Leech v. Independent Newspapers* in respect of a series of defamatory articles falsely insinuating that the plaintiff had an affair with a government minister, the Supreme Court may give clarity as to how the courts are to approach guidance to juries in the near future.

The Act restates the defences to a defamation claim, the primary defences now to be known as "truth" and "honest opinion" with qualified privilege more precisely defined and a new *Reynolds* type defence of "fair and reasonable publication on a matter of public interest." The Act also now places the Press Council on a statutory footing and provides for its regulation. Controversially, the Act provides that blasphemy will be a criminal offence subject to a maximum fine of €25,000.

Karyn Harty and Lesley Caplin are lawyers with McCann Fitzgerald in Dublin.

Federal Shield Law Bill Stalled in Senate Committee

The Senate Judiciary Committee debated a federal shield law bill at a mark-up on September 17, but ended the discussion without voting on the legislation. The bill, called the “Free Flow of Information Act of 2009” (S. 448), would provide a qualified privilege against disclosure of confidential sources. (The bill does not cover unpublished, non-confidential information.)

It was initially scheduled for mark-up on September 10, but committee members instead adopted a [Managers’ Amendment](#) put forward by the sponsors and agreed to postpone the formal mark-up by a week to provide more time for amendments. S. 448 was introduced in February 2009 by Sen. Chuck Schumer (D-NY) and Sen. Arlen Specter (D-PA), among others. It is similar to a federal shield law bill that passed the Senate Judiciary Committee in October 2007 ([S. 2035](#)). The House of Representatives passed a version of the “Free Flow of Information Act of 2009” ([H.R. 985](#)) in March 2009. It covers both confidential sources and unpublished information.

On September 17, most of the time scheduled for the mark-up was spent hearing about the bill’s shortcomings – particularly with respect to national security – from both Republicans and Democrats.

Sen. Jeff Sessions (R-AL) and Sen. John Kyl (R-AZ) each gave lengthy opening statements, effectively filibustering any votes on amendments to the Managers’ Amendment. They focused on leaks of classified information and cited opposition to the bill by current and former intelligence officials, including FBI Director Robert Mueller. Sen. Sessions, ranking Republican on the committee, argued that there was no need for the legislation as the Justice Department had subpoenaed few reporters in the last two decades.

Sen. Dianne Feinstein (D-CA), Intelligence Committee Chair, took issue with how the privilege would apply in cases involving national security. She argued that the bill unfairly weighed in favor of journalists in such cases.

As now drafted, the bill would require disclosure of information by the journalist (defined as a “covered person”) where the information: was “obtained as the result of the eyewitness observations of, or obtained during the course of, alleged criminal conduct by the covered person”; “is reasonably necessary to stop, prevent, or mitigate a specific case

of (1) death; (2) kidnapping; or (3) substantial bodily harm;” or “would materially assist in preventing or mitigating, or identifying the perpetrator of (1) an act of terrorism; or (2) other significant and articulable harm to national security that would outweigh the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information.”

As the opening statements during the mark-up continued, attendance decreased, eventually leaving too few Senators in favor of the bill with a quorum to cut off debate. The committee, however, adopted a [technical amendment](#) put forward by Sen. Schumer.

The technical amendment made a few substantive changes to the bill, including limiting the scope of persons covered by the legislation. The Managers’ Amendment defined “covered person” as a person who “with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes on such matters by (I) conducting interviews; (II) making direct observation of events; or (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form; and has such intent at the inception of the newsgathering process.” The definition of covered person includes “a supervisor, employer, parent company, subsidiary, or affiliate of such person.”

The technical amendment adds a requirement with respect to media, namely that the person “obtains the information sought while working as a salaried employee of, or independent contractor for, an entity (I) that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means; and (II) that (a) publishes a newspaper, book, magazine, or other periodical; (b) operates a radio or television broadcast station, network, cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier; (c) operates a programming service; or (d) operates a news agency or wire service.”

En Banc Military Appellate Court Holds that No Reporter's Privilege Exists in Courts Martial for Non-Confidential Materials

By Nicole A. Auerbach

On August 31, 2009, the Navy-Marine Corps Court of Criminal Appeals ("NMCCA"), sitting *en banc*, ruled that journalists do not possess a privilege against disclosure of non-confidential newsgathering materials subpoenaed for use in courts martial. The NMCCA's opinion in *United States v. Wuterich*, __ M.J. __, 2009 WL 2730890, is the latest development in a protracted battle between CBS and the government over a subpoena issued by the prosecution to CBS News for outtakes of a *60 Minutes* interview with Marine Staff Sergeant Frank Wuterich, who stands accused of killing some two dozen Iraqi civilians in Haditha, Iraq in 2005.

Over the objection of CBS and the accused, the Court held that it had jurisdiction under Article 62 of the Uniform Code of Military Justice to hear the government's interlocutory appeal of the trial court's Order quashing the subpoena. (The Court's interlocutory appellate jurisdiction over the case is the subject of a pending *cert.* petition to the Supreme Court regarding earlier appellate rulings in the case.). It then went on to hold that the Military Rules of Evidence do not allow the recognition of either a First Amendment or common-law reporter's privilege concerning non-confidential newsgathering materials, and remanded the case to the trial court for further proceedings. Further discretionary appeals to the Court of Appeals for the Armed Forces ("CAAF"), the highest military court, are also possible.

Background

Staff Sergeant Wuterich is charged with manslaughter and other crimes in connection with his involvement in the killing of some 24 Iraqi civilians in Haditha, Iraq in November 2005. The government alleges that, contrary to the military "rules of engagement," which require troops to positively identify a threat before using deadly force, Staff Sergeant Wuterich instructed his men to "shoot first, ask questions later" as they used grenades and guns to "clear" several houses they believed to be hostile, al-

though it turned out they were occupied by Iraqi civilians, including women and children.

On March 15, 2007, CBS aired a report concerning the incident on *60 Minutes* entitled "The Killings at Haditha." The centerpiece of the report was an interview of Staff Sergeant Wuterich by CBS News Correspondent Scott Pelley. In the interview, Wuterich described in detail the events surrounding the "clearing" of the houses in question and explained why he believed the killings had been warranted under the circumstances. In January, 2008, just before Staff Sergeant Wuterich was set to go to trial, the military prosecutors served a subpoena on CBS News calling for the outtakes from that interview.

Procedural History:

The First Trial Court Decision Quashing the Subpoena

The trial court judge, Lt. Col. Jeffrey Meeks, granted CBS's motion to quash the subpoena under Rule 703 of the Rules for Courts-Martial (the military analogue to Federal Rule of Criminal Procedure 17(c)), stating that "the information desired here by the government from CBS would be cumulative with what is already in the hands of the government." He therefore found that the "necessity" requirement under Rule 703 had not been met, and quashed the subpoena.

With respect to the reporter's privilege, Lt. Col. Meeks stated that, "although not required based on these findings announced above, the court is persuaded that a qualified reporter's privilege under the First Amendment does, in fact, exist under federal common law." While noting that this conclusion was *dicta*, he observed that "as the court does not find the subpoena meets . . . the lower standard articulated under R.C.M. 703, it is a logical conclusion that the greater standard required for disclosure under this qualified privilege has not been met."

The First NMCCA Opinion Reversing the Trial Court

The NMCCA exercised its discretion under Article 62 to hear the government's appeal from the trial court Order

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and reversed Judge Meeks, finding that he had erred by concluding that the outtakes were cumulative and unnecessary without first conducting an *in camera* review of the materials. *United States v. Wuterich*, 66 M.J. 685, 688-92 (N.M. Ct. Crim. App. 2008). It also held that Wuterich did not have standing to challenge the Court's jurisdiction under Article 62, which allows the government to take interlocutory appeals of orders "exclude[] evidence that is substantial proof of a fact material to the proceeding," including the order at issue.

The CAAF Opinion

Both CBS and SSgt. Wuterich sought review by CAAF. On November 17, 2008, CAAF vacated the NMCCA's opinion, but affirmed its reversal of Judge Meeks' Order quashing the subpoena. CAAF found that Wuterich did have standing to challenge this Court's exercise of jurisdiction, but went on to find that the appellate courts did have jurisdiction under Article 62 to entertain an interlocutory appeal of the military judge's discovery order. On the merits, CAAF agreed with the NMCCA that Judge Meeks had erred by ruling on the motion to quash without conducting an *in camera* review of the outtakes. In remanding the case, CAAF noted that such an *in camera* inspection would "provide the appropriate forum for consideration of issues pertinent to a motion to quash the subpoena, such as the existence, if any, of a qualified newsgathering privilege" as well as "the scope of any such privilege, and the application, if any, of such a privilege to the requested materials." *Id.* at 79, *reconsideration denied*, 67 M.J. 205 (C.A.A.F. 2008).

The Trial Court's Decision on Remand

On remand, after reviewing *in camera* the eight DVDs containing CBS's outtakes, Judge Meeks found that the footage on five of the eight discs was not relevant, material, or necessary to the Government's case. Rather, such footage consisted of background material or the accused discussing events that occurred either before or after the events of November 19, 2005, that are the basis of the charges against him.

For the remaining three DVDs, which represented approximately 80 minutes of interview footage, the Military Judge found that, while they were material and relevant in that they contained footage of the accused discussing the events underlying the charges, their contents were "cumulative and available from other sources," including from other statements of the accused. The Military Judge went on to find that these three tapes nonetheless met Rule 703's threshold requirements of materiality, relevance and necessity because "the evidence is presented in a professionally prepared video format" and "is obtained by the questioning of a skilled reporter who develops the information in a logical and a coherent manner."

The Military Judge then ruled, however, that those three DVDs were shielded from disclosure by a common-law "qualified news gatherer's privilege with respect to non-confidential sources." Specifically, Judge Meeks noted that "the nature of [the outtakes] is troubling. The press has an interest in being able to interview newsworthy individuals and obtain information to present in newsworthy cases." He asserted that journalists have "the interest to be able to prepare and preserve their stories without becoming an investigative arm of the government in criminal cases." Moreover, he noted, "[i]f the subpoena is enforced without the application of appropriate safeguards, the court is concerned that there will be a chilling effect on the freedom of the press."

Accordingly, the Military Judge applied the three-part test employed by the Second Circuit in *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), and evaluated whether the Government had met its burden of establishing that: (a) the footage was "highly material and relevant"; (b) it was "necessary or critical to the prosecution's case"; and (c) the evidence was "not obtainable from other sources." While he found that the footage was highly material and relevant, he concluded that the Government had failed to meet its burden of overcoming the second and third prongs of the test. Specifically, again relying on the evidentiary record he canvassed in connection with his initial ruling on the Motion, Judge Meeks found that "the statements of the accused [in the outtakes] are consistent with all prior statements and other testimony available to the government" and are "obtainable from other sources," including substantial evidence

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“already in the possession of the government.” The Military Judge therefore quashed the subpoena a second time.

The Second Appeal to the NMCCA

The government once again appealed the trial court’s Order. The essential question on appeal was whether Military Rule of Evidence 501 (“MRE 501”) provides a basis for applying the qualified reporter’s privilege with respect to non-confidential materials in the military courts. Unlike the Federal Rules of Evidence, which leave the development of specific privileges to the Courts, the Military Rules set out a list of specifically enumerated privileges. However, MRE 501 allows the military courts to recognize privileges other than those contained within the rules themselves under certain limited circumstances. For example, MRE 501(a)(1) authorizes the application of privileges “provided for in the United States Constitution as applied to members of the military.” And MRE 501(a)(4) allows the courts to apply privileges “provided for in . . . [t]he principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or [the] Manual [for Courts Martial].”

On appeal, the government argued that Judge Meeks had erred in applying the qualified reporter’s privilege under MRE 501(a)(4) because: (a) the qualified privilege with respect to non-confidential materials was not “generally recognized” in criminal cases in the federal civilian courts; and (b) that application of the privilege would be “contrary or inconsistent” with the principles underlying the Military Rules of Evidence, in that it would lead to unwarranted uncertainty in a system in which certainty and efficiency are crucial.

CBS argued that the qualified reporter’s privilege applied both under MRE 501(a)(1) (allowing application of those privileges “provided for in the United States Consti-

tion”) and under MRE 501(a)(4) (allowing the application of privileges “generally recognized” by the civilian courts). With respect to the application of MRE 501(a)(1), CBS emphasized that even those federal courts that have applied a “common law” privilege have recognized that the privilege is grounded in the First Amendment. It also noted that those military courts that had applied the privilege had spoken of it as a First Amendment privilege, recognizing the constitutional interests at stake. See *United States v. Bennett*, U.S.M.C., Sierra Judicial Circuit, Apr. 6, 1999 (quashing subpoena for unedited videotape of “Dateline NBC” interviews with accused’s alleged victims and other witnesses in sexual assault case); *United States v. Ashby*, U.S.M.C., Piedmont Judicial Circuit, Feb. 4, 1999 (quashing subpoena to CBS and *Rolling Stone* magazine for audio and video outtakes from interviews with the accused and an eyewitness, in case involving crash into Italian ski gondola cable resulting in 20 civilian deaths and causing international controversy).

Military Rules of Evidence do not allow the recognition of either a First Amendment or common-law reporter’s privilege concerning non-confidential newsgathering materials. . .

With respect to the application of MRE 501(a)(4), CBS noted that of the eight Circuit courts to have considered the issue, six have recognized the applicability of the reporter’s privilege in the criminal context. See *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir.1980); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). It also noted that of the six Circuits to consider directly whether the privilege applied to non-confidential materials sought in the context of criminal trials, four concluded that it did. See *LaRouche Campaign*, 841 F.2d at 1181-83; *Burke*, 700 F.2d at 77; *Cuthbertson I*, 630 F.2d at 147; *Caporale*, 806 F.2d at 1504. It therefore argued that the privilege was “generally recognized in the federal courts” and should be applied through MRE 501(a)(4).

On August 31, 2009, the NMCCA, sitting en banc, unanimously reversed the trial court. First, relying heav-

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ily on *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972), the court found that there was no First Amendment privilege that could be applied through MRE 501(a)(1). While the Court acknowledged that several of the cases cited by CBS had in fact been “grounded” in the First Amendment, it held that “these cases do not support the existence of a broadly based First Amendment privilege, nor of one ‘required by or provided for’ in the Constitution.” The Court therefore held that the qualified privilege could not be applied through Rule 501(a)(1).

Next, the Court considered whether a common law privilege with respect to non-confidential materials had been “generally recognized” in criminal cases by the federal civilian courts. Acknowledging that the federal courts have “generally recognized” a reporter’s privilege in civil cases, the court went on to find that recognition “of a reporter’s privilege in the criminal context . . . has most often been in cases of confidential sources or material.” The court emphasized that only four Circuit Courts (the First, Second, Third, and Eleventh Circuits) had applied the privilege to subpoenas for non-confidential information in criminal cases, and that four others (the Fourth, Fifth, Sixth and Seventh Circuits) had refused to apply the privilege in that context. It then concluded that Judge Meeks had erred in not making a legal determination that the privilege was “generally recognized” in the civilian courts before applying it. It remanded the case once again to the trial court, noting that CBS was free to seek an appropriate protective order to prevent “disclosure of their newsgathering methods, editing tech-

niques, and other proprietary interests.”

The Current Status of the Litigation

Neither CBS nor Staff Sergeant Wuterich has yet filed a notice of appeal. However, the government may seek “certification” from the Judge Advocate General of the Navy, which would require CAAF to hear the case. (In the military courts, the Government may request such certification even though it prevailed below, allowing it to seek extension of the ruling to the other service courts beyond the Navy-Marine Corps Court).

In addition to any appeal that may take place, the ultimate outcome of this case could be determined by Wuterich’s pending petition for a writ of certiorari to the Supreme Court concerning the appellate courts’ jurisdiction over the government’s first appeal under Article 62. If the petition were to be granted, and if Wuterich were to prevail on this issue, all of the opinions after the initial Order by the trial court quashing the subpoena would be vacated. We expect the Supreme Court to act on the petition in the October term.

CBS Broadcasting Inc. was represented by Anthony Bongiorno, Carl R. Benedetti, Susanna Lowy, and Richard H. Altabef of CBS and Lee Levine, Seth D. Berlin and Nicole A. Auerbach of Levine Sullivan Koch & Schulz, L.L.P. The government was represented by LT Timothy H. Delgado, JAGC, USN. Staff Sergeant Wuterich was represented by Col. Dwight H. Sullivan, USMCR and LT Kathleen L. Kadlec, JAGC, USN.

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Voluntary Dismissal And Fee Awards In Copyright Cases

By Lincoln D. Bandlow

Under Section 505 of the Copyright Act, a “prevailing party” in a copyright infringement action is entitled to an award of attorney’s fees. 17 U.S.C. § 505. What about the defendant, faced with a copyright infringement action, who employs counsel to work up and fire off a motion that ultimately persuades the plaintiff to voluntarily dismiss the action. Can that defendant be deemed a “prevailing party” entitled to recover the attorney’s fees incurred in having to prepare that motion? Over 60 years ago, the Ninth Circuit held in *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575 (9th Cir. 1941) that the answer to that question was “yes.”

This past June, in *Cadkin v. Loose*, 569 F.3d 1142 (9th Cir. 2009), the Ninth Circuit reversed course and held, based on the U.S. Supreme Court ruling in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), that when a plaintiff voluntarily dismisses without prejudice a lawsuit containing copyright claims, the defendant cannot be deemed the “prevailing party” and thus *Corcoran* is “no longer good law.”

In *Cadkin*, plaintiff Emil Cadkin, sometimes solely and sometimes with defendant William Loose, had created and recorded thousands of music cues for television and movies. These cues were administered by a partnership owned by Cadkin and Loose. In 2003, Cadkin filed a complaint against Loose, alleging that Loose had removed Cadkin’s name as author from cues that Cadkin had composed, incorporated those cues into Loose’s own music library with Loose being credited as the sole author and then registered those cues with the U.S. Copyright Office, allowing Loose to collect full royalties from any uses of the cues. The complaint, filed in federal court, contained claims for copyright infringement, false designation of origin and various California state law claims.

After a successful motion to dismiss by defendants, plaintiff filed a first amended complaint which was also dismissed, again with leave to amend, on defendants’ motion. Plaintiff then moved to “remand” to state court and attached a

second amended complaint to the motion which contained only state law claims for declaratory judgment, unjust enrichment and accounting for profits. The court denied the motion because the action had been initiated in federal court, but treated the second amended complaint attached to the motion as the operative complaint. Defendants again moved to dismiss, arguing that the claims were preempted by the Copyright Act, the factual allegations lacked specificity and any federal claims had been waived by being omitted from the amended complaint. Plaintiff opposed the motion but also lodged a notice of voluntary dismissal, without prejudice, under Federal Rule of Civil Procedure 41(a). The district court ultimately entered the voluntary dismissal without comment.

Defendants then brought motions to recover their attorney’s fees and costs, contending that defendants were the “prevailing parties” in the action. The District Court granted defendants’ motions and entered judgment in favor of defendants in the amount of almost \$300,000. Plaintiff appealed.

The Ninth Circuit reversed the judgment, holding that defendants were not the prevailing party for purposes of a fee award under Section 505. The Court first noted that, in applying Section 505, a district court has two tasks: (1) decide whether an award of attorney’s fees is appropriate; and (2) calculate the amount of the award. Although district courts have broad discretion in making fee awards, “that discretion is triggered only if the party in fact prevailed on the copyright claim.” *Cadkin*, 569 F.3d at 1147. The district court had found that defendants were the prevailing parties based on *Corcoran*. The Ninth Circuit noted that the district court was “correct to follow controlling circuit precedent” set by *Corcoran*, but that *Corcoran* is now “clearly irreconcilable” with the U.S. Supreme Court’s decision in *Buckhannon*.

In *Corcoran*, the district court had denied defendants’ motion to dismiss but granted a motion for a more definite statement on plaintiff’s copyright claim. Rather than amend, plaintiff voluntarily dismissed without prejudice and the dis-

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Can that defendant be deemed a “prevailing party” entitled to recover the attorney’s fees incurred in having to prepare that motion? Over sixty years ago, the Ninth Circuit held...that the answer to that question was “yes.”

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trict court then awarded defendants their attorneys' fees. On appeal, the Ninth Circuit rejected the contention that a voluntary dismissal without prejudice was insufficient to confer prevailing party status, holding that where "a defendant has been put to the expense of making an appearance and of obtaining an order for the clarification of the complaint" which then prompts a voluntary dismissal "the party sued is the prevailing party within the spirit and intent of the statute even though he may, at the whim of the plaintiff, again be sued on the same cause of action." *Corcoran*, 121 F.2d at 576. The court in *Cadkin* noted that it had not cited *Corcoran* in subsequent decisions applying Section 505, but the Ninth Circuit had never overruled *Corcoran* "or questioned its continuing viability." *Cadkin*, 569 F.3d at 1148.

That viability, however, was undermined by the U.S. Supreme Court in *Buckhannon*, where the Court held that a plaintiff was not a prevailing party under the FHAA when the "lawsuit brought about a voluntary change in the defendant's conduct" without a "judgment on the merits or a court-ordered consent decree." In making that ruling, the Court had relied on the definition of "prevailing party" in Black's Law Dictionary and concluded that a "prevailing party" is one who has been awarded some relief by the court. *Buckhannon*, 532 U.S. at 600, 603. Thus, in determining whether a party is a "prevailing party" in an action, the "key inquiry is whether some court action has created a 'material alteration of the legal relationship of the parties.'" *Cadkin*, 569 F.3d at 1148 (quoting *Buckhannon*, 532 U.S. at 604).

In *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978 (9th Cir. 2008), which involved an analysis of a fee shifting statute under the Individuals with Disabilities Education Act that is comparable to the fee shifting provisions of the Copyright Act, the Ninth Circuit followed *Buckhannon* and held that an involuntary dismissal without prejudice did not confer prevailing party status on a defendant because it was "not a decision on the merits' and plaintiff was free to re-file his complaint in federal court" and thus "dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing." *Cadkin*, 569 F.3d at 1148 (quoting *Oscar*, 541

F.3d at 981).

Oscar distinguished *Miles v. California*, 320 F.3d 986 (9th Cir. 2003), where the court applied *Buckhannon* and concluded that a voluntary dismissal of a claim under the Americans with Disabilities Act without prejudice to plaintiff seeking relief in a state court was sufficient to confer prevailing party status because the dismissal had eliminated the federal ADA claim from further proceedings in federal court and thus the voluntary dismissal had changed the legal relationship between plaintiff and defendant. *Miles*, 320 F.3d at 989; see *Oscar*, 541 F.3d at 982.

The Ninth Circuit concluded that "*Corcoran* cannot be reconciled with *Buckhannon*'s material alteration test." *Cadkin*, 569 F.3d at 1148. *Corcoran* had incorrectly "focused on the expense the defendant incurred and expressly disregarded that the parties' legal relationship had not changed as a result of the voluntary dismissal." *Id.* Moreover, the court had construed "prevailing party" in

light of the policies of the Copyright Act while ignoring "the plain meaning of the phrase" as the Supreme Court had done in *Buckhannon*. *Id.*; see *Buckhannon*, 532 U.S. at 607 (suggesting that legislative history would not overcome plain meaning of "prevailing

party").

Although *Buckhannon* was not a copyright case, the Ninth Circuit held that "the distinction is immaterial" because the Ninth Circuit had already determined that *Buckhannon*'s construction of prevailing party "applies to federal fee shifting statutes other than the FHAA that contain that phrase, which is appropriate given the Court's reliance on a dictionary definition for its holding." *Cadkin*, 569 F.3d at 1149. Thus, "the material alteration test the Supreme Court articulated in *Buckhannon* governs the prevailing party inquiry under § 505 of the Copyright Act" and therefore *Corcoran* is no longer controlling "to the extent it is inconsistent with *Buckhannon*." *Id.* The Ninth Circuit noted that its holding was consistent with every circuit that had considered the issue.

The court then analyzed whether there had been a material alteration in the legal relationship of the parties. Although *Cadkin*'s voluntary dismissal had not stated whether it

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**Unfortunately, under *Cadkin*,
the other thing these defendants
will never see again is the money
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that the claim should never
have been brought in the first place.**

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was with or without prejudice, under Federal Rule of Civil Procedure 41(a)(1)(B), such a dismissal is automatically “without prejudice.” Thus, this did not alter the legal relationship between the parties because defendant remained subject to the risk of refiling. Accordingly, defendants were not the prevailing party. The court rejected defendants’ argument that the legal relationship had changed because plaintiff waived the copyright claim by omitting it from the second amended complaint.

Although claims alleged in an original complaint which are not alleged in an amended complaint may be waived, that waiver does not apply to a new lawsuit filed after a voluntary dismissal without prejudice. *Cadkin*, 569 F.3d at 1149. Moreover, the court rejected defendants’ argument that the district court’s two prior dismissals of the copyright claims conferred prevailing party status, again pointing out that de-

defendants remained subject to the risk that plaintiff would refile the copyright claims.

Thus, defendants in a copyright infringement action who have undergone the time and expense of preparing and filing a motion that causes the plaintiff to voluntarily dismiss the action without prejudice should feel happy that they will most likely never see that lawsuit again.

Unfortunately, under *Cadkin*, the other thing these defendants will never see again is the money they spent convincing the plaintiff that the claim should never have been brought in the first place.

Lincoln D. Bandlow is a partner in the Los Angeles office of Lathrop & Gage and an Adjunct Professor of media and communications law at USC. Plaintiffs were represented by Marty O’Toole, Law Offices of Marty O’Toole, Los Angeles. Defendant was represented by Sandra Levin, Michael A.

Court Reject’s Copyright Plaintiff’s New Trial Motion in Infringement Suit Over Movie Defense Verdict Not Against Weight of Evidence

By Louis P. Petrich

On December 9, 2008, after a trial in which each side was allowed only 12 hours for direct and cross-examination, a jury rejected a \$40 million copyright infringement claim and rendered a defense verdict in favor of Tyler Perry, his production company and Lions Gate Entertainment, Inc., the distributor of his motion picture “Diary of a Mad Black Woman.” Plaintiff claimed that the movie copied her obscure play. See [MediaLawLetter Jan. 2009](#), “Jury Finds No Copyright Infringement By Tyler Perry.”

Six months after the submission of plaintiff’s motion for new trial, U.S. District Judge Leonard Davis of the United States District Court, for the “plaintiff friendly” Eastern District of Texas, issued a 25-page Order denying plaintiff’s motion. *West v. Perry*, No. 2:07CV200 (E.D. Tex. July 23, 2009). The motion raised a number of procedural and substantive issues.

The Golden Rule Argument

Plaintiff challenged an opening statement made by

Perry’s counsel that the jury members should “imagine yourself” being accused of stealing plaintiff’s play -- a variation of the so-called “Golden Rule” argument. The court held that there is no prohibition against the statement when it is used regarding *liability* issues although its use is a ground for objection and possibly a new trial when raised on the question of *damages*, citing *Stokes v. Decambre*, 710 F.2d 1120, 1128 (5th Cir. 1983).

Expert’s Qualifications

The court rejected plaintiff’s challenge to the qualifications of defendants’ *scenes a’ faire* and probative similarity expert, writer, producer, director Bob Gale, co-author of, and an Academy Award nominee for, the “Back To The Future” screenplays. Gale testified about his familiarity with thousands of films, his prior expert testimony in infringement cases, his experience as a judge of screenwriter contests, and as an arbitrator of WGA screen writer credit arbitrations.

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Registration and Protectability

Plaintiff challenged the verdict form, which asked “Do you find that the movie of *Diary of a Mad Black Woman* infringed Plaintiff’s copyright, if any, in *Fantasy of a Black Woman?*,” arguing that the phrase “any of the protectable elements” should have been added. The court rejected the argument, holding that the jury instructions sufficiently explained that only original forms of expression are protected by plaintiff’s copyright.

The court also noted that modifying the phrase “protectable elements” with the word “any” would undercut the “substantial similarity” requirement. Plaintiff did not register the alleged 1991 version of her play with the Copyright Office until 2006, one year after defendants’ highly popular movie was released for public exhibition. Plaintiff obtained a pretrial Order barring defendants from mentioning either the late registration or the late deposit – because those facts might unduly prejudice plaintiff’s case. However, the court’s Order also provided that if plaintiff mentioned registration, defendants would be free to do so. The court rejected the argument that the phrase “if any” required the jury to make a finding regarding registration. Nothing in the verdict form or jury instructions mentioned registration.

When a juror’s note asked “is a work considered to have been copyrighted, *i.e.*, are there any procedures that must take place to copyright a work?,” the court answered: “the Court’s charge contains all of the instructions regarding the law.” Plaintiff did not object to the court’s answer when given.

Scenes a Faire

Plaintiff challenged the jury instruction that “copyright protection is denied to those expressions that are standard,

stock, or common to a particular topic or that flow necessarily or naturally from a common theme or setting.” Plaintiff contended that the instruction placed undue emphasis on defendants’ arguments about stock characters and situations in two works that dealt with philandering husbands and abused wives.

The court held that because plaintiff’s play included both copyrightable expression and non-copyrightable *scenes a faire*, an instruction differentiating the two was not only proper, but necessary.

Weight of the Evidence

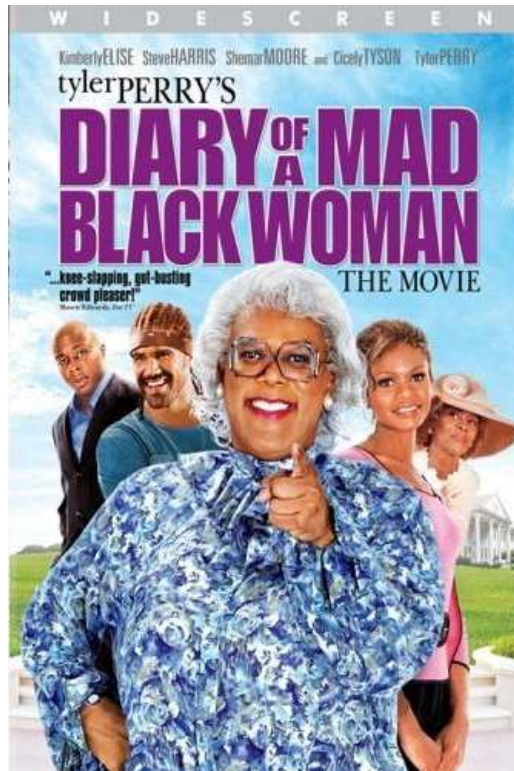
The court held the jury could reasonably conclude there was no access by Perry to plaintiff’s play or probative similarity. Additionally, the jury could find that the works were not strikingly similar – based on the admission by plaintiff’s expert that she could not opine that Perry must have copied, and the testimony of defendants’ expert that Perry could have created his work independently of plaintiff’s play.

(Defendants were able to show the jury both works during cross-examination of plaintiff, crucially before plaintiff’s similarity expert testified).

Finally, the jury could reasonably have determined there was no substantial similarity, as the jury saw the movie and heard the plaintiff read her play from the stand.

The defense verdict thus was not against the great weight of the evidence.

Lou Petrich, Abigail Jones and Jamie Lynn Frieden of Leopold, Petrich & Smith of Los Angeles and Rick Faulkner of Longview, Texas represented defendant Lions Gate Entertainment, Inc. Defendant Tyler Perry was represented by Veronica Lewis and Dimitri Dube of Vinson and Elkins of Dallas, Texas. Plaintiff was represented by Aubrey “Nick” Pittman and Willie Briscoe of Dallas, Texas.



After a trial in which each side was allowed only 12 hours for examination, a jury rejected a \$40 million copyright infringement claim and rendered a defense verdict in favor of Tyler Perry, his production company and Lions Gate Entertainment.

Fair Use Stake Driven Through The Heart Of Monster Copyright Claim

By M. Kelly Tillery, Cara M. Kearney,
and Christopher D. Olszyk, Jr.

The right to Fair Use of copyrighted works has been vindicated for a one-man publishing house known for his biographical artist career retrospectives. In *Warren Publishing Company and James Warren v. J. David Spurlock d/b/a Vanguard Productions*, No. Civ. 08-3399, 2009 WL 2412542 (E.D.Pa. Aug. 4, 2009), United States District Judge Michael M. Baylson, by his Summary Judgment ruling in favor of Defendant on all counts, reiterated the importance of the Fair Use exception to the Copyright Act: Fair Use is a fundamental policy of the Copyright Laws which is equally as important as a copyright owner's property right.

Background

Famous Monsters of Filmland is a magazine of yesterday, originally published by Plaintiff James Warren and his original Warren Publishing Company from 1958 to 1983. The magazine was geared toward fans of monster movies and movie monsters. It contained articles about popular and classic monster movies, photos and stills from favorite monster movies, editorials, and mail order advertisements for the company's latest and greatest monster paraphernalia. The covers of the magazines were often adorned with colorful reproductions of paintings of movie monsters created by various artists. The original magazine folded in 1983, and much of the "monster" artwork that appeared on the covers lay hidden in storage for decades.

One of the most prolific and well-known artists whose work appeared on the covers of *Famous Monsters* was Basil Gogos. Mr. Gogos was a freelance artist who produced cover art for 51 of the 191 issues of *Famous Monsters*, as well as numerous other magazines and publications. Although he is best known for his monster-movie art, Mr. Gogos also has had a decades-long career producing Old West images, work for various men's magazines, and a wide variety of other types of commercial and fine artwork.

Defendant J. David Spurlock, an author, editor and publisher of Vanguard Productions, a small but distinguished publishing company, sought and was granted Mr. Gogos' permission to publish a retrospective of Mr. Gogos' career as an artist, featuring 160 of Mr. Gogos' works. A number of

the works Mr. Spurlock used in the Gogos retrospective were (1) reproductions of paintings that were featured on covers of *Famous Monsters* magazine and, where the original painting was not available, (2) reproductions of actual *Famous Monsters* magazine covers.

In 2004, Mr. Spurlock approached Mr. Warren about collaborating on a retrospective book on Gogos' monster-art career, but after the two debated multiple options, including a Gogos-focused book and a Warren Publishing-focused book, an agreement was never reached. Relying on his conviction that he was entitled to use the works pursuant to the Copyright Act's Fair Use exception, 17 U.S.C. §107, Mr. Spurlock went ahead and published the book, entitled *Famous Monster Movie Art of Basil Gogos* (the "Gogos Book"), without Mr. Warren's blessing.

The Gogos Book, originally published in March 2006, was a critically acclaimed success in the science fiction/comic/monster genres, quickly earning praise and awards within the industry. However, believing he was owed a slice of the book's acclaim and profits, Mr. Warren filed suit on July 21, 2008, seeking (1) injunctive relief and \$3.6 million in Statutory Damages for infringement of 36 copyrights (later reduced to 24) in various Warren Publishing Company magazines (most notably *Famous Monsters of Filmland*), and (2) damages under Pennsylvania Common Law for Unfair Competition. Mr. Warren's copyright claims stemmed from his asserted ownership in the magazine covers reproduced in the book and in the Gogos artwork itself, which Mr. Warren claimed he owned as works-for-hire under the Copyright Act of 1909.

Copyright Fair Use

In granting Summary Judgment to Mr. Spurlock on all counts, the Court dismissed Plaintiffs' claims for Copyright Infringement and found that Mr. Spurlock's use of the magazine covers and artwork was fair. In so ruling, the Court considered each of the statutory factors: (1) the purpose and character of the use, (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. 17 U.S.C. § 107.

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The Court found that the first factor, the purpose and character of the use, weighs heavily in favor of Mr. Spurlock. The Court was guided by the examples of Fair Use set forth in the preamble of §107 (works reproduced “for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research”), and found that the Gogos Book, as a biography or career retrospective, fits “comfortably within” the statutory categories, which reinforced the Court’s conclusion that Mr. Spurlock’s use was highly transformative.

Whether or not a work is transformative is a key consideration in the factor one “purpose and character” analysis. In other words, is the allegedly infringing use of a work for purposes different from the use of the original work, or does it merely repackage, republish, and supersede the original? In this case, the Court found the Gogos Book to be highly transformative, as it takes the reader through the history of Mr. Gogos’ work and career, whereas the works as used on the *Famous Monsters* magazines were used to help sell magazines, to describe the latest in monster movies through an eye-catching display, and to convey to the reader or potential reader what topics the magazine discussed in that issue.

Another consideration in the factor one “purpose and character” analysis is whether the defendant acted in bad faith. The Court summarily dismissed Plaintiffs’ assertion that Mr. Spurlock’s use of the works after being denied permission from Plaintiffs amounted to bad faith. Citing to the seminal Supreme Court decision on fair use, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Court reiterated “the important lesson on bad faith to be taken from Campbell [] that a defendant’s ‘request for permission to use the original’ and ‘being denied permission to use a work do[] not weigh against a finding of fair use.’ Where the defendant requested permission, ‘the offer may simply have been made in a good-faith effort to avoid [] litigation.’” *Opinion* at 22-23 citing *Campbell*, 510 U.S. at 585 n. 18.

The second factor in the Fair Use analysis requires the Court to consider the “nature of the copyrighted work.” 17 U.S.C. §107(2). This factor calls for recognition that some works are closer to the core of intended copyright protection than others. The Court found that this factor weighed slightly

in favor of Plaintiffs, but is of limited relevance because the Gogos Book is transformative.

The third factor involves a consideration of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor contains a quantitative (how much was taken) and qualitative (what was taken) analysis. Quantitatively, Mr. Spurlock argued, and the Court agreed, that he copied the cover (one page) of certain issues of *Famous Monsters* magazines, which range in length from 68 to 100 pages. In other words, Mr. Spurlock copied 1 – 1.5% of each work. Plaintiffs relied on *Schiffer Publ’g, Ltd. v. Chronicle Books, LLC*, 2004 WL 2583817 (E.D. Pa. Nov. 12, 2004) in arguing that even though the copyright registrations cover the magazine as a whole, each cover is its own individually copyrighted work. In other words, Mr. Spurlock copied 100% of each work.

The Court rejected Plaintiffs’ argument as contrary to binding precedent and the statute itself, which calls for an analysis of the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3) (emphasis added). The Court

found, as the Third Circuit did in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003), that the portion taken is quite small. *Id.* at 201 (finding that 1.7% to 2.2 % copying to be quantitatively small).

The Court found that Mr. Spurlock’s use was also qualitatively reasonable, that is, the magazine covers did not appropriate “the heart” of the magazine’s content, as the magazine was devoted to updating its readers on recent developments in the monster movie industry and not discussing the cover art or artists.

Finally, factor four, “the effect of the use upon the potential market for or value of the copyrighted work,” weighed slightly in favor of Plaintiffs. In making all factual inferences in favor of Plaintiffs as the Court must on summary judgment, and despite weighing the fact that Plaintiffs had done nothing to exploit their copyrights in over twenty years and had neglected their copyrights entirely for over twenty years against the testimony of Mr. Warren and his experts, the Court found this factor slightly favored Plaintiffs.

The Court concluded that the Fair Use factors, considered as a whole, weighed in favor of Mr. Spurlock: “The fact

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The Court has done a great service to the artists, authors, publishers and the Copyright Bar by reinforcing the boundaries of copyright law.

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that the Gogos Book is inherently biographical render it so fundamentally transformative in nature, coupled with the fact that Spurlock utilized such a quantitatively and qualitatively minor portion of the magazines, requires this Court to conclude that Spurlock's use is fair use and to grant Spurlock's motion for Summary Judgment on the copyright claims."

Common Law Unfair Competition

Defendant also prevailed at Summary Judgment on his defense of Plaintiffs' Common Law Unfair Competition claim, a late-added claim attempting to parlay the nostalgia associated with James Warren as the founder of *Famous Monsters of Filmland* into an actionable claim. Plaintiffs argued that the title of Spurlock's book *Famous Monster Movie Art of Basil Gogos*, created a false association with Plaintiffs' purported common law "Famous Monsters" trademark.

The Court, applying the Lanham Act's test for Unfair Competition (15 U.S.C. §1125(a)), found the title of the book did not falsely link defendant to any "name, title, or 'mark' that is associated with the plaintiff" for the mere fact that Plaintiffs held no trademark or protectable interest in the mark "Famous Monsters."

Most notably, the Court, relying on *Kusek v. Family Circle, Inc.*, 894 F.Supp. 522 (D.Mass. 1995), found any inconsequential use of the mark by Plaintiffs (attendance at trade-shows, selling back issues of the magazine and memorabilia from his personal collection), after ceasing publication of the magazine 26 years ago cannot forestall abandonment. Following the Lanham Act's statutory framework under 15 U.S.C. §1127, the Court found Plaintiffs' non-use for a period of three consecutive years, *prima facie* (and un rebutted) evidence of abandonment. Thus, not only had Plaintiffs' Federal Registration expired decades earlier, but the evidence of record established abandonment of any purported Common Law rights to the mark "Famous Monsters" without any intent to resume use.

Finally, the Court also rejected Plaintiffs' residual goodwill argument, dismissing the limited authority raised by Plaintiffs that even despite abandonment, the "Famous Monsters" mark, the public association with the name created a protectable interest. Having no trademark (either Federal or at Common Law), and no protectable interest in the terms "Famous Monsters", no cause of action for Unfair Competi-

tion existed, and appropriately the Court granted Defendant's Summary Judgment motion with respect to unfair competition as well.

Conclusion

The Court's decision as a whole is not groundbreaking. It does not make new law, but merely applies old, well-established Copyright Fair Use principles to a particular set of unique facts. As the Supreme Court has observed, defenses such as Fair Use should be encouraged as much as legitimate infringement claims so that "the boundaries of copyright law" are "demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). The Court here has done a great service to the artists, authors, publishers and the Copyright Bar by reinforcing the boundaries of copyright law. This decision will serve as very real and practical guidepost to a myriad of players in the copyright field.

Final Judgment was entered August 5, 2009 in favor of Defendant on all claims. A motion for over \$300,000 in attorneys fees and costs, pursuant to 17 U.S.C. §505 is currently pending with the Court.

M. Kelly Tillery, Cara M. Kearney, and Christopher D. Olszyk, Jr. in the Philadelphia office of Pepper Hamilton LLP represented the Defendant in this case. Manny D. Pokotilow, Salvatore Guerriero, and Douglas Panzer of the Philadelphia law firm of Caesar, Revise, Bernstein, Cohen & Pokotilow, Ltd. represented the Plaintiffs.

Any developments
other MLRC members
should know about?

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Copyright Claim Against Blogger Dismissed

Plaintiff's Photos on Gripe Site Deemed a Fair Use

One decision raising eyebrows is the recent decision from the Northern District of California, holding that a blogger's use of copyrighted images was fair use. [Sedgwick Claims Management Services, Inc. v. Delsman](#), No. 09-1468, 2009 WL 2157573 (N.D. Cal. July 17, 2009) (Armstrong, J.).

Background

The plaintiff, an insurance claim management services company, was representing the defendant in his claim for disability benefits. At some point the defendant became dissatisfied with Sedgwick's handling of the claim, and, as a way to retaliate, he began a blog, accusing Sedgwick and its employees ("Sedgthugs") of having committed various "Sedgcrimes." (The blog was maintained at various URLs, including:

- www.sedgwickcms.blogspot.com,
- www.gesupplydiscrimination.com,
- <http://gesupplyrexeldiscrimination.blogspot.com>.

(All websites were still up and running as of August 24, 2009.)

In February 2009, he also began a postcard mailing campaign, taking two copyrighted photographs – headshots of the CEO and the COO – and superimposed them on fugitive style WANTED postcards, which he sent to Sedgwick employees, consumers, and potential consumers. Postcards were captioned with various text; for example, one postcard had large text "WANTED FOR HUMAN RIGHTS VIOLATIONS" across the CEO's photograph, as well as the text "Have you been threatened by this man or his minions? The time for change is at hand!" alongside the photograph. The defendant obtained the photos from a company press release and other websites; the plaintiff registered them with the Copyright Office on March 19.

On April 3, Sedgwick brought suit for trespass to chattels, copyright infringement, interference with prospective

economic advantage, trade libel, defamation and libel, and unfair competition. Acting pro se, the defendant motioned for summary judgment. The court "liberally construed" this as a motion to dismiss the only federal claim, copyright infringement, and a special motion to strike the remaining state law causes of action and, on July 17, dismissed the case.

Regarding the copyright infringement claim, the court considered whether the use qualified for fair use. In keeping with Ninth Circuit precedent, it focused on the first factor (purpose and character of the use) and applied the functionality-based inquiry espoused in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003). The *Sedgwick* court emphasized that the question is not whether the

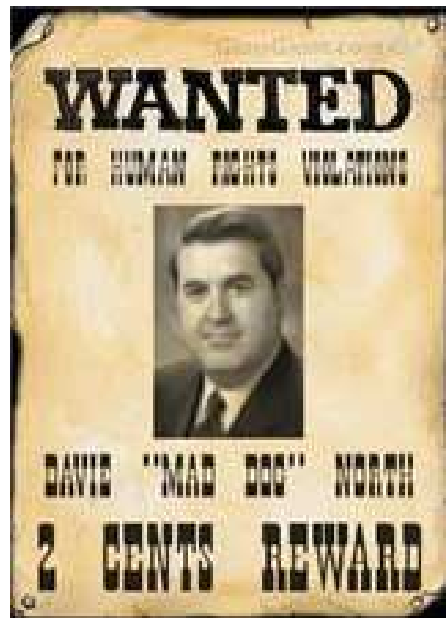
"photographs themselves were unaltered," but rather if the use of the photos, "in the specific context used, was transformative. . . . In that regard, the Ninth Circuit has consistently held that 'making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.'" *Id.* (quoting *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007) and *Kelly*, 336 F.3d at 816)).

The court held that "[h]ere, there can be no legitimate dispute that Defendant's use of [the photographs] was transformative. Both images originally were used by Defendant for promotional reasons. Defendant, however, used the photographs as a vehicle for criticizing the Company." The

court found no claim that the defendant had used the photographs for commercial gain, but noted that "given the transformative nature . . . the matter of whether the use was commercial is less significant."

The court then found that the second factor (nature of the plaintiff's work) was neutral given the transformative nature, and that the third factor (amount of the work used) was neutral, as well, because the use of an entire image "may be reasonable if it serves the defendant's intended purpose." The court briefly discussed the fourth factor (effect of the use on

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One of the disputed postcards.

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the potential market), finding that even if there were a commercial market for the photographs, the use was transformative enough to be a substitute for the original.

The court next considered the remaining state claims in light of California's anti-SLAPP statute, Cal. Code. Civ. Proc. § 425.16(e)(4), which will dismiss claims arising from speech or conduct 1) made in a public forum and 2) involving a matter of public interest. Summarily, the court found both factors met, finding that the second prong was met because

the defendant's purpose in making the statements was "to enlighten potential consumers of Sedgwick's allegedly questionable claims practices and to avoid using the company's services." The court then found that Sedgwick could not overcome the anti-SLAPP motion by showing a probability of prevailing on the merits.

Plaintiff has filed a notice of appeal to the Ninth Circuit.

Plaintiffs are represented by Ian K. Boyd and Seth I. Appel, Harvey Siskind LLP, San Francisco. Defendant is acting pro se.

Seinfeld Defeats Cookbook Competitor's Copyright & Trademark Infringement Claims

No Substantial Similarity Between Books on Cooking Healthy for Kids

Jessica Seinfeld, wife of comedian Jerry Seinfeld and author of best seller *Deceptively Delicious: Simple Secrets to Get Your Kids Eating Good Food*, and publisher HarperCollins, won summary judgment this month on copyright, trademark and related claims brought by Missy Chase Lapine, author of *The Sneaky Chef: Simple Strategies for Hiding Healthy Food in Kids' Favorite Meals*. *Lapine v. Seinfeld*, No. 08 Civ. 128, 2009 WL 2902584 (S.D.N.Y. Sept. 10, 2009) (Swain, J.)

The court found no substantial similarity to support plaintiff's infringement claims.

An additional state law claim for defamation against Jerry Seinfeld, who joked on the David Letterman Show that assassins often have three names, like plaintiff's, was dismissed for lack of jurisdiction after the dismissal of the federal claims.

Background

Plaintiff Lapine is a classically-trained cook, member of Parenting Magazine's team of experts, and former faculty member at New York's New School Culinary Arts Program. HarperCollins rejected her original proposal for *Sneaky Chef* twice in early 2006, and the book was later published by Running Press in April 2007. Seinfeld's allegedly infringing work was published by HarperCollins in October of that same year. Both books were built on the theme of "camouflaging carefully-selected pureed healthy food inside children's favorite meals."

District Court Decision

As Judge Swain emphasized in her September 15 opinion, the only similarities that matter in an infringement case are those concerning the elements of a work that are protected under copyright law. Indeed, Lapine acknowledged that neither her individual recipes, nor the idea of camouflaging vegetables in kid-friendly food, are copyrightable per se. Lapine instead argued that her unique arrangement of a variety of elements, which are not copyrightable in themselves, is itself copyrightable as an original compilation. She further argued that while the *idea* of sneaky cooking may not be copyrightable, her particular *expression* of it is.

Copyright protection is generally extended to compilations so long as they embody some small degree of creativity. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991). The amount of protection given to such works is often rather thin, though it can vary depending on the measure of creativity contained therein. Rather than attempting to articulate those creative aspects of *The Sneaky Chef* which are subject to copyright protection, the court investigated each point of alleged similarity for possible infringement. Many of the similarities, the court determined, were the almost inevitable result "of the similar medium of expression used, or of the similar subject matter that both cookbooks address."

Anecdotes about mothers dealing with picky eaters and drawings of cooks winking or holding their finger up to their lips in a shushing gesture were held to be stock elements,

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which are never offered copyright protection.

The manner in which chapters were organized, or in which kitchen tools and ingredients were listed, were also found to be insufficiently novel.

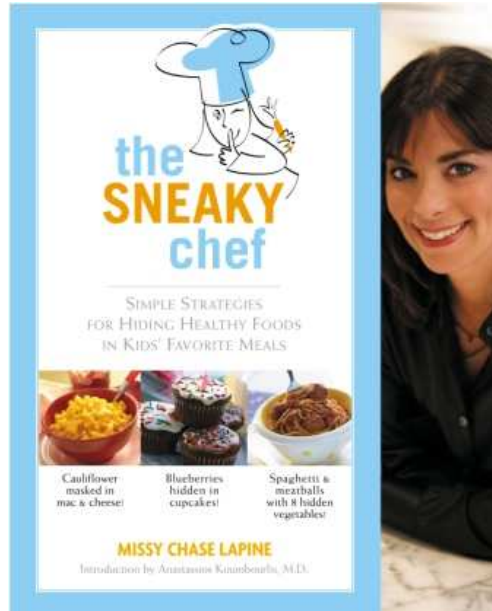
After undercutting the foundation of Lapine's argument for protection based on creativity, the court compared the "look and feel" of each work considered as a whole. Lapine's work, which includes discussions of child behavior, parenting, and food philosophy in addition to its more traditional cookbook component, was described as text-heavy, relatively colorless, and didactic as opposed to collegial. *Deceptively Delicious*, on the other hand, was said to target a different audience, with its cheerfully splashy color spreads, simplified cooking instructions, and personal tone.

Given the low level of copyright protection available to Lapine's work, combined with the dissimilar "look and feel" of the two cookbooks, the court found no support for "a finding of substantial similarity between the two works."

As a result, the court granted summary judgment in favor of Seinfeld and Harper-Collins, dismissing Lapine's copyright infringement claims.

Trademark Infringement Claims

The reasons for the failure of Lapine's trademark claims and for the failure of her copyright claims are related. Assuming that there are trademarks affiliated with *The Sneaky Chef* that are protected by law (the court does not waste its time investigating this claim), the marks are not similar enough to sustain a claim of infringement. Under both the Lanham Act and New York



Law, the plaintiff must show that the defendant's actions are "likely to confuse consumers as to the source or sponsorship of [plaintiff's product]." The court's comparison of Seinfeld's marks—which include a colorful and detailed drawing of a casually-dressed woman, a pink plaid pattern, and the title phrase "Deceptively Delicious"—with Lapine's marks—which include a simple and mostly colorless sketch of a chef, and a different title and overall aesthetic—yielded few similarities.

The only meaningful similarities between these marks were the result of theme and necessity. Motivated by these findings, the court found that the marks were not confusingly similar as a matter of law, entitling Seinfeld to summary judgment on the trademark claims.

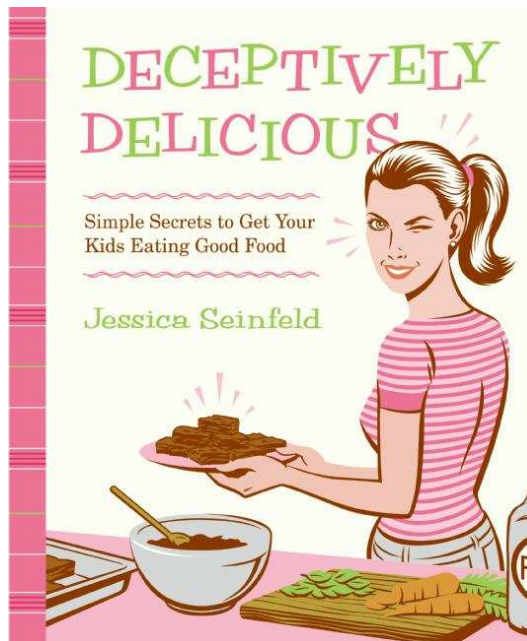
Defamation Claim

The defamation claim against Jerry Seinfeld was based on a comedic exchange in October 2007 on the David Letterman show. Although

he did not mention Lapine by name, Seinfeld referred to her claim against his wife as "vegetable plagiarism,"; noted that "wackos will wait in the woodwork ... to inject a little adrenaline in your life experience"; and that the complaining author "was a three name woman — many of the three-named people do become assassins."

Plaintiff was represented by Christopher Seeger, David Buchanan, Seeger Weiss

LLP, NY; and Howard B Miller, Joseph Gjonola, Girardi & Keese, Los Angeles, CA. Defendants were represented by Orin Snyder, Theodore Boutrous, Gibson, Dunn & Crutcher LLP; and Richard Glen Menaker, Cheryl Lynette Davis, Menaker and Herrmann, Los Angeles, CA.



Federal Court Enjoins U.S. Publication of “60 Years Later: Coming Through The Rye”

Second Circuit to Hear Expedited Appeal in Copyright Infringement Case

By Maura J. Wogan and Marisa Sarig

The tension between copyright protection for a work of fiction and the right of a subsequent author to use elements of that work for purposes of parody, commentary and criticism is at the heart of *Salinger v. Colting, et al.*, 09 Civ. 5095 (S.D.N.Y.) (DAB), a case currently pending before the Second Circuit Court of Appeals.

Defendants Fredrik Colting, Windupbird Publishing Ltd., Nicotext A.B., and SCB Distributors Inc. have appealed from a lower court order banning the publication and distribution of *60 Years Later: Coming Through The Rye* (“60YL”), a novel written by Colting (writing under the pseudonym J.D. California).

Background

60YL has been published in the United Kingdom and was scheduled for publication in the United States in September 2009. Apparently upon learning of *60YL*, J.D. Salinger initiated a suit in the Southern District of New York, alleging copyright infringement of the book *The Catcher in the Rye* (“*CITR*”) and the character Holden Caulfield, as well as a claim for common law unfair competition. Salinger simultaneously moved for a preliminary injunction to enjoin the publication *60YL*.

Defendants opposed Salinger’s motion, denying that there had been any infringement of *CITR* or *Holden* and argued that, to the extent that *60YL* incorporated any copyrightable material from *CITR*, such use was protected by the fair use doctrine. They also asserted *60YL* is a highly transformative work of commentary and criticism that explores the relationship between Salinger and Holden, his most famous character.

Defendants argued that *60YL* is not a sequel to *CITR* – it is not a continuation or retelling of *CITR*, nor could it possibly satisfy the public interest in what happened to Holden or any of Salinger’s other characters. Rather, *60YL* examines the widely-held impression of Holden as a free and independent hero, by juxtaposing it against the one (based on reality) that the reclusive Salinger is an author imprisoned by writer’s

block and fear of failure. In *60YL*, Colting creates an imaginary world where Mr. C (the 76-year-old Holden) and the 90-year-old Salinger meet face-to-face sixty years after the events in *CITR* took place, and Salinger tries to kill Mr. C so that he too can be free.

Defendants also argued that, in *60YL*, the character Mr. C is entirely transformed and has little resemblance to Holden. Mr. C (who is never referred to as Holden) has the physical attributes and concerns of a 76-year-old man, not a sixteen-year-old boy. Mr. C is not even a real person (in the sense that Holden was portrayed as a real person in *CITR*). Rather, he is a cardboard fictional character under the control (to greater and, then, lesser degrees as the story proceeds) of Colting’s Salinger character. Mr. C exists only to serve Salinger’s own purposes, and Colting’s as well.

Finally, defendants argued that an injunction would constitute an unconstitutional prior restraint and was otherwise inappropriate because there was no evidence of irreparable harm. Defendants also submitted evidence establishing that, in fact, no harm would result from the publication of *60YL*.

The District Court Opinion

By order entered July 1, 2009, Judge Deborah A. Batts granted a preliminary injunction barring the defendants from publishing, advertising or otherwise distributing *60YL* in the United States during the pendency of the suit. The District Court held that *60YL* constituted an unauthorized infringement of *CITR*. Central to this holding was the court’s determination that both *CITR* and the literary character of Holden Caulfield deserved copyright protection, and that, based upon the court’s comparison of *CITR* and *60YL*, there was substantial similarity between the two works.

The District Court also held that *60YL* did not qualify for protection under the fair use doctrine, finding that *60YL* “contains no reasonably perceived parodic character as to *CITR* and Holden Caulfield” because “[Colting’s commentary was] thoroughly depicted and apparent in Salinger’s own narrative about Caulfield.”

The District Court also found that *60YL* was not transfor-

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mative because Colting used *60YL* as a “tool with which to criticize and comment on the author, J.D. Salinger and his supposed idiosyncrasies,” rather than “direct[ing] criticism toward [*CITR*] and Caulfield themselves.”

While recognizing that the publication of *60YL* would not harm the market for *CITR*, the Court held that allowing works like *60YL* to be published would likely harm the market for any authorized derivative works. Concluding that Salinger had established a *prima facie* case of copyright infringement, the District Court, without further analysis, held that irreparable harm may be presumed.

The District Court did not address whether the balance of hardships between the parties warranted the injunction nor did it consider the effect of the injunction upon the public interest.

The Second Circuit Appeal

Defendants immediately appealed the injunction order. The Circuit Court will hear the appeal on an expedited schedule.

In their appeal, defendants argue that the District Court’s order barring the publication of *60YL*, a transformative work of fiction that criticizes and comments upon Salinger, *CITR* and Holden, is an impermissible prior restraint not tolerated by the First Amendment. While injunctions might be appropriate in copyright cases involving “simple piracy,” the same is not true of a case, like this one, concerning a transformative work of fiction that copied minimal elements from the original.

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court warned that the goals of copyright are not always served by issuing injunctions, even if the taking from a copyrighted work goes “beyond the bounds of fair use.” *Id.* at 578 n.10. There is a vast difference between cases involving “simple piracy,” where injunctions may be warranted, and those “worlds apart” that raise reasonable contentions of fair use. *Id.* See also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (vacating District Court injunction against publication of work that parodied *Gone with the Wind*).

The defendants argue that the District Court improperly ignored the Supreme Court’s standard for injunctions set forth in *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006), which, among other things, requires plaintiffs to show actual

irreparable harm that cannot be compensated with monetary damages. *Id.* at 392-93. The record before the Court is devoid of any evidence of harm to Salinger.

Finally, the defendants argue that the District Court failed to balance the harm visited upon defendants, and the public, by the entry of the injunction. See *Winter v. Natural Res. Defense Council, Inc.*, 129 S. Ct. 365 (2008). Furthermore, by limiting the public’s access to a work of academic and entertainment value, the injunction encroaches upon freedom of speech generally.

Indeed, the Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In addition, defendants argue that Salinger failed to prove that he was likely to succeed on the merits of his claims: *60YL* is not an infringement of Salinger’s copyrights. Defendants also argue that, even if there were copyright infringement, *60YL* is entitled to the affirmative defense of fair use.

Taking each of the four fair use factors in turn, Defendants have shown that: (i) *60YL* is a transformative work of fiction that comments both upon Salinger and his underlying work, though commentary on Salinger alone would have been sufficient given the highly transformative nature of Colting’s book; (ii) the nature of *CITR* as a work of fiction does not militate against a finding of fair use, especially where the “thin” copyright in a character is at issue; (iii) *60YL* took only what was reasonably necessary from *CITR* to satisfy its parodic purpose; and (iv) there is no evidence that *60YL* harms the market for *CITR* or any authorized derivatives.

Salinger’s brief in the Second Circuit is due on August 13 and defendants’ reply is due August 21. The case is scheduled for argument on September 3, 2009. A copy of the brief filed by defendants in the Second Circuit can be found at <http://www.fkks.com> and describes in more detail the transformative nature of *60YL*.

The injunction issued by the District Court prevents the public -- including readers of this article -- from reading the actual book and seeing for themselves that it constitutes fair use.

Edward Rosenthal, Maura Wogan, Jessie Beeber and Cameron Myler of Frankfurt Kurnit Klein & Selz, PC in New York represent the defendants in this case. Marcia Paul, Kevan Choset and Deborah Adler in the New York office of Davis Wright Tremaine LLP represent J.D. Salinger and the J.D. Salinger Literary Trust.

District Court Summarily Dismisses Claim That *Las Vegas* Series Infringed Plaintiffs' Movie Script, Television Treatment

No Substantially Similarity

By David Halberstadter

Judge Gary Allen Feess of the Central District of California has entered judgment and awarded attorneys' fees in favor of DreamWorks LLC in a copyright infringement lawsuit in which the plaintiffs claimed that the television series *Las Vegas* infringed upon their movie script and their separate television series proposal. Each of plaintiffs' works, like the *Las Vegas* series, was set in an upscale Las Vegas hotel/casino. DreamWorks executive produced the television series. *Todd Camhe, Jonathan Segal et al. v. DreamWorks LLC*, No. 07-3741-GAF (C.D. Cal. filed May 14, 2009).

Applying the Ninth Circuit's "extrinsic test" for substantial similarity by objectively comparing each of plaintiffs' works to the television series, the court found that there was no basis for plaintiffs' infringement claims as a matter of law. The only similarities between plaintiffs' works and the *Las Vegas* television series were unprotectable *scenes a faire* and stock elements that would be expected in any work about high-end Las Vegas hotel/casinos and the people who work in and visit such locales. The court refused to allow plaintiffs to aggregate their separate works into a single comparison with *Las Vegas*, and declined to apply the so-called "inverse ratio rule" to lessen plaintiffs' burden of proving substantial similarity.

Background

By early 2000, plaintiffs had written two different works situated in Las Vegas. The first, a motion picture screenplay titled *Fringe Players*, tells the story of a young casino host who aspires to wealth and power by attracting high rollers – known as "whales" – to his casino. This modern variant on the Faust legend focuses on the host's efforts to land the largest "whale" and the unanticipated, unwelcome consequences that follow when he succeeds. The second work, a detailed outline (or "treatment") for a television series titled *Hard Rock Hotel*, centers around the hotel/casino's wealthy, manipulative owner and his ambitious employees, who stab each other in the back to advance their careers.

According to plaintiffs, in connection with an August 2000 presentation regarding an unrelated project, they provided copies of their Las Vegas-based works to DreamWorks executives. DreamWorks ultimately passed on plaintiffs' project.

Two years later, the well-regarded screenwriter Gary Scott Thompson (*Hollow Man, The Fast and the Furious*) worked with DreamWorks to develop the television series *Las Vegas*, which aired on the NBC network from 2003 to 2008. *Las Vegas* follows the elite surveillance team charged with maintaining security at the fictional Montecito Hotel. The ensemble of characters includes the ex-CIA head of security, his rebellious daughter and his ex-Marine second-in-command, a casino host, an MIT graduate who works as head valet, the special events director and the head pit boss. All of the series' episodes center on surveillance and security issues at the hotel/casino as a variety of visitors come and go, and on the relationships between and among the principal characters and others.

Following the completion of discovery, DreamWorks moved for summary judgment. It contended, among other things, that the *Las Vegas* series was not substantially similar in protectable expression to either of plaintiffs' works.

The motion was vigorously opposed by plaintiffs, who argued that the court properly could consider their screenplay and treatment together for purposes of comparing them to *Las Vegas*. They asserted that evidence of DreamWorks' access to their works required the court to apply a lower standard of substantial similarity under the "inverse ratio rule" that the Ninth Circuit had applied in certain earlier decisions. Finally, plaintiffs claimed that the evidence of similarities between their works and *Las Vegas* precluded summary judgment.

District Court's Ruling

The district court heard argument on DreamWorks' motion in late February 2009 and issued its written order granting summary judgment on May 14, 2009. The court first addressed plaintiffs' contention that the "inverse-ratio rule" applied to lower their burden of proof of substantial similarity

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because of the purported evidence of DreamWorks' access to plaintiffs' works.

The Inverse Ratio Rule. The court observed that several decisions in the Ninth Circuit have questioned "the viability and imagined logic" of the rule, which was described in the copyright treatise *Nimmer on Copyright* and first acknowledged by the Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977). For example, the court pointed out that in *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987), the Ninth Circuit had opined that "no amount of proof of access will suffice to show copying if there are not similarities." Judge Feess observed that in *Aliotti*, the Ninth Circuit explained that since no amount of access relieves the plaintiff of proving substantial similarity, the "inverse ratio rule" confuses and even conceals the substantial similarity requirement.

The district court pointed out that more recently, in *Funky Films, Inc. v. Time Warner*, 462 F.3d 1072, 1077 (9th Cir. 2006), the trial court had assumed access in ruling on a motion for summary judgment and granted a defendant's motion on a finding of no substantial similarity. The plaintiff on appeal claimed that a continuance should have been granted to permit it to develop evidence of a high degree of access so that it could invoke the inverse ratio rule. The Ninth Circuit rejected the argument and affirmed the trial court, noting: "We do not agree that appellants' invocation of the inverse-ratio rule requires reversal of the district court's decision. No amount of proof of access will suffice to show copying if there are no similarities, and, in this case, additional discovery would not change the fact that the two works lack any concrete or articulable similarities."



The only similarities between plaintiffs' works and the *Las Vegas* television series were unprotected scenes a faire and stock elements that would be expected in any work about Las Vegas. . .

Judge Feess concluded that regardless of the degree of purported access, plaintiffs still bore the burden of proving the full measure of substantial similarity between *Las Vegas* and their own works.

Aggregation of plaintiffs' Works. Next, the district court considered plaintiffs' contention that they could combine their two distinct works (their motion picture screenplay and television series treatment) to show substantial similarity to *Las Vegas*. DreamWorks had argued that each of plaintiffs' works had to be compared separately to *Las Vegas* and subjected to separate substantial similarity analyses.

Judge Feess agreed with DreamWorks, finding no legal support for plaintiffs' aggregation theory. Plaintiffs had relied upon *Metcalfe v. Bochco*, 294 F.3d 1069 (9th Cir. 2002), in which the plaintiff's infringement claim was based upon a written treatment and two versions of a screenplay for a potential television series, all of which told the same basic story. According to Plaintiffs, the *Metcalfe* court held that the treatment and the film script in combination were sufficiently similar to withstand summary judgment.

Judge Feess rejected this argument, holding that "*Metcalfe* contains no such holding and the court nowhere stated that it considered the works in combination. Indeed, the [*Metcalfe*] court's own summary of the case indicates that the court was comparing one screenplay with another." The Ninth Circuit discussed "aggregation" in *Metcalfe* only for the purpose of explaining that unprotected elements could be selected and sequenced in a single work in such a way that the aggregation reflected sufficient originality to justify protection under the Copyright Act.

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In the district court's view, "*Metcalf* holds that an author's selection and sequencing of elements may be protectable, but not that the court should comb through an author's multiple works, imagine a new work amalgamated from those works, and then assess whether a defendant's work is substantially similar to, and therefore infringes, the amalgamated works of the plaintiff."

The court also found that the Second and Sixth Circuit decisions relied on by plaintiffs were likewise inapposite. In short, "none of these cases support combining plaintiffs' different works into a single copyright analysis. ... [O]ne looks to both works to identify protectable elements, but that process does not require, contemplate or even permit aggregation."

No Substantial Similarity in Protected Expression. After addressing these preliminary issues, the district court applied the Ninth Circuit's "extrinsic test" for substantial similarity by comparing each of plaintiffs' works to the television series *Las Vegas*. Judge Feess observed that the only common elements between plaintiffs' works and the DreamWorks series were unprotectable.

In the court's opinion, "[t]he most obvious similarity is the locale – Las Vegas and its environs and the characters that inhabit that environment.

However, none of these elements provides any basis for a copyright claim: "The city of Las Vegas in general, and hotels and casinos in particular, have provided the setting for movies since at least 1960 when the original *Ocean's Eleven* was released Since then, many movies, some well known, others not, have been set in Las Vegas with casino life frequently a story element. Some of the more famous include: *Leaving Las Vegas* (1995); *Showgirls* (1995); *Godfather II* (1974); *Honeymoon in Vegas* (1992); *Ocean's Eleven* (2001); *Casino* (1995)."

The court noted "[a]ll of these movies share a locale and a wide variety of stock characters associated with casinos, hotels, and gambling, including: valets, pit bosses, casino hosts, pathetic losers, celebrities, high-rollers, and call girls... Likewise, the idea that a story about Las Vegas may feature sexy characters engaged in uninhibited, fleeting, perhaps illicit, relationships can hardly be described as novel or original."

Judge Feess concluded from his detailed review and comparison of the *Las Vegas* series and plaintiffs' works that there was no similarity in protectable expression between the works, and that plaintiffs therefore could not satisfy their bur-

den of proving infringement as a matter of undisputed fact and law.

Award of Attorneys' Fees

Following the summary judgment order, DreamWorks sought entry of a proposed judgment that entitled it to seek recovery of its attorneys' fees. Plaintiffs objected to the proposed judgment's language concerning attorneys' fees recovery, arguing that the "mere awarding of summary judgment on a copyright claim does not warrant the awarding of attorney fees."

In a separate Minute Order issued on May 28, 2009, the district court overruled plaintiffs' objections and finding that DreamWorks was entitled to recover its attorneys' fees. In deciding to award DreamWorks its attorneys' fees, the court expressly followed the principles articulated by the United States Supreme Court in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), and the standards adopted by the Ninth Circuit upon remand of that decision in *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 557-58 (9th Cir. 1996). Specifically, the court:

considered that DreamWorks prevailed on summary judgment because, as a matter of law, its work was not substantially similar to plaintiffs' works. It considered that the majority of the similarities plaintiffs identified between the works were not protectable. It considered how plaintiffs improperly, and in clear contravention of established law, attempted to aggregate two separate works for purposes of comparison with DreamWorks' allegedly infringing television show, *Las Vegas*. The Court also considered plaintiffs' motivation in bringing suit, after threatening DreamWorks with infringement litigation if DreamWorks did not hire plaintiffs as staff writers on *Las Vegas*. The Court concluded the successful defense of plaintiffs' claims encourages further creative works and furthers the policies of the Copyright Act "every bit as much as successful prosecution of an infringement claim." *Fogerty*, 510 U.S. at 527.

Gail M. Title, David Halberstadter and Tiffany J. Hofeldt of Katten Muchin Rosenman LLP in Los Angeles represented DreamWorks. Plaintiffs were represented by Storch Amini & Munves, P.C. in New York and Ghoreichi Law Firm in Los Angeles..

FCC Chair Genachowski Announces Support for “Net Neutrality”

“How do you design a network that is ‘future proof’ – that can support the applications that today’s inventors have not yet dreamed of?” With this quote from historian John Naughton, new FCC Chairman Julius Genachowski announced on September 21 that the FCC would back “net neutrality.”

“Net Neutrality” is a catch phrase for the general principle of equal treatment in online traffic – and short hand for various proposals for new government regulation. Proponents of net neutrality object to “traffic shaping” by Internet service providers, usually by slowing down some forms of online traffic, like file-sharing, while giving others priority.

The issue began to gather steam in 2007, when the AP reported that Comcast, the nation’s largest cable TV operator and No. 2 Internet provider, was blocking some Internet traffic. Nationwide tests conducted by the AP found that users could download files without hindrance from file-sharing sites like BitTorrent, but uploading files were blocked or delayed by Comcast. The technology used by Comcast was described by the AP as thus: “If it were a telephone conversation, it would be like the operator breaking into the conversation, telling each talker in the voice of the other: ‘Sorry, I have to hang up. Good bye.’” Following the article, public interest groups such as Public Knowledge began to embrace the concept of “net neutrality,” and while campaigning, President Obama pledged to endorse it.

The “National Broadband Plan,” as introduced by Genachowski, would expand rules that prohibit ISPs from filtering or blocking net traffic, seeking to cover all broadband connections, including data connections for smartphones. In addition to the four current broadband principles—often condensed to “any lawful content, any lawful application, any lawful device, any provider”—Genachowski suggested adding two more, first denying broadband providers the right to discriminate against services or applications by slowing them down, and second, by requiring broadband providers to tell customers how the engineers manage the network when it gets congested.

Proponents argue that no commercial entity should be able to pick the winners and losers, such as by crippling the growth of technologies requiring large bandwidth such as file-sharing sites like BitTorrent or other applications such as Skype. As Genachowski stated, the lack of competition in the broadband market means the providers’ “rational bottom-line interests may diverge from the broad interests of consumers in competition and choice.”

Opponents argue that the rules will mark the end of the era of “all-you-can-eat, flat-rate internet access,” as companies and consumers using broader bandwidth will be charged more. Furthermore, they argue, the rules will stifle attempts at innovation, such as finding ways to prioritize video calls over less urgent traffic such as photo uploads. Given that bandwidth is not unlimited, the ISPs argue that their engineers need the freedom to shape traffic in order to stop spam and viruses, and to keep the system running during peak times.

Further reading:

Marc Lawrence-Apfelbaum, "The Net Neutrality Debate," MLRC MEDIA LAW LETTER, [July 2007](#), at 49.

Dylan F. Tweney, *FCC Position May Spell the End of Unlimited Internet*, Wired.com, Sept. 21, 2009, at <http://www.wired.com/epicenter/2009/09/fcc-neutrality-mistake/>.

Public Knowledge, “Network Neutrality,” <http://www.publicknowledge.org/issues/network-neutrality> (last visited Sept. 25, 2009).

Carole E. Handler, *The Struggle Over Net Neutrality*, Law.com, Feb. 23, 2009, at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428474927>.

Update: Complaint Against Google for Ringtone Advertisements Dismissed

Plaintiff Failed to Plead “Plausible” Facts to Avoid Section 230

A federal district court in California dismissed a complaint against Google seeking to hold it responsible for allegedly fraudulent third party ring tone advertisements that appear on the web as part of Google’s AdWords program. *Godard v. Google, Inc.*, No. 08-2738, 2008 WL 5245490 (N.D.Cal. July 30, 2009) (Fogel, J.).

Last year the court [dismissed](#) the complaint under Section 230 of the Communications Decency Act. But the court allowed the plaintiff to amend her complaint and potentially plead around Section 230 by fleshing out her allegations that Google helped create the advertisements.

At issue in the case are advertisements by mobile service subscription providers (“MSSPs”) who sell ringtones which are charged directly to the buyer’s cell phone bill. Plaintiff alleged she clicked on a MSSP ad created as part of Google’s AdWords advertising program and that the MSSP made fraudulent charges to her cell phone bill.

The plaintiff brought a variety of claims against Google, including violation of California’s unfair competition law, breach of contract, negligence and aiding and abetting liability.

In her amended complaint, plaintiff alleged that Google’s involvement in creating the ads “was so pervasive that the company controlled much of the underlying commercial ac-

tivity engaged in by the third-party advertisers.” And that Google “not only encourages illegal conduct, [but] collaborates in the development of the illegal content and, effectively, requires its advertiser customers to engage in it.”

The court noted that these allegations supported by specific allegations of fact “would remove Plaintiff’s action from the scope of CDA immunity.” However, plaintiff’s attempt to plead around Section 230 failed because her allegations were “labels and conclusions.” The “formulaic recitation of the elements” of CDA developer liability ... will not do.” Quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Under the *Twombly* standard the plaintiff would have to allege facts “that plausibly suggest the collaboration, control, or compulsion that she ascribes to Google’s role in the creation of the offending AdWords.” However, plaintiff “did not come close to substantiating the ‘labels and conclusions’ by which she attempts to evade the reach of the CDA.”

Google was represented by Karen Johnson-McKewan, Kikka N. Rapkin, Nancy E. Harris, and Nikka Noel Rapkin of Orrick Herrington & Sutcliffe LLP in San Francisco. Plaintiff was represented by Alan Himmelfarb of Kamberedelson LLC in Vernon, CA and Michael James McMorroff of Kamberedelson LLC in Chicago.

Shooting Victim’s Complaint Against Craigslist for Sale of Gun Dismissed

In a recent decision, a federal court in New York dismissed a complaint against Craigslist, the online classified advertising site, seeking to hold it responsible for injuries caused by a handgun purchased through the site. *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (S.D.N.Y. June 15, 2009) (Berman, J.). The court held that the complaint was barred by Section 230 of the Communications Decency Act.

The plaintiff alleged he was shot by an assailant who bought a handgun through the website. He claimed that Craigslist breached a duty of care to ensure that hazardous objects such as handguns are not sold through the site. The district court held that Section 230 could be raised on a 12(b)(6) motion to dismiss and that Craigslist was entitled to dismissal under Section 230. The court notably cited both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct.1937 (2009) to emphasize that plaintiffs must plead more than “labels and conclusions” to state a cause of action.

Assault and Immunity

Court Applies Section 230 Immunity To Assault Claim Against MySpace

By Lincoln D. Bandlow

In the early years of the internet, the *Prodigy* decision sent shockwaves through the burgeoning communication medium when it held that internet service providers could be held liable for defamation based on the content posted by a third party, even though the internet service provider played no editorial role in the posting. The court based that holding in part on the general efforts that the internet service provider had undertaken to police the content of material posted by users. That is, the internet service provider had a policy to screen for and remove such content as child porn or bulletin board posts that were defamatory or otherwise violated proper “netiquette.”

In light of the *Prodigy* holding that essentially said “if you do that screening, you’re a publisher and you get publisher liability with it” a number of internet service providers said “okay, we won’t do that” and stopped screening posts for such content. That response by internet service providers quickly got the attention of Congress, whose attitude was “no, wait, we want you to do that!”

Thus, in response to the *Prodigy* decision, in 1996 Congress enacted Section 230 of the Communications Decency Act, which provides internet service providers with immunity from certain claims brought against them based on the acts of third parties. Since the passage of Section 230, courts have grappled with the question of how far that immunity extends. In *Doe v. MySpace, Inc.*, 175 Cal.App.4th 561 (2009), a California Court of Appeal held that this immunity extends to claims brought against MySpace that stemmed from minors being sexually assaulted by adults that the minors had met on the MySpace website.

Background

The decision arose out of four cases, that had been consolidated into one appeal, involving similar facts and legal allegations. In each of the cases, girls aged thirteen to fifteen had been sexually assaulted by men that they had met on MySpace.com, a popular internet social networking site. Founded in 2003, MySpace is “the world’s most visited domain on the internet for American users” and one that, despite its being limited to users aged fourteen or older, can easily be

accessed by underage users by simply “entering a false birth date to appear older.” *Doe*, 175 Cal. App. 4th at 150.

A MySpace user typically creates a profile that provides personal information such as age, gender, schools, etc. Other MySpace users can search these profiles to find individuals that meet particular criteria and send emails to users who have met the criteria. The MySpace Terms of Use prohibit users from soliciting personal information from anyone under eighteen. MySpace also provides safety tips for new users that, among other things, caution against “posting anything that would make it easy for a stranger to find you, such as where you hang out every day after school,” warn that “[p]eople aren’t always who they say they are” and instruct users not to “mislead people into thinking that you’re older or younger.” *Id.*

In incidents that are every parent’s nightmare and that are tragically becoming all too frequent, a number of young girls were attacked by men who had lured these girls to meetings through finding them on MySpace. Doe II, a fifteen year-old girl, met a twenty-two year-old man through MySpace and was sexually assaulted by him at an in-person meeting. Doe III, another fifteen year-old girl, met a twenty-five year-old man on MySpace who lured her from her home, “heavily drugged her, and brutally sexually assaulted her.” Doe IV, a fourteen year-old, met up with an eighteen year-old she had met on MySpace who, along with his adult friend, drugged Doe and then they took turns sexually assaulting her. Fourteen year-old Doe V and fifteen year-old Doe VI each met eighteen and nineteen year-old men on MySpace and were later sexually assaulted at in-person meetings. *Id.* at 151.

These Doe plaintiffs brought substantially identical causes of action against MySpace for negligence, gross negligence and strict product liability, alleging that “MySpace has made a decision to not implement reasonable, basic safety precautions with regard to protecting young children from sexual predators” and that MySpace was “aware of the dangers that it poses to underaged minors” who use the website. *Id.* In particular, the plaintiffs alleged that MySpace should have implemented “readily available and practicable age-verification software” or made sure that the Does’ MySpace profiles were set to “private.”

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In response, MySpace brought a demurrer (the California procedural equivalent of a motion to dismiss) on the grounds that the claims were barred by Section 230. Although the trial court granted the motion, it allowed plaintiffs leave to amend to plead around Section 230. Plaintiffs did so, adding a section specifically entitled “Plaintiffs Bring No Claims That Implicate the Communications Decency Act.” They alleged that their claims “rest on MySpace’s failure to institute reasonable measures to prevent older users from directly searching out, finding, and or communicating with minors. The claims are not content based.” *Id.* MySpace filed another demurrer, which the court granted without leave to amend, finding that the plaintiffs had failed to allege sufficient facts to plead around Section 230 immunity. Plaintiffs appealed and the Court of Appeal affirmed the dismissal.

Court of Appeal Decision

The Court first examined Section 230, pointing out Section 230 was enacted to: (1) “promote the continued development of the Internet”; (2) “preserve the vibrant and competitive free market that presently exists for the Internet and

other interactive computer services, unfettered by Federal or State regulation”; (3) “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services”; (4) “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) “ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* at 152 (quoting Section 230).

To accomplish those goals, Section 230 provides 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” and that although States were not prevented “from enforcing any State law that is consistent” with Section 230, “[n]o cause of action may be brought and no liability may be imposed under any

State or local law that is inconsistent with this section.” *Id.* The Court noted that the “express language of the statute indicates Congress did not intend to limit its grant of immunity to defamation claims. Instead, the legislative history demonstrates Congress intended to extend immunity to all civil claims.” *Id.* at 153.

Zeran and Section 230

The court, citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) and *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 804-805 (2006), noted that to qualify for immunity under Section 230, three elements must be shown: (1) defendant is an interactive computer services provider; (2) defendant is not an information content provider with respect to the disputed activity; and (3) plaintiff seeks to hold the internet service provider liable for information originating with a third party user of its service. *Id.* Plaintiffs

took issue with the second and third elements, alleging that MySpace was an information content provider and that plaintiffs were not trying to hold MySpace liable for the communications between the plaintiffs and their assailants, but rather, for MySpace’s failure to institute

reasonable security measures. The Court rejected these arguments.

Plaintiff first argued that it was not treating MySpace as a publisher, which would trigger Section 230 immunity, but was simply alleging “a breach of a legal duty to provide reasonable safety measures” to prevent predators from gaining access to minors through MySpace and that Section 230 should be narrowly construed to extend only to claims “stemming from harms caused by the defendant’s republication of inherently offensive or harmful content.” *Id.* In rejecting that argument, the Court examined *Zeran*, the “leading case on immunity protection under Section 230.” *Id.* In that case, plaintiff discovered false advertisements placed in his name on AOL for sale of shirts that mocked the 1995 bombing of the Oklahoma City Federal Building and complained that AOL failed to remove the postings, notify others that the postings were false and screen out further such post-

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The “real question” was whether plaintiffs were seeking “to hold MySpace liable for failing to exercise a publisher’s traditional editorial functions...”

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ings. The Fourth Circuit held that Section 230 immunity applied even when a provider had been notified of objectionable content on its site:

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users.... The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Doe, 175 Cal. App. 4th at 154 (quoting *Zeran*, 129 F.3d at 331).

The California Court of Appeal then noted that same argument as that put forth by the plaintiffs had recently been rejected by the Fifth Circuit in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). There, a thirteen year-old (pretending to be eighteen) created a profile on MySpace that was automatically set to "public" because she had indicated she was eighteen (it would have automatically been set to "private" had she used her true age). She met a nineteen year-old man on MySpace, the two eventually met in person where he sexually assaulted her. After the girl and her mother filed suit against MySpace on the grounds that it had failed to implement basic safety measures to protect minors from adult predators, the Fifth Circuit, citing *Zeran* and the legislative history of Section 230, upheld the district court's dismissal of the action, interpreting Section 230 "to provide broad immunity extending to cases arising from the publication of user-generated content." *Doe v. MySpace*, 528 F.3d at 418.

In reaching that conclusion, the Fifth Circuit cited the policy reasons underlying Section 230, including the intent to "remove disincentives for the development and utilization of

blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." Moreover, the Fifth Circuit noted that cases from other circuit courts had broadly construed Section 230. Finally, the Fifth Circuit noted that parties harmed by publication of user-generated content were not without recourse: "they may sue the third party user who generated the content." Under Section 230, however, aggrieved parties simply cannot sue the interactive computer service that enabled the third party to publish the content online. *Id.* at 419.

The California Court of Appeal then cited the Ninth Circuit decision in *Carafano v. Metrosplash.com, Inc.* 339 F.3d 1119, 1122 (9th Cir. 2003), in which the court extended Section 230 to an online dating service, finding that it was not liable when an unidentified party posted a false online profile of an actress, which resulted in harassing phone calls, letters, and faxes to her home. Under *Carafano*, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id.* at 1124.

The California Court of Appeal also noted an Ohio district court decision which had extended Section 230 immunity to an online dating service where the plaintiff had relied on another member's claim on her profile that she was 18 years old when he had sex with her. He was subsequently arrested for unlawful sexual conduct with a minor because, in fact, she was only 14. *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007), *aff'd.*, 551 F.3d 412 (6th Cir. 2008). After plaintiff asserted claimed based on the allegation that the dating service failed its obligation to discover that the minor lied about her age, defendant's motion to dismiss was granted on the ground that the complaint attempted to hold the dating service liable for its publication of content provided by the minor. *Id.* at 728.

California Case Law

The California Court of Appeal then noted that these decisions, although persuasive, were not binding and turned to an examination of California case law. The only California Supreme Court case which addresses Section 230 immunity is *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006) which involved claims for defamation. Noting that such facts were "not exactly on point," the Court of Appeal noted that *Barrett* had held that "the immunity conferred by section 230 applies

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even when self-regulation is unsuccessful, or *completely unattempted.*” *Doe*, 175 Cal. App. 4th at 155 (quoting *Barrett*, 40 Cal. 4th at 53) (italics added by court).

Moreover, *Barrett* had noted the legislative history contained in a subsequent federal statute that explicitly supported a broad interpretation of Section 230 immunity in negligence cases. Regarding California intermediate appellate court decisions, the Court in *Doe* noted that these courts had also consistently extended Section 230 immunity to negligence claims, citing *Delfino* (negligence claims based on cyberthreats that originated from employer’s computer system barred under Section 230) and *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 824 (2002) (negligence and unfair trade practices claims against eBay stemming from forged sports memorabilia sold on eBay barred by Section 230). The Court of Appeal also noted that other cases had extended Section 230 immunity to other types of claims. See *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (2001) (immunity from taxpayer action for waste of public funds granted to library providing internet access to patrons).

Given this “general consensus to interpret section 230 immunity broadly,” the Court concluded that Section 230 shielded MySpace from liability. Although plaintiffs had styled the claim as one for “failure to adopt reasonable safety measures,” this did not avoid Section 230 immunity:

It is undeniable that [Does] seek to hold MySpace responsible for the communications between the [Does] and their assailants. At its core, [Does] want MySpace to regulate what appears on its Web site. [Does] argue they do not “allege liability on account of MySpace’s exercise of a publisher’s traditional editorial functions, such as editing, altering, or deciding whether or not to publish certain material, which is the test for whether a claim treats a website as a publisher under *Barrett*.” But that is precisely what they allege; that is, they want MySpace to ensure that sexual predators do not gain access to (i.e., communicate with) minors on its Web site. That type of activity - to restrict or make available certain material - is expressly covered by section 230.

Doe, 175 Cal. App. 4th at 156-157.

Plaintiffs tried to distinguish the federal and state cases discussed above by characterizing the harm in those cases as

caused by the release of information while the harm plaintiffs were alleging was caused by the physical assaults. In those cases, according to plaintiffs, the claims all stemmed from the words themselves being the tortious act (false descriptions of sports memorabilia in *Gentry*, falsely attributed statements mocking the Oklahoma City bombings in *Zeran*, false profile information in *Carafano*) which brought the claims within the scope of Section 230, whereas the communications exchanged between the Does and their assailants were not actionable and thus Section 230 did not apply. The Court rejected that argument, saying this was a “false distinction” and the “real question” was whether plaintiffs were seeking “to hold MySpace liable for failing to exercise a publisher’s traditional editorial functions, namely deciding whether to publish certain material or not. Because they do, section 230 immunizes MySpace from liability.” *Id.* at 157. Moreover, the Court found that plaintiffs were simply misreading the *Gentry* and *Zeran* cases because the alleged harm in those cases did not stem from the information exchanged, but from conduct outside of the communications (*Gentry* harm was from the purchase of the sports memorabilia, *Zeran* and *Carafano* harm was from the outside harassment that was caused by the posting of the false information).

Distinguishing Roommates.com

Plaintiffs also contended that, by collaborating with the plaintiffs and their eventual attackers to create MySpace profiles and by allowing the attackers to search profiles to find targets to assault, MySpace was a content provider and thus outside of Section 230 immunity. In making this argument, plaintiffs relied on *Fair Housing Council, San Fernando v. Roommates.Com*, 521 F.3d 1157 (9th Cir. 2008) in which defendant ran a website to match roommates and subscribers were required to answer a series of questions about their sex, sexual orientation, and whether they would bring children and also could provide comments in an open-ended essay.

The plaintiffs complained that Roommates.com’s business violated the federal Fair Housing Act and California’s fair housing law, both of which prohibit discrimination on the basis of race, familial status or national origin. The Ninth Circuit held that Section 230 immunity did not apply because Roommates.com was an information content provider because it “created the discriminatory questions, presented a limited choice of answers and designed its search and email

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systems to limit listings based on sex, sexual orientation, and presence of children” and because subscribers were forced to answer these questions as a condition of using its services. *Doe*, 175 Cal. App. 4th at 157-158 (citing *Roommates*, 521 F.3d at 1166).

Immunity was extended, however, to the additional comments section because *Roommates.Com* published the comments as written and did not provide guidance or urge subscribers to input discriminatory preferences. *Id.* at 1174.

The Court of Appeal noted that the *Roommates* decision represented “two ends of the spectrum with respect to how much discretion a third party user has in the content he posts on the site.” On the one hand, a subscriber filling in the “additional comments” section had unfettered discretion as to content. On the other hand, the choices to the subscriber were limited in the question and answer profile section. The Court held that the situation presented in the case before it “falls somewhere in between.” A MySpace user is not allowed unfettered discretion regarding the content of a profile (users are prompted to enter a name, email address, gender, postal code and date of birth and are “encouraged” to enter personal information such as schools, interests, etc.). Moreover, the information is then organized by MySpace and is searchable by other users. The Court pointed out, however, that unlike in *Roommates*, the *Doe* plaintiffs were not alleging that the MySpace profile questions were discriminatory or otherwise illegal, nor were MySpace members required to answer the questions as a condition of using the site.

The Court concluded that the facts in the case before it align more closely with those in *Carafano* because, there, the online service provider had provided “neutral tools which the anonymous poster used to publish the libelous content. The dating service did nothing to encourage the posting of such content and in fact, the posting was contrary to its express policies.” *Doe*, 175 Cal. App. 4th at 158. In contrast, in *Roommates*, the website was “designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who are looking for rooms based on criteria that appear to be prohibited” by law. *Id.* (quoting *Roommates*, 521 F.3d at 1172). Thus, MySpace was not a content provider and was thus protected by Section 230 immunity.

There has been some press of late about predators using the Craigslist website to locate women who then are attacked, sexually assaulted and sometimes killed. Craigslist has since

removed its “erotic services” category and otherwise tried to address this issue. If they did so out of the motivation to be good citizens, good for them. If they did so out of fear of potential liability, *Doe* stands for the proposition that Section 230 may eliminate that concern.

Lincoln D. Bandlow is a partner in the Los Angeles office of Lathrop & Gage where he practices media and intellectual property litigation and is also an Adjunct Professor at USC where he teaches media and communications law. MySpace was represented by Richard L. Stone, David R. Singer and Amy M. Gallegos of Hogan & Hartson. Plaintiffs were represented by the Law Offices of Daniel M. O’Leary in Los Angeles; and Yetter, Warden & Coleman, in Houston, TX.

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Fifth Circuit Rejects First Amendment Challenge to Texas Open Meetings Law—For Now

By James C. Ho

Media organizations have frequently—and successfully—invoked the First Amendment to require that various judicial and other governmental proceedings be held in the open, accessible to both the media and the general public. So it would be surprising—if not alarming—if public officials began to argue that the First Amendment somehow *forbids* public access and open government. Yet that is precisely what is happening in Texas.

The en banc panel of the U.S. Court of Appeals for the Fifth Circuit recently dismissed such claims by a 16-1 vote—and in so doing, left intact the State’s victory in the district court, which had upheld the Texas Open Meetings Act (TOMA). But the Court dismissed the claims on mootness grounds, and counsel has made clear they will not rest until TOMA is struck from the books.

Background

Two Alpine City Council members were indicted in February 2005 for violating TOMA. According to local prosecutors, Avinash Rangra and Katie Elms-Lawrence wrote a series of private e-mails discussing official business with a quorum of the council. Because the public was not given advance notice of the discussion, Rangra and Elms-Lawrence were charged with conducting an illegal closed meeting. The charges were later dropped.

Rangra and another city council member, Anna Monclova, subsequently filed suit in federal court (*Rangra and Monclova v. Brown and Abbott*), seeking injunctive relief against the district attorney and the attorney general, along with a declaration that the criminal provision of TOMA ([Tex Gov’t Code § 551.144](#)) violates the First Amendment rights of public officials. The plaintiffs are represented by noted Texas criminal defense lawyer Dick DeGuerin and Alpine attorney Rod Ponton.

The district court rejected Plaintiffs’ claims (2006 WL 3327634), but a three-judge panel of the Fifth Circuit reversed and remanded ([566 F.3d 515](#))—holding that TOMA is a content-based regulation of speech by public officials and thus should have been subject to strict scrutiny.

The State sought rehearing en banc on May 7. (To the State’s surprise, Plaintiffs filed their own en banc petition on May 8, thus agreeing with the State that their panel win should be vacated.) The Fifth Circuit granted en banc rehearing, and vacated the panel opinion accordingly, on July 27.

Texas Open Meetings Act

The Texas Open Meetings Act is based on a simple premise: Elected officials work for the people—and the people have a right to know how public officials are conducting public business on their behalf.

Open meeting laws further, rather than frustrate, First Amendment values, by informing the public about their government. Indeed, courts have repeatedly invoked the First Amendment to *require* public access to various judicial and other governmental proceedings (*see, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)). It would be surprising if the Constitution somehow prohibited what in many contexts it actually requires.

Every state in the nation has enacted an open meeting law. Provisions vary from jurisdiction to jurisdiction, but they all share a common design: the establishment of a legally enforceable right of any member of the general public to observe governmental proceedings. And given the ubiquity of such laws, it is unsurprising that *every* court to have addressed the validity of state and federal open meeting laws to date has upheld them against First Amendment challenge.

Although there is a national legislative and judicial consensus behind open meeting laws, the U.S. Supreme Court to date has not articulated precisely which First Amendment standard applies to such laws. But the State has filed extensive briefing arguing that open meeting laws should be analyzed—and upheld—as content-neutral time, place, and manner regulations, pursuant to the framework articulated in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

To be sure, TOMA applies only to public officials, and it applies only when the discussion involves public business. But that alone does not make the law a content based regulation of speech, presumptively unconstitutional unless it can satisfy strict scrutiny. To the contrary, the government inter-

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est served by TOMA is to expand—not suppress—communication. Any alleged adverse impact on speech caused by TOMA is not only incidental and unintended—it is antithetical to the interest in open government served by the Act. TOMA is thus content neutral under *Ward*.

Mootness Issue

The State is eager to defend the principle of open government before the 17-member Court. But the case has taken some notable twists and turns in recent months.

Rangra left the city council in late May 2009, as Monclova had done three years earlier. As a result, neither plaintiff in the case remains subject to TOMA today. Because neither plaintiff continues to suffer the on-going First Amendment injury alleged in their complaint, neither retains standing to seek declaratory or injunctive relief. Their claims are accordingly now moot.

It is “the duty of counsel to bring to [the Court’s] attention, without delay, facts that may raise a question of mootness.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). So when the Attorney General’s office first learned of Rangra’s departure from the city council, we immediately informed the Court on August 10.

Plaintiffs’ counsel countered that the case was not moot, based on the novel legal theory that Rangra and Monclova filed suit, not in their personal capacity, but in their official capacity as members of the city council—so their successors in office should be automatically substituted as Plaintiffs.

The State responded that this new theory was untimely and, in any event, meritless. After all, the criminal penalties under TOMA apply to governmental officials personally—not to the governmental bodies they serve on, and certainly not to their successors in office. Had Rangra been convicted, he—and no one else—would have been subject to any penalties.

On September 10, the Court dismissed Plaintiffs’ claims as moot by a 16-1 vote. Judge James L. Dennis—the author of the original three-judge panel ruling—authored the sole dissenting opinion.

The case has taken some additional turns in recent weeks. Since the September 10 ruling, Plaintiffs’ counsel has issued statements to the media criticizing the Court for allegedly mishandling the case. Specifically, Plaintiffs have attacked the Court for “dismiss[ing] the case without obtaining and

reviewing all briefing in the case.” They claim the Court violated their right to file a reply to the State’s supplemental en banc brief. But no such right exists.

Plaintiffs’ attack appears to confuse regular briefing before the three-judge panel with supplemental briefing before the en banc Court. Plaintiffs have already filed their opening and reply briefs, over a year ago, before the three-judge panel. When the Court grants en banc rehearing, it typically allows the parties to file “supplemental” briefing, under a tightened schedule. In this case, the Court ordered Plaintiffs and the State to file their supplemental briefs by August 18 and September 9, respectively. So both sides have fully briefed their arguments on rehearing en banc—and the Court properly dismissed Plaintiffs’ claims the day after the close of briefing. (Notably, under Plaintiffs’ theory, they would have been entitled to file a reply brief, pursuant to the traditional 14-day rule, by September 23—just *one day* before the originally scheduled oral argument. Nothing in the Court’s rules remotely contemplates granting Plaintiffs such an advantage.)

Plaintiffs’ attack on the Court is additionally curious, considering that they failed in their own duty to inform the Court of Rangra’s departure from the city council.

Plaintiffs have also recently announced yet another new theory of standing. They note that, because Rangra left office on May 19, 2009, he remains subject to prosecution until May 19, 2011, for any TOMA offense he may have committed on his final day in office. But this theory of standing does not coincide with Plaintiffs’ own complaint—a facial challenge seeking prospective relief only, and not an as applied challenge based on conduct on May 19, 2009 (years after they filed their complaint). To establish standing to obtain prospective relief, Plaintiffs must allege future First Amendment injury—on-going activity chilled by TOMA. That is of course impossible here—Plaintiffs no longer serve on the city council and are thus no longer governed by TOMA.

In all events, counsel has announced they will seek another round of en banc rehearing. Should that fail, they say they will either seek relief from the U.S. Supreme Court, or simply refile on behalf of new plaintiffs in federal district court. The saga of this litigation thus appears destined to continue for the foreseeable future.

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Second Circuit Denies Public Access To Wiretap Material In Spitzer Case

Rejects Common Law and First Amendment Claims for Access

By Itai Maytal

The news media and the public do not have a right to obtain federal wiretap application and orders under either the First Amendment or the common law, the Second Circuit Court of Appeals ruled this month in a case brought by The New York Times to obtain materials related to the Eliot Spitzer prostitution investigation.

In a unanimous decision, the Second Circuit overturned a lower court ruling that gave *The Times* access to wiretap applications, interim reports and orders in the Spitzer case. *In the Matter of the Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*, Nos. 09-0854-cv (L), 09-1164 (con), 2009 U.S. App. LEXIS 17642 (2nd Cir. August 7, 2009). Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.S. § 2518(8)(b), allows such materials to be released only upon a showing of “good cause.”

Holding that the statute pre-empted the common law right of access that normally applies to judicial documents, the court said that *The Times* was required under Title III to show that it was an “aggrieved party” in order to gain access to the material it sought from the government.

The court concluded that *The Times* did not meet this burden when it asserted it was pursuing a matter of public interest. The term “aggrieved party” typically refers to those who were caught on the wiretaps or whose phones were tapped.

The court also rejected *The Times's* argument that *The Times* had a First Amendment right to gain access to them, finding that the First Amendment did not apply because, under the *Press-Enterprise* test, the materials had historically been closed and that access would not advance a public interest.

Background

The case arose out of the March 2008 resignation of Gov. Eliot Spitzer of New York, following his acknowledgment that he had been a client of a prostitution ring known as The Emperor’s Club. For more than a year, federal authorities

had investigated the Emperor’s Club, using court-authorized wiretaps and a search warrant, among other techniques. Shortly after the government arrested four people in the ring and charged them with conspiracy to violate prostitution laws and money laundering, media reports identified Gov. Spitzer as one of the ring’s clients. A few days later, Gov. Spitzer resigned his office. By July 2008, the four defendants had pleaded guilty, the government announced it would not pursue charges against Gov. Spitzer, and prosecutors indicated that the case was over.

Questions remained about the genesis and conduct of a federal prostitution investigation that involved such a prominent public figure.

While federal officials said that the investigation into Spitzer’s activities arose from routine examinations of suspicious financial transactions by Gov. Spitzer reported to the federal government by participating banks, there were growing public concerns that the former governor had been targeted for political purposes.

The Times filed its motion in December 2008 in the Southern District of New York seeking the unsealing of materials related to the wiretap authorization and a search warrant used in the Emperor’s Club investigation.

In support of its motion, *The Times* invoked rights of access under both the common law and the First Amendment, analogizing to prior judicial decision granting media access to search warrant applications and orders. The Government released in redacted form the warrant application and related materials, but disputed the public’s right to the disclosure of the materials from the wiretap authorizations.

In February 2009, after briefing and oral argument, Judge Jed Rakoff of the Southern District of New York agreed with *The Times's* request to unseal the wiretap materials, finding that the materials – with the names of all customers but Spitzer redacted – should be released under both the First Amendment and federal common law. *In re New York Times Co.*, 600 F. Supp. 2d 504 (S.D.N.Y. 2009).

Rakoff concluded that wiretap applications and orders are “judicial documents” because they “are plainly ‘relevant to the performance of the judicial function,’” and therefore

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“presumptively subject to public access” under both the common law and the First Amendment. While the presumption in favor of access had to be balanced against factors favoring confidentiality, “such as the government’s law enforcement interests and the privacy interests of affected parties,” Rakoff ruled that in this case the redaction of names sufficiently addressed the countervailing interest.

In looking at Title III’s “good cause” standard, he held that “there’s no reason to believe that Congress intended ‘good cause’ to be anything other than a synonym for the balancing dictated by the aforementioned constitutional and common law principles.” At the Government’s request, Judge Rakoff stayed his order to permit the appeal.

In its brief to the Second Circuit the Government argued that under Title III there is a strong presumption against disclosure of wiretap applications and orders, and that the “good cause” requirement of Title III should not be conflated with the common law or First Amendment right of access. In response, *The Times* argued that the statutory requirement of Title III should be read as compatible with the balancing test required under the common law, or in the alternative, that a qualified First Amendment right of access applies to wiretap applications and orders. *The Times* also argued that the “good cause” standard itself permitted access applications in the public interest, irrespective of the common law or the Constitution.

The Second Circuit Opinion

Writing for a three-judge panel, Circuit Judge Jose Cabranes rejected in large part the lower court’s analysis by holding that Title III superceded, rather than accommodated any common law right of access. While the Circuit agreed with Judge Rakoff that the wiretap applications and orders were indeed judicial records, the panel held that the common law right of access did not apply to them given the preemption of Title III. In the court’s view, the case therefore turned on a statutory interpretation of the meaning of “good cause.”

Judge Cabranes noted that while neither Congress nor the Supreme Court had defined the meaning of “good cause” in Title III, the Second Circuit had already concluded in *In re National Broadcasting Co v. U.S. Dept. of Justice*, 735 F.2d 51 (2d Cir. 1984) (“*NBC*”) that “good cause” could be found where the applicant seeking to unseal wiretap applications was ‘an aggrieved person,’ but not upon any lesser showing.”

In *NBC*, the Circuit had denied the defendant access to wiretap applications and orders in a libel case, noting that the defendant was not an aggrieved party,” which the statute defined as “a party to any intercepted wire or oral communication or a person against whom the interception was directed.” In reading *NBC* to require that the access motion be brought by an aggrieved person, the court rejected *The Times*’s argument that the case said only that an aggrieved person was an example of the type of party who could seek access. *The Times* cited two cases from other circuits where parties other than aggrieved persons had won access to wiretap applications and orders.

Turning to the instant case, Judge Cabranes wrote there was no reason why the Circuit’s “good cause” analysis in *NBC* should not apply to a newspaper litigant acting as a surrogate for the public. “It is irrelevant for the purposes of Title III that *The Times* is a newspaper investigating a matter of public importance,” the court said.

Finally, the Circuit rejected the lower court’s conclusion that the First Amendment right of access required unsealing of the wiretap applications. In deciding that the First Amendment did not apply, the court employed the standard test of whether the materials had been historically open and whether openness would logically serve the public interest. Neither prong of the test was met by the historically secret Title III materials, which were made confidential by Congress to protect personal privacy, the court said. The panel was not convinced that “monitoring the government’s use of wiretaps and potential prosecutions of public officials is more compelling than Congress’s apparent concern for confidentiality and privacy.”

The Times had also sought access to interim reports filed by the Government with the courts while the wiretaps were ongoing. Such reports are not mentioned in the “good cause” provision. The District Court had held that common law and First Amendment right applied to the interim reports as well. The Circuit did not specifically address them in its opinion.

The Times has decided not to seek further review of the decision by the Second Circuit.

Itai Maytal is the First Amendment Fellow at The New York Times Company. The Times was represented in this matter by David E. McCraw, Assistant General Counsel to the newspaper, and Mr. Maytal. The Government was represented by Assistant U.S. Attorneys Daniel L. Stein and Jesse M. Furman.