

MILRC Media
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MEDIA LAW LETTER

Associate Member Edition

2010:1

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UPCOMING EVENTS

NAA/NAB/MLRC Media Law Conference 2010

September 29-October 1 | Chantilly, VA

For more information, [click here](#).

MLRC Annual Dinner

November 10 | New York, NY

DCS Annual Meeting

November 11 | New York, NY

British Science Writer Simon Singh Wins Libel Appeal

*A Bad Day For The Orwellian Ministry Of Truth,
But A Good One For Honest Opinion*

By David Hooper

On April 1, 2010 a strongly constituted Court of Appeal consisting of the Lord Chief Justice, Lord Judge, the Master of the Rolls, Lord Neuberger and Lord Justice Sedley – word was that two more junior judges originally chosen for the case were bounced off the bench- unanimously overruled the earlier decision by Mr Justice Eady that remarks made by Dr Simon Singh about the British Chiropractic Association (BCA) were matters of fact which had to be justified rather than opinion which could fall within the compass of a defense of fair comment. [*British Chiropractic Association v. Singh*](#) 2010 EWCA 350.

Background

Dr Simon Singh was an academic who had made a study of the efficacy of chiropractic medicine. He was co-author of a best selling book *Trick or Treatment* which examined alternative medicine. So it was that in Chiropractic Awareness Week in April 2008 he had been invited to write a piece in a comment column of the *Guardian* about the BCA. BCA was set up under the Chiropractic Act 1994 to promote and maintain professional standards.

In his article Singh did not criticize any particular chiropractitioner. He did, however, say that there was "*not a jot of evidence*" for the BCA claims to be able to remedy such matters as "*children's colic, sleeping and feeding problems, ear infections and asthma.*" He went on to observe that "*as the respectable face of the chiropractic profession the BCA happily promotes bogus treatment.*"

That Mr Justice Eady decided was an allegation of dishonesty and denoted that the BCA was knowingly peddling false remedies knowing they were ineffectual. Ironically the Advertising Standards Authority had upheld a claim in respect of an advertisement by a chiropractor who made very similar claims namely that he could treat children with colic and learning difficulties. The BCA had suffered no financial damage but the implications of Eady J's ruling were

very grave for Dr Singh.

Costs in relation to this ruling on meaning topped £100,000 before Eady J; and by the time of the Court of Appeal hearing they exceeded £200,000. If Eady J's ruling stood, Singh had to prove that what he said was true which not only would have been very costly but might well have proved impossible as he had never intended to make such an in personam attack on the BCA.

Court of Appeal Decision

The Court of Appeal had little doubt that Eady J had erred in his approach. There were considerable concerns in the Court of Appeal and indeed in the political arena – the case spawned a well-organized libel reform group backed by all political parties – that scientific disputes should not be adjudicated in the courts and also that the powerful organisations or drugs companies could use the laws of libel to silence their critics.

This had been done in the outrageous case brought by the Upjohn Company of Kalamazoo against a Scottish scientist, Professor Oswald, who had exposed the dangers of the sleeping pill Halcion and had exposed the fact that the results of the experimental administration of the drug to prisoners had been falsified. Professor Oswald's criticisms of the Upjohn drug company were in large measure supported by the DEA which progressively imposed stricter restrictions on the use of Halcion. Needless to say, however, Upjohn had won their libel action against Professor Oswald, although his counterclaim against the drug company for some of its more unpleasant and unworthy criticisms of him resulted in his also being awarded damages.

The question in the view of the Court of Appeal in the instant case was whether Dr Singh's statements were a matter of opinion and whether there was evidence to support those opinions. Once the court went down that route it mattered

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not that Dr Singh had expressed himself very forcefully or that others might disagree with his opinion. The question was whether on analysis the words could constitute an opinion which a person might honestly hold.

Interestingly, the Court of Appeal in the opinion to which all three judges subscribed, felt that the defense was better described as a defense of *honest opinion* rather than of fair comment and in so doing, they followed the approach of the courts in New Zealand, Australia and the Republic of Ireland. Describing the defense as honest opinion in the words of Lord Judge “*better reflects the realities.*” One of the problems with the term “fair comment” is that it invites a jury to evaluate the merits of the opinion and to form a view as to whether or not the comment was objectively fair, whereas in reality the defense is a subjective one overlaid with the much lesser objective threshold of whether a person could honestly hold such an opinion. It is a welcome clarification of language if it is taken up, as the threshold then becomes one of honesty rather than fairness.

On analysis of the language, the Court of Appeal considered that the article meant not that the BCA was promoting what they knew were bogus treatments, but rather that Singh *believed* the treatments to be bogus, having regard to the want of reliable evidence of their efficacy. In other words, one looked at the thought processes of Dr Singh in forming his opinion rather than dissecting minutely the words to see if they spelt out an allegation of fact.

In so doing, the court may have weakened the single meaning rule whereby it decides at the outset whether, and if so to what extent, the words are defamatory before considering whether the words constitute fact or comment. The Court of Appeal felt that might not always be the best approach. Instead one should consider the entirety of the article and in this instance a court should consider firstly was there any evidence to support BCA’s claims about the efficacy of chiropractic treatment and, secondly, if not, did the personnel of the BCA know this.

The view of the court was that the answer to the first question was a matter of epidemiological debate when Dr

Singh wrote of there not being a “*jot of evidence*” that was his evaluation of the epidemiological evidence, that is to say, his opinion. The Court approached this from the basis that this was Dr Singh’s assessment of the evidence rather than looking for allegations of fact and imputations of bad faith which then had to be justified. It was in the court’s view a question of opinion whether there was evidence to support the BCA’s claim and Eady J had erred in treating it as a matter of verifiable fact which had to be proved.

The Court of Appeal appears to have strongly felt that such scientific policies should not be litigated in court. The court should not cast itself in the role of a historian or investigative journalist. To use the graphic words of the Lord Chief Justice otherwise the court would be invited “*to become*

and Orwellian Ministry of Truth.”

Reference was also made at the judgment to the poet John Milton’s visit to the ageing Galileo in 1638. Galileo had grown old as a prisoner of the Inquisition “*for thinking astronomy was otherwise than the Franciscan and Dominican licensers thought.*” That was a situation

the Court wanted to avoid in future.

The Court of Appeal did not seek to corrode the distinction between fact and opinion. The court did, however, adopt a rather wider approach to deciding whether something was fact or opinion. The court cited the judgment of Judge Easterbrook, Chief Justice of the Seventh Circuit Court of Appeals in *Underwager v. Salter*. 22 F3d 730 (1994) in relation to litigation regarding such scientific claims. The plaintiffs “*cannot by simply filing suit and ‘crying character assassination’ silence those who hold divergent views... Scientific controversies must be settled by the methods of science rather than by the method of litigation.*”

Analysis

So how important is the Singh decision? The answer is that although it does not change the law, the approach is significantly different. Such cases will no longer turn on fine

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distinctions and theoretical decisions as to whether there is an imputation of fact which must be justified.

A broader approach will be taken on meaning and the article will be looked at as a whole and in context. Scientific controversies are less likely to be litigated in court. If the court accepts that the words complained of are comment, it is a relatively simple matter for the defendant to establish that the opinion was honestly held and it is an extremely difficult matter for the claimant to establish that the defense of fair comment is vitiated by proof of malice.

There have been a number of claims recently brought in England in relation to scientific matters. Professor Lacerda, Professor of Phonetics at Stockholm University found that his academic paper with the punchy title of *Charlatanry in Forensic Speech Science* was withdrawn in the face of threats of legal action by the Israeli company making the equipment in relation to which the professor was questioning the effectiveness of the voice risk analysis.

Dr Peter Wilmshurst has been locked in litigation with NMT Medical a Delaware company operating in Boston where criticisms were made to the research and efficacy of their device Starfly which related to holes in the heart and the alleviation of migraine. It is questionable whether in the light of the Singh case there will be so much enthusiasm for such claims in future.

Indeed, GE Healthcare has dropped its lawsuit against a Danish radiologist called Henrik Thomsen at Copenhagen University who had linked one of their drugs which was given to kidney patients to enhance MRI scans to a crippling side-effect. Thomson was triumphantly defended by Carter-Ruck in defendants conditional fee agreement.

The BCA has now dropped its foolish claim against Singh and will have to pay his costs. Singh may end up £20,000 out of pocket in regard to irrecoverable legal costs. The case was a triumph for his counsel Adrienne Page QC. The BCA can never in its wildest imaginings have anticipated what a determined and charismatic opponent Dr Singh would turn out to be. Additionally he has turned out to be a crucible for the reform of the libel laws.

David Hooper is a partner at Reynolds Porter Chamberlain in London. Simon Singh was represented by barristers Adrienne Page QC and William McCormick (instructed by Bryan Cave solicitors). Plaintiff was represented by Heather Rogers QC (instructed by Collyer Bristow solicitors).



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German Court Finds Jurisdiction Over New York Times in Libel Suit

The German Federal Court of Justice ruled in March that the German courts had jurisdiction over The New York Times, reversing a lower appellate court's decision in a long-running libel suit brought against the newspaper by a businessman who lives in Germany. [*Boris Fuchsmann v. New York Times Company and Raymond Bonner*](#), VI ZR 23/09.

While the court acknowledged that a publisher should not be subject to suit just because a website is accessible in a certain jurisdiction, it found that jurisdiction in this case was proper because a German resident's personality rights were at issue in the suit and the subject matter of the article touched on Germany. The court found significant that the relevant passages involved a German resident and referred to a German law-enforcement investigation.

The court discussed at length the conflicting views of how jurisdiction should be determined in Internet cases. It pointed out that for traditional print libel cases, the courts looked at whether the publisher distributed the publication in the jurisdiction. But, the court concluded, distribution was not an appropriate test for web publications because they are not distributed by the publisher but instead accessed by readers.

The court then surveyed a variety of Internet jurisdiction cases. It noted, for instance, that in financial torts such as unfair competition German and European law looked at whether a website was targeted toward Germany. It rejected that test for libel cases, holding that a libel claim arose whenever third parties became aware of the content regardless of the defendant's intent. Even a single viewing of the website by a single individual could cause harm to another's reputation and give rise to a claim in the jurisdiction, according to the court.

The court also eschewed any test that turned on the number of hits after discussing a French decision that had taken that approach. The court reasoned that the number of hits is often difficult to determine and disclosure of data about the visitors may in fact violate German privacy laws.

Instead, the court said, the decisive factor was whether the content involved Germany to such a degree that it was fair to say that the conflict in rights at the center of the dispute – between the plaintiff's right to his reputation on one hand and the publisher's right to report the news on the other – occurred in Germany.

The libel case was filed in 2003 by Boris Fuchsmann, a Dusseldorf resident who claimed that he was libeled by a June 2001 story in which The Times said he had ties to Russian organized crime according to a secret FBI report. Fuchsmann, a partner of well-known New York businessman Ronald Lauder in certain European ventures, was mentioned only in passing in the article, which principally dealt with a U.S. investigation into Lauder's business dealings in the Ukraine.

The Federal Court's ruling overturned a decision by the Dusseldorf Court of Appeal, which had affirmed the trial court's dismissal of the lawsuit on jurisdictional grounds. The Court of Appeals had ruled that Germany did not have jurisdiction over an online publication unless the publication was targeted to a German audience. That court had noted that the article was in English and intended for an American audience and that the part about Fuchsmann was incidental to the main thrust of the article, which dealt with a U.S. investigation of a U.S. businessman.

The Court of Appeals had also taken note of the fact that at the time of the publication The Times's European distributor had gone bankrupt. As a result, the evidence did not support Fuchsmann's contention that the newspaper was widely circulated in Germany in June 2001.

The Federal Court's decision sends the case back to the Court of Appeals for further proceedings. Unless The Times files an appeal with the German Constitutional Court – which hears only arguments asserting violations of constitutional rights – the case will ultimately proceed to fact-finding and a trial in a local Dusseldorf court.

MLRC Joins Media Amicus Brief to European Court in Max Mosley Privacy Case

Opposes Claim that Media Must Give Prior Notice to Subjects of Articles

MLRC has joined many of Europe's leading newspaper publishers and anti-censorship groups to urge the European Court of Human Rights to reject the claim that journalists should be required by law to give at least 2 days notice of their intention to expose the misbehavior of a public figure so that their potential victim can go to court to obtain an injunction to stop the publication.

In 2008, Max Mosley, then President of the International Racing Federation, won a high profile lawsuit against the News of the World tabloid for breach of confidence and unauthorized disclosure of personal information. The newspaper learned that Mosley was a regular participant in sado-masochism sessions with prostitutes and focused on what appeared to be Nazi overtones of the sessions. That angle was particularly interesting given that Mosley's father, Oswald Mosley, was a leading British Fascist and Hitler supporter in the 1930s. The articles were accompanied by video clips from the sessions that had been secretly recorded by one of the female participants. For full background see "Max Mosley Wins Privacy Case Against Tabloid: F1 Boss Has Sick Orgy With 5 Hookers - But Not, As It Turns Out, A Nazi Orgy," MediaLawLetter Aug. 2008 at 25.

Following his successful lawsuit against the News of the World, Mosley filed a complaint with the European Court of Human Rights. The gist of his complaint is that the UK is in breach of its Article 8 requirement to respect private life because there is no positive requirement on the press to notify subjects prior to publication of an alleged disclosure of private information so that the subject can seek to obtain an injunction against publication.

The European Court of Human Rights found that the complaint was admissible and decided to fast-track it for a hearing. If it is upheld, the UK will be obliged to pass a new law that requires newspaper to submit their articles to those they intend to expose in time for them to obtain an injunction. Free expression advocates consider Mosley's claim to be the most *serious threat to press freedom in Europe*.

Among the most notable points in the brief, written by distinguished free-speech advocate Geoffrey Robertson QC, is the historical background to the European Convention on Human Rights. Robertson points out that when the European Convention was settled in 1950, all States voted to exclude "reputation" from the definition of privacy but European judges have recently reversed this decision, without explanation, by deciding that under the privacy law, public figures can protect their reputation by suppressing true facts about themselves. This has enabled them to circumvent the law of libel, where truth is always a defense.

The full brief follows:

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 48009/08
Mosley v United Kingdom

WRITTEN COMMENTS OF
Media Legal Defence Initiative
Index on Censorship
The International Media Lawyers' Association
European Publishers' Council
The Mass Media Defence Centre
Romanian Helsinki Committee
The Bulgarian Access to Information Programme (A.I.P.) Foundation
Global Witness
Media Law Resource Center

Pursuant to leave granted on 1 February 2010 by the President of the Grand Chamber under Rule 44(2) of the Rules of the

Court, the above named organisations hereby submit written comments on the principles involved in the solution to the case, as identified in the 'questions to the parties' on 22 October 2009.

INTRODUCTION

I believe that newsworthiness is a firm realisation of the fact that there's nothing so much the average Englishman enjoys on a Sunday morning - particularly a Sunday morning - as to read a bit of dirt.

- Sir Melford Stevenson QC, High Court judge in *The Bounds of Freedom* (Constable, 1980), page 34.

The interveners represent a wide range of media organisations, operating in the UK and throughout Europe, and public interest organisations concerned that the legal system should not impede the publication of the truth in relation to any matter of public interest. The Claimant is a wealthy international public figure with a penchant for satisfying his sexual desires by beating women, and being beaten by them. He pays prostitutes to engage with him in mildly sado-masochistic orgies, and campaigns for a law that will enable the truth about such 'private' conduct to remain secret, namely a statutory requirement to give advance notice several days before anyone's privacy is (even arguably) infringed so that an injunction can be obtained banning publication.

Interveners point out (as does a recent UK Parliamentary Committee) that any such advance notice requirement on the media would be a serious incursion on freedom of expression guaranteed by Article 10. In these proceedings, however, the Respondent called upon to defend free speech is, under the procedural rules, none other than the United Kingdom, which has been demonstrated to be amongst the worst violators of free speech in Europe. The cases in which the UK government has been found to have breached Article 10 are numerous, from *Golder v United Kingdom*¹ and *Sunday Times v United Kingdom*² through to *Observer and Guardian v United Kingdom*,³ *Hashman and Harrop v United Kingdom*,⁴ *Silver v United Kingdom*,⁵ *Steel and Morris v United Kingdom*,⁶ *Bowman v United Kingdom*,⁷ *Financial Times v. United Kingdom*,⁸ etc, etc. – a list of cases that extends throughout the years until the present day. In such cases, the Respondent government has been shown to have breached Article 10 principles, and indeed it is generally recognised by the media as an enemy of free speech. For example, the United Nations Human Rights Committee, in its most recent 'Concluding Observations' on UK compliance with the UN Covenant on Civil and Political Rights, singled out Britain's libel laws as having '*served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work*' and noted that with the advent of the internet the UK's '*unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.*'⁹ So it is obviously unsatisfactory to have the main case against an important new and unique restriction on the media argued by a party in which the media and civil society itself has no confidence, in written submissions that have not been shown to the media for comment and in oral submissions to which the media cannot reply. Whilst this unsatisfactory and unfair position may be the result of the procedural rules, it can only be ameliorated by inviting the media and civil society: to file comments on the final submissions of the UK government; and to appear at any hearing and to make an oral submission. These interveners respectfully request such an invitation from the Court.

The Root Problem: This Court's illegitimate importation of 'honour and reputation' into Article 8

Article 10(1) guarantees free expression, including the right to impart information, subject to a number of Article 10(2) exceptions prescribed by law and necessary in a democratic society for (*inter alia*) 'the protection of the reputation and rights of others'. It was, until recently, settled law that Article 10(1) creates a presumption in favour of free speech, defeasible only in response to a pressing social need for the protection of reputation, an exception that must be 'strictly construed' and convincingly established. There is no 'balance' between Article 10(1) freedom and Article 10(2) reputation — the latter is amongst 'a number of exceptions which must be strictly interpreted'.¹⁰ This is a clear approach to Article 10 interpretation, precise enough for the media, its readers and its potential complainants to understand. Free speech is guaranteed (yes, guaranteed) unless it is necessary to restrain or punish its exercise because it damages a reputation. Since the 'reputation' that overrides free speech must be a true reputation, it cannot be damaged by the

publication of truthful information. The 'reputation' protected as a subsidiary right under Article 10(2) is the right to stop, or to receive compensation for the publication of, falsehoods.

Otherwise, outside the framework of Article 10, publication of truth can only be restrained as the result of a 'balance' with another primary guarantee e.g. fair trial (Article 6 — not relevant here) or Article 8, which calls for 'respect for his private and family life, his home and his correspondence'. Interestingly, Article 8 itself makes no exception for the right to freedom of expression — an indication that the framers did not intend it to be 'balanced' with Article 10, other than in respect of a class of publications that interfere disrespectfully with private, home and family life. It is only in this comparatively narrow area that a 'balance' is the appropriate legal mechanism: where the strength of the competing public interest are compared, there will be cases where one's home and family life must be respected and the press can be stopped, for example, from providing intimate personal details or disclosing personal matters concerning children. In relation to such publications which have no countervailing public interest, injunctions and compensatory damages are entirely in order, as would be a condign penalty, for example, indemnity costs or aggravated damages — where notice of a gross privacy invasion was not given.

This simple and straightforward position was thrown into turmoil in a series of decisions that imported 'honour and reputation' as protected rights under Article 8. This development is both astonishing and illegitimate, as it is well known that at the drafting meetings in 1950 an attempt was made to insert 'honour and reputation' into Article 8, but was resoundingly rejected by the high contracting parties.¹¹ As a result of the founding states' deliberate decision, 'reputation' is not protected as an Article 8 right to be advanced against the presumption in Article 10(1). However, quite incredibly, beginning with several cases from France (*Radio France* and *Chauvy*) the Court has simply stated that Article 8 protects 'reputation', without giving any reason for this departure from historical fact, and of course courts in the UK and elsewhere have followed, making the same assumption without investigating its validity. It is our respectful opinion that because 'reputation' was deliberately rejected as an Article 8 right in the *travaux préparatoires*, it was intellectually irresponsible for the Court to smuggle it back into Article 8, without explanation or reasoning. In *Radio France*,¹² the Court said no more than it was 'an element of Article 8' and in *Chauvy*¹³ it said that reputation was 'part of the right to respect for family life' (which it plainly is not). These cases are juristically unacceptable: judges have no right to twist or distort the law that they apply, to protect rights that they know were specifically excluded from the law at the time it was framed and agreed. The discretion allowed to judges to 'develop' the law is not vouchsafed for them to develop it so as fundamentally to contradict the deliberate intention of the law-makers. 'Reputation' is protected under Article 10(2), under the mechanism as stated by that article, but has no place in Article 8.

There was some dawning recognition of this fact in *Karako v Hungary*,¹⁴ where the correct suggestion is made that libel — an attack on character — should be dealt with entirely under Article 10, not Article 8. This was certainly the intention of the framers of the European Convention on Human Rights, and of the full European Court in the *Sunday Times* decision. It would leave a narrow list of matters to be subject to the 'notice requirement' sought by this application. However, the acceptance by this court (for example, in *Pfeifer v Austria*¹⁵) that 'a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity' makes the notice requirement sought in this case quite unacceptably broad. It would mean that the media would be obliged to give several days' notice of any criticism of a public figure, however 'public' the context of the debate, which could upset such nebulous but ego-centric concepts as 'personal identity' and 'psychological integrity', especially if such criticisms are true.

What the Claimant in this case wants is for Courts to shield by pre-publication injunction important people like himself from criticism based on facts that are true. This would be a massively disproportionate result in the UK because of the rule against prior restraint (see below), which prevents any injunctive restraint on the dissemination of information alleged to be untrue, where the publisher indicates an intention to defend.

Consequences of Prior Notification: Banning or Delaying Perishable News

The fact that the notice requirement for the potential breach of Article 8 would apply wherever reputation is in issue, even in public debate involving public figures, would delay publication of important news — a very perishable commodity — in a wide range of public interest situations and wherever the public figure could claim his or her 'psychological integrity' was at stake from publication of the truth — for example, that he had sex with sheep, or did not pay his taxes, or practiced black magic, or beat up his girlfriend or sold arms in the breach of UN sanctions. This would be an absurd restriction, yet it is a consequence of the Complainant's case. Of course, having stalled publication for 48 hours, the public figure (which could be a multinational corporation claiming that its integrity was at stake¹⁶) would hire lawyers to apply to a judge to claim that the psychological impact of the Article 8 violation by themselves or on members of their family would outweigh the public interest inherent in learning of their exploits with sheep or tax avoidance or whatever.

The judge would probably continue the injunction for a week (this is the usual practice) until there was time for a full hearing — so that is another week in which the Article 10 right to publish is suspended. Then a day would be set aside for a hearing to see whether the Claimant has a case that might succeed at trial. It will not be a full hearing, but will be decided on affidavits by people who may later fear to turn up at trial or may later have to accept they are mistaken. A full day hearing at the High Court will cost the media defendant up to £60,000 if it loses and about £10,000 if it wins. This, of course, is the 'chilling effect' of a notice requirement: newspapers will not bother to publish newsworthy stories of genuine public importance for which they must give notice because they know that giving notice will trigger expensive attempts to stop the story.

Failure to define 'respect for privacy'

Further uncertainty - so much that the 'prescribed by law' requirement is breached — is provided by the failure of this Court and of UK judges to give any sensible or coherent definition to the concept of privacy and 'respect of privacy'. In *Pfeifer*, the Court says it includes 'psychological integrity'. But what does this mean? A capacity to suffer embarrassment because others know the truth? In *Von Hannover*¹⁷ the Court talked of 'the development of the personality of each individual in his relations with other human beings'. What does this mean? If a public male figure consistently lies to the women he seduces, does this truth about his developing personality require covering up, even if the women seduced went to exercise their free speech rights? The Court goes on to locate 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life'.¹⁸ What on earth does this formulation mean? How is a court to locate 'this zone of interaction...in a public context', the truth of which may be withheld from the public? Definitions like this are so intolerably vague that a restriction based upon them cannot be said to be 'prescribed by law'.¹⁹

The UK judges have done no better in defining privacy — indeed, their efforts have been even vaguer. In *R v Broadcasting Standards Commission, Ex p BBC*²⁰ Lord Mustill said:

*To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace or shell or umbrella or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolable.*²¹

This is entirely metaphysical: the media is to be punished for violating the 'carapace of a personal space' — a nonsense — and for 'affronting personality' which could include any critical comment, however true or any insult, however trivial or justified. Lord Hope has found that 'his reputation, his personality, the umbrella that protects his personal space from intrusion'²² would mean that the appellant's privacy is invaded by a broadcaster pointing out the true fact that his DNA proved he was guilty of rape. It is extraordinary that the media had to go to the highest court to establish the simple fact that it was in the public interest to breach 'privacy' in order to publish evidence of a person's guilt of a serious crime. Although the Applicant's behaviour is not in this category and some would not even think it immoral, ironically, it could amount to a crime in English law of 'keeping a disorderly house', which is occasionally prosecuted and even punished

by prison sentences: see *R v Cynthia Payne*.²³

But the point is that cases like *Attorney-General's Reference (No. 3 of 1999)* may often be decided in favour of the media in the end, but the end is a Supreme Court where the costs orders, when they win, are only around 60% of the total they have paid and if they lose, they must pay the other side's costs, which usually total over £1 million.²⁴ So long as wealthy or 'conditionally fee'd' claimants can take the media to court (and because 'reputation' is an 'element' of an utterly vague concept of 'privacy', they can usually get in to court), the media faces heavy legal costs no matter how obviously incidental the story. The media simply cannot pay lawyers to contest every case where compulsory notification would inevitably be followed by an injunction.

Judges in the UK and in Europe are *insouciant* about legal costs: they think that the 'balancing act' between Article 8 and Article 10 is fine because public interest cases will usually win out at the end of the day. They do not comprehend the importance of being able to publish truthful information quickly and without legal inhibition, or the cost in editorial and journalistic time, quite apart from the cost of exorbitantly charging UK lawyers, in fighting for the right to publish.

If 'reputation' were no part of Article 8, and private information was properly defined, there might be an argument for a notice requirement, for example relating to medical records, sex with consenting partners who did not want to have the details published, photographs taken without consent in private places and so on. But the vast scope of the new law which is contended for — backed by a criminal sanction in the case of non-compliance — whenever the 'reputation' aspect of privacy or the 'carapace of psychological' well being is violated, is so vague as to be unworkable. Editors simply will not know whether to give notice or not, in relation to a vast range of newsworthy stories that will affect someone's reputation or someone's carapace of psychological wellbeing (which may depend on whether that someone has an 'eggshell' carapace, i.e. is likely to take offence easily).

The Applicant's case for compulsory pre-publication notification has been roundly rejected by the House of Commons *Press Standards, Privacy and Libel Report*.²⁵ It found the Applicant's suggestion to be unworkable and ineffective, because there would have to be a 'public interest' exception which would have permitted the editor in this case to avoid notice because he genuinely believed that there was a Nazi sex orgy (which would, apparently, have made the story of public interest²⁶) and had a statement from one participant purporting to confirm it. Even had notice been given and a hearing convened, the evidence would have been on affidavit and since the editor had a witness statement from witness 'A', the woman who organised the party and who purported to confirm the 'Nazi theme', he would have satisfied the pre-trial hearing test, i.e. Mr Mosley could not have shown that he was likely to succeed at trial (succeed he did eventually, but only after the witness "went to water" and refused at the last minute to testify on behalf of the newspaper).

The UK Parliamentary Select Committee points out, at para 87, that NGOs would be seriously and adversely affected by a pre-notice requirement. Global Witness, one such NGO which is party to this submission — repeats the point it made convincingly to the Parliamentary Committee, that a compulsory pre-notice requirement would, in relation to some of their reports (e.g. on Blood Diamonds) put staff and sources in danger.²⁷

The Rule Against Prior Restraint

The UK government had a positive and powerful obligation not to provide the Claimant with the power to go to Court to stop the press. This derives from Anglo-American history and tradition which is very different and much sturdier and more principled than European traditions of *lettres de cachet* and the Napoleonic insult laws, and which is summed up in the Duke of Wellington's reply to a journalist who gave notice, namely "Publish and be Damned!". The UK/Commonwealth/US rule is called *The Rule Against Prior Restraint* and is a fundamental right to publish, with any damnation coming later. It is hallowed by the great jurist Blackstone, who expressed it as follows:

*The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to law what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.*²⁸

Blackstone's words were the basis for both British and American common law and the rule against prior restraint was affirmed by the US Supreme Court in its historic *Pentagon Papers*²⁹ decision:

*Any system of prior restraint on expression comes to this court bearing a heavy presumption against its constitutional validity. The only effective restraint upon executive police and power in the areas of national defence and international affairs may be an enlightened citizenry - informed and critical public opinion which alone can here protect the values of democratic government. For without an informed and free press there cannot be an enlightened people.*³⁰

The rule against prior restraint has operated in libel cases in Britain for centuries.³¹ It is modern and well-understood by litigants and was recently endorsed by the Court of Appeal in *Greene v Associated Newspapers Ltd.*³² It would be wrong in principle and contrary to the Anglo-American tradition of freedom of speech for a UK government to require newspapers to notify (and thus invite injunction) whenever they plan to publish newsworthy information that may damage a reputation or arguably disrespect privacy. A notification requirement would destroy the rule against prior restraint and reverse the long line of case law that prevents a pre-publication injunction being granted in a libel action where the newspaper is prepared to defend on public interest grounds.

Notwithstanding what is said above, we note that the Court, without hearing argument, is already infected with the Article 8 and Article 10 'balancing' approach, which we contend is fundamentally wrong and which repeals the approach under Article 10 laid down in *Handyside*³³ and *Sunday Times*. The manner in which the Court has framed question 2(b)) assumes that there is a 'balance' between 'the interests protected under Article 8' and the freedom guaranteed by Article 10. In the *Sunday Times* case, the Court stressed that there was no 'balance': there was a presumption in favour of Article 10 and 'reputation' was a subsidiary right which had to be narrowly interpreted and firmly established. (The only occasion for 'balance' is where a genuine Article 8 right is involved, i.e. an intimate personal detail or confidential information about home and family life).

Question 3 assumes that Article 8 was legitimately engaged in this case. The only extent to which it was engaged was in the secret filming of a private party. The use of a surreptitious surveillance device may be deplorable and something for which the victim can be awarded damages, but it is not information that can be made subject to a notice requirement. That 'information' was simply that a wealthy public figure so enjoyed beating women, and being beaten by them, that he paid a large sum of money to savour this experience with five prostitutes. The judge found that this was 'private' information, although it had nothing to do with family and home life, and any personal details were hardly intimate since they were exhibited to five women.

It is almost always overlooked by complainants and by courts that Article 8 does not guarantee a right to privacy. It guarantees a right to respect for private and family life. What respect did Mr Mosley show for his own private and family life by disporting himself with five prostitutes, whom he paid to share his otherwise private sado-masochistic fantasies and to watch him ejaculate? He took the risk that any one of those five, who all knew who he was, might choose to talk or to publish an account of his gluttony for punishment. He complains that he was given no notice of publication, and of course it is accepted that the newspaper published a serious defamation of him: they said he had indulged in a Nazi sex orgy whereas he had only indulged in a British sex orgy. Had he sued in defamation, he would have been entitled to compensatory and aggravated damages (aggravated of course by the lack of notice) awarded by a jury. But he did not have to go before a jury — in the UK, the ultimate arbiter on questions of free speech - he sued in privacy which removes the right to trial by jury in favour of the newspaper. His receipt of £60,000 for damages from the judge has served to vindicate his position as a decent person without the slightest interest in Nazi themes; he has exposed the incompetence of the News of the World journalists; he now tours the country as a scourge of the tabloid press and makes himself available for flattering profiles in other sections of the press. He has, of course, suffered embarrassment (although his attraction to *le vice anglais* is not unusual in English men) and mortification at the exposure of his private pleasure but, this did not unseat him from his pre-eminent position in the sport of motor racing. His damages and costs award was adequate compensation for the newspaper's disrespect for his private life.

It is Mr Mosley's fundamental contention that without a notice requirement to enable victims to put the genie back into the bottle, they have no effective remedy. This argument fails to take on board the fact that once information is 'out' — especially out in newspaper offices — it cannot effectively be bottled. It will spread as rumour, and it will go up on internet blog sites, social media such as twitter and the fact of the injunction may make people think that the information is 'worse' than it really is. Moreover he has the 'just satisfaction' of having been vindicated in court - with the consequent enhancement of his dignity and public standing, and the consequent contempt (from media groups in particular) towards *News of the World*, which did not even appeal the decision.

It is idle for the Complainant's lawyers to go on at length about the 'commercial incentives' of the press. 'Responsible journalism' is a defence in libel cases but not in privacy (another rank unfairness is protecting 'reputation' under Article 8) but as the leading case of *Jameel*³⁴ recognises, there is no absolute obligation to notify the defamee so as to enable him to take out an injunction.

In paragraph 25, the Applicant says there is 'universal support amongst both academics and the judiciary' for the view that an injunction is the only effective remedy. This is not correct for the reasons given above, but in any event the examples given are not statements in favour of compulsory pre-publication notification. The notion that 'claimants with resolve and financial resources are likely to be few and far in between' is nonsense. The prospect of obtaining heavy and tax free damages, through lawyers operating on conditional fee arrangements with 100% uplifts, will encourage claimants who have suffered any gross privacy incursion. Indeed it has been widely reported that a number of persons who had their phones illegally bugged by a *News of the World* reporter have sued for damages, with the paper paying £700,000 in settlement to one litigant and a million to another. Sums of this size are a real deterrent to privacy invasion.

Margin of Appreciation

In any event, there must be a very considerable margin of appreciation permitted to states in relation to Article 8.³⁵ What amounts to a respect for private life is very much a matter for domestic notions of morality (see *Wingrove v United Kingdom*³⁶) and for the democratic process. It will be appreciated that questions of privacy protection have been regularly debated in the UK Parliament in recent years, and have been the subject of two reports by Sir David Calcutt, regular reports by the Press Complaints Commission and most recently by the House of Commons Culture and Sport Committee.

A law of privacy is being developed by the judiciary, and will of course be honoured by the media. A notice requirement imported by a court which knows collectively nothing about British traditions of 'publish and be damned' — about John Milton and *Areopagitica*, about John Wilkes and Tom Paine and Blackstone and Bentham and the rule against prior restraint — should not upset a local tradition that has for centuries protected freedom of speech. There is no European consensus on privacy, or on notice requirements, in any event. And there is no certain standard of morality: some would regard the Claimant's activity as morally questionable, whilst others would regard him as not bad for his age. The French are culturally amused at English infantile sexuality such as spanking fetishes said to develop in male public schools; the English deride a state that uses privacy laws to stop its citizens from hearing that fact that its President has an illegitimate child and a son involved in an illegitimate arms trade. The Swedes find British tabloids disgusting; the British find Swedish newspapers terminally boring. There is no 'universal bottom line', other than that children, family and home life always deserve protection and that well established categories of information (like personal medical records, diary contents, intimate personal relations with partners or details divulged to professional counsellors) should be safeguarded. Any wider privacy law is a matter for national laws based on national morals and attitudes to privacy.

GEOFFREY ROBERTSON QC DOUGHTY STREET CHAMBERS 23 March 2010

Notes

1. *Golder v United Kingdom* (1975) 1 EHRR 524.
2. *Sunday Times v United Kingdom* (1979) 2 EHRR 245.
3. *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153.
4. *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241.
5. *Silver v United Kingdom* (1983) 5 EHRR 347.
6. *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.
7. *Bowman v United Kingdom* (1998) 26 EHRR1.
8. *Financial Times v. United Kingdom*, Application No. 821/03 of 15 December 2009.
9. Human Rights Committee Concluding Observations, 30 July 2008, UN Doc. CCPR/C/GBR/CO/6.
10. *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 271. See also *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153 at para 55.
11. Professor Velu in Robertson, *Privacy and Human Rights* (1973), 15-18.
12. *Radio France and Others v France* (2004) 40 EHRR 29.
13. *Chauvy v France* (2005) 41 EHRR 29.
14. *Karako v Hungary* (Application No. 39311/05), unreported, 28 April 2009.
15. *Pfeifer v Austria* (2007) 48 EHRR 175, 183, para 35.
16. In the UK case law, companies have been held to have privacy rights, for example, to sue to protect confidentiality: see *X Ltd v Morgan Grampian (Publishers) Ltd* [1990] 2 W.L.R. 421 (CA) per Lord Donaldson.
17. *Von Hannover v Germany* (2005) 40 EHRR 1
18. *Von Hannover*, para 50.
19. *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, at paras 31-39.
20. *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885 ('*R v BSC*').
21. *R v BSC*, para 48 per Lord Mustill.
22. *Attorney-General's Reference (No. 3 of 1999)* [2000] 3 WLR 1164, para 22.
23. *R v Payne (Cynthia)* (1980) 2 Cr. App. R. (S.) 161.
24. The costs of *Jameel v Wall Street Journal* [2007] AC 359 (HL) after a three week trial, three days in the Court of Appeal and two days in the House of Lords, amounted to £2.28 million of which only £1.346 million was recovered.
25. House of Commons Culture Media and Sport Committee Report, 'Press Standards, Privacy and Libel', Second Report of Session 2009-2010, Volume 1, published 24 February 2010.
26. But this is questionable. Eady J assumed that there would be public interest in the revelation if the Nazi fetish element were proved, but why should this be so? If there is a privacy right to keep one's sexual fetishes to oneself and to act them out with willing (even if paid) partners, why should it matter whether the fantasies involved schoolgirls or nurses or Nazis or women from Mars, so long as they are consenting adults?
27. See Press Standards, Privacy and Libel Report, para 87 and Evidence, 241-2.
28. William Blackstone, *Commentaries on the Laws of England* (1975), Book IV, 151-2.
29. *New York Times v. U.S.*, 403 U.S. 713 (1971).
30. *New York Times v. U.S.*, 403 U.S. 713 (1971) at 729.
31. *Bonnard v. Perryman* (1891) 2 Ch. 269 (justification); *Quartz Hill Consolidated Mining v. Beal* (1882) 20 Ch. D. 501 (privilege); *Fraser v Evans* (1969) 1 Q.B. 349 (fair comment).
32. *Greene v Associated Newspapers Ltd* [2005] QB 972.
33. *Handyside v United Kingdom* (1976) 1 EHRR 737.
34. *Jameel and others v Wall Street Journal Europe Sprl* [2007] AC 359.
35. See the recent decision in *A v Norway*, Application No. 28070/06, Judgment of 9 April 2009.
36. *Wingrove v United Kingdom* (1997) 24 EHRR 1.

French Court Rules in Favor of Roman Polanski on Photo Privacy Complaints

By Clara Steinitz and Jean-Frédéric Gaultier

Arrested on September 26, 2009 at the Zurich airport, the film director Roman Polanski is currently on bail in his chalet, after more than two months spent in a Swiss prison. He is waiting for Switzerland's response to a US extradition request over his guilty plea over a sexual relationship with a 13 year old dating back more than 30 years.

Claiming that he and his family had been harassed by the press in his ski resort retreat, Polanski filed a series of complaints against several magazines in France. Notwithstanding his arrest, release on bail and the admission of a relationship with a teenager, Polanski claimed that the press photographs violated his right to privacy. In defense, the magazines argued in substance that the pictures were harmless and directly linked to current news as they illustrated the reunion of Polanski and his family after the film director's incarceration.

For a start, the judge found that the disputed publications related to news of legitimate interest for the public, firstly because they refer to an uncommon judicial matter, i.e. *"Criminal lawsuits initiated by the US justice Department for facts dating back to 1977 and related to (...) an extremely famous film director."* Secondly, they are *"in the heart of current affairs,"* since Roman Polanski was arrested in September 2009, placed in custody then released on bail in November 2009. Lastly, the media have broadly covered the matter, its developments, the public reactions to the film maker's incarceration, etc. Thus, it is legitimate to publish photos of Roman Polanski to illustrate the judicial scenario he is entangled into.

The judge undertook a thorough analysis of each of the disputed photographs to determine whether their publication was justified in view of the legitimate interest of the public to be informed of the matter. As a result, some of the disputed pictures, taken in public places and not revealing anything intimate about the complainants, were found not to damage their right to privacy.

Others, however, were found by the court to be unrelated to the current matter (e.g. a picture of the Polanski couple attending a public event) or taken without Polanski or his family knowing it, in the course of private moments *"insufficiently linked to the related news event"* (e.g. lunch,

time shared by mother and child) or inside the private chalet. The judge found that their publication was *"neither necessary nor useful to the legitimate information of the public."*

The court's reasoning on the use of photographs to legitimately illustrate a news event was of particular interest with respect to two of the published pictures. The first photograph depicts Polanski's wife standing by the window of the chalet. For the judge, this violated the right to privacy because the public interest does not extend to the entire family circle for the mere reason that Polanski's bail necessary affects the personal life of his family. Moreover, to the extent the photograph illustrated the Polanski family's sense of confinement, such confinement was a constraint created by the press itself in gathering outside the chalet rather than from the judicial bail measure. In other words, the press could not illustrate a news fact caused by its own behaviour.

The second interesting demonstration relates to a picture of Roman Polanski seated at the back of the car bringing him from his place of custody back to his chalet in Gstaad. There is no question that the picture is directly linked to the news event. However, the court considered the car to be a private place, noting that the car had tinted windows. For the judge, the widespread habit of publishing this type of picture in criminal cases is not justifiable when the targeted person is *"in a private place where he/she should be able to legitimately hope to be protected from all indiscretions, including when he/she is involved in a news event which legitimacy to relate is not questioned."*

That being said, in view of the many court decisions to the contrary produced by the defense, the judge, sitting in emergency proceedings, referred the matter to be discussed within the course of a procedure on the merits.

Beside the publication of extracts of the decisions, the judge ordered the payment of 5,500 € (\$7,490 U.S.) of damages for the magazine with the most extensive pictures publication and 3,000 € (\$4,085 U.S.) to cover the legal costs incurred. Although damages are not meant to be punitive nor should they be based on the profits made by the defendant, claimants often complain about compensations being inferior to costs of proceedings.

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Supreme Court of Canada Decision in *Quan v. Cusson*

Media Entitled to Rely on the Responsible Communication Defense Which Their Appeal Was Responsible for Developing

By Wendy Wagner and Richard Dearden

The Supreme Court of Canada's landmark decisions in *Grant v. Torstar Corp.* 2009 SCC 61 and *Quan v. Cusson* 2009 SCC 62 have brought Canadian law into the 21st Century by creating the "Public Interest Responsible Communication Defense," which provides protection for false and defamatory facts in circumstances where the publication is a matter of public interest and the defendant shows diligence in attempting to verify the allegations having regard to all the relevant circumstances.

Decisions rendered by the Supreme Court of Canada in the 1950's and 1960s denied the media use of the traditional qualified privilege defense for publications to the world at large. The Court signaled its willingness to reconsider these decisions when it granted leave to appeal from the Court of Appeal for Ontario's decision in *Quan v. Cusson*, on April 3, 2008. In *Quan v. Cusson*, the Court of Appeal for Ontario had recognized a public interest responsible journalism defence based on the House of Lords' decisions in *Reynolds v Times Newspapers Ltd.* and *Jameel v. Wall Street Journal Sprl*, but denied the defendants the opportunity to benefit from the new defense.

The Supreme Court's decision in *Quan v. Cusson* was issued concurrently with its decision in *Grant v. Torstar*, a case in which the Reynolds privilege had been advanced at trial. (Leave to appeal was granted on an expedited basis in *Grant v. Torstar* on February 19, 2009, shortly after *Cusson v. Quan* was argued before the Supreme Court of Canada on February 17, 2009.)

The Court set out the contours of the new Public Interest Responsible Communication defence in *Grant v. Torstar*. See "Supreme Court of Canada Creates Defence of Public Interest Responsible Communication," [MLRC MediaLawLetter December 2009](#) at 29.

In *Quan v. Cusson*, the Court held that it would be contrary to the interests of justice to deprive the defendants the opportunity to avail themselves of the responsible communication defense which their appeal was responsible for developing.

The Court answered the question raised in *Quan v.*

Cusson as to whether traditional qualified privilege could co-exist with the new defence in the affirmative within the *Grant* decision, but characterized the circumstances under which the traditional defense could be used for publication to the world at large as restrictive.

Background

Quan v. Cusson involved three *Ottawa Citizen* articles reporting on the conduct and performance of the plaintiff, Ontario Provincial Police Constable Danno Cusson, in Ottawa and New York City during the two weeks following the events of September 11, 2001. The articles were headlined "Renegade OPP Officer Under Fire," September 25, 2001; "OPP Apologizes for Cusson Fiasco," September 26, 2001; "OPP's Cusson Faces Internal Investigation," October 11, 2001.

Following the September 11 attacks, the Ontario Provincial Police ("O.P.P") had volunteered its assistance to New York authorities through official channels, but the offer had been declined. Without the permission of his employer, Constable Cusson left his post and travelled from Ottawa to Manhattan with his pet dog Ranger, presenting himself as an R.C.M.P. trained search and rescue volunteer to the police authorities at Ground Zero. When the OPP ordered Constable Cusson to return to his post, he tendered his resignation to the force.

Cusson had given numerous interviews to the local and national media. Prior to the publication of the *Ottawa Citizen* articles, he was hailed as a hero for his canine search and rescue efforts at Ground Zero, while the O.P.P. were publicly assailed for ordering him to return to duty in Ottawa. The three *Ottawa Citizen* articles in issue reported information obtained from Cusson's commanding officer and from N.Y. police officers that differed drastically from the information conveyed prior to the publication of the *Ottawa Citizen* articles, including that Cusson had misrepresented himself to the authorities in New York and possibly interfered with the rescue operation.

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Trial Decision

At trial, the defendants pleaded traditional qualified privilege, but did not rely on the separate defense known in England as “responsible journalism” or Reynolds privilege, which, at the time, had not been recognized as a distinct defense by any Canadian court. The trial judge agreed that an article reporting that Cusson’s superior planned to file a complaint over disciplinary proceedings was within the scope of the traditional qualified privilege for reports of pending court proceedings recognized by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130. With respect to the two other articles, the trial judge denied the qualified privilege defence on the basis that there was no “compelling” moral or social duty to publish the articles in question, and through they were “certainly of public interest,” he could not “say with sufficient confidence that they were in the public interest to the extent they needed to be heard.”

The jury was asked to rule on the meaning, defamatory content, status as fact or opinion, and truth of over 50 impugned statements in the two articles. The jury found that some of the statements were fair comment, and that many, but not all, of the factual imputations in the articles had been proven true. Among the true facts found by the jury were that the plaintiff had failed in his duties as an O.P.P officer and abandoned his responsibilities without justification, that neither he nor his dog had received formal training in search and rescue operations; that the plaintiff had misled N.Y. police into thinking he was an R.C.M.P. Officer, and the N.Y. police intended to arrest him. Conversely, the jury rejected that it was true that the plaintiff deliberately misled N.Y. police by representing himself as a trained R.C.M.P. K-9 officer, that he had concealed his true identity, and that he may have compromised the rescue effort at Ground Zero. The Supreme Court of Canada described these findings as “difficult to reconcile with one another.”

The jury awarded Cusson \$100,000 in general damages against the media defendants.

Court of Appeal

The appellant media defendants argued before the Court of Appeal for Ontario that the trial judge had erred in rejecting the defense of qualified privilege with respect to the

two articles. Specifically, they submitted that the trial judge set too high a standard by requiring a “compelling” duty to publish, and erred in not finding that the articles were on a matter of public interest. The appellants argued in the alternative that if the traditional qualified privilege were not available on the facts, they were entitled to rely on the Reynolds privilege as recently restated by the House of Lords in *Jameel*, in that the articles in issue reported on a matter of public interests and met the standard of responsible journalism.

The Court of Appeal never directly answered the appellants’ primary issue on appeal, *i.e.*, whether traditional qualified privilege applied in the circumstances of the case. After examining lower court decisions which had applied traditional qualified privilege to publications to the world at large in the post-*Charter* context, as well as developments in the law in other jurisdictions, the Court of Appeal determined that it was appropriate to develop the common law by adopting a public interest responsible journalism defence along the lines of the House of Lord’s decisions in *Reynolds v. Times Newspapers Limited* and *Jameel v. Wall Street Journal*. The Court of Appeal acknowledged that the articles in issue were on a matter of public interest, but held that the appellants were not entitled to the benefit of the newly created public interest responsible journalism defense because they had not advanced this new defense at trial.

Supreme Court of Canada

Before the Supreme Court of Canada, the appellants in *Quan v. Cusson* advanced the position that the Court could bring the laws of defamation into accord with section 2(b) *Charter* values by allowing the media to rely on both the “*Reynolds-Jameel* public interest responsible journalism” defense and traditional qualified privilege. The appellants urged the Court to find that the articles at issue were protected by traditional qualified privilege (a legal issue), or alternatively, that the appellants were entitled to benefit from the change in the law that created the new defense of responsible journalism.

On the first issue, the Court held that, as explained in the companion case *Grant v. Torstar*, the time had come to recognize a new defense – the defense of responsible communication on matters of public interest. The Court further held that the publications at issue in *Quan v. Cusson*

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were clearly in the public interest:

The Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety. While the subject of the *Ottawa Citizen* articles was not political in the narrow sense, the articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service. When Cst. Cusson represented himself to the New York authorities and the media as an OPP or RCMP officer, he sacrificed any claim to be engaged in a purely private matter. News of his heroism was already a matter of public record; there is no reason that legitimate questions about the validity of this impression should not have been publicized too. *Quan v. Cusson, supra*, para. 31 (whether a publication is in the public interest is a matter of law to be determined by the trial judge).

On the second issue, the Court disagreed that the appellants could not benefit from the new defense in that this would contravene the principle against raising "new issues" on appeal. The Court noted that the Court of Appeal did in fact allow the "new issue" of responsible journalism to be raised on appeal, and "broke new jurisprudential ground on precisely this issue." *Id. at* para. 34.

The Court also questioned how "new" the issue was in the sense of being legally and factually distinct from the issues litigated at trial, since much of the evidence that had been adduced to demonstrate qualified privilege and malice would also be relevant to responsible communication. For example, the defendants led evidence from the journalist of the steps he took to verify the allegations: "Importantly, he talked to Cst. Cusson and gave him the opportunity to tell his side of the story. Cusson's denials were included in the article." *Id.* para. 39 (whether the diligence factors are met is a matter of fact to be determined by the jury - or trial judge in its role as trier of fact).

The Court held that the interests of justice favored allowing the appellants the opportunity to avail themselves of the change of the law brought about by their litigation on a new trial. The standard for ordering a new civil trial, i.e., that a "substantial wrong or miscarriage of justice has occurred" had been met in that the appellant would be "seriously disadvantaged by being deprived the opportunity to avail themselves of the responsible communication defence which their appeal was responsible for developing" and "if it turns out the defence is found to apply to the articles in question,

such a deprivation would amount to an injustice". A new trial was ordered.

Co-existence of Traditional Defense

In the *Grant v. Torstar* decision, the Supreme Court explained that it was creating the new defense of public interest responsible communication, "leaving the traditional defence of qualified privilege intact." *Grant v. Torstar, supra* para. 95.

The Court noted that the traditional defense of qualified privilege had seldom assisted the media in defending libel actions in that it was grounded in special relationships characterized by "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large.

The Court also held that many forms of qualified privilege would not be well served by opening up the privilege to media publications. For example, the duties and interests of people communicating and receiving job references or police reports are definable with some precision and involve a genuine reciprocity. By contrast, the reciprocal duty and interest involved in a journalistic publication to the world at large, by contrast, is largely notional. *Id.* para. 93.

The Court nonetheless noted that in the last decade, the traditional defense of qualified privilege had sometimes been extended to media defendants provided they can show a social or moral duty to publish the information and a corresponding public interest in receiving it citing *Grenier v. Southam Inc.*; *Leenen v. Canadian Broadcasting Corporation*; *Young v. Toronto Star Newspapers*. (*Grant*, para. 36). The Court concluded:

Despite these tentative forays, the "threshold" for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege. *Id.* para. 37.

Wendy Wagner and Richard Dearden, partners at Gowlings in Ottawa, Canada, represented the media defendants before the Supreme Court of Canada in Quan v. Cusson.

The Other Side of the Pond

Lord Justice Jackson Libel Report Produces Important Changes For Defendants

By David Hooper

On 14 January 2010 Lord Justice Jackson, an English Court of Appeal Judge, produced his [final report](#) on costs in civil litigation. He had been appointed in 2008 by Lord Neuberger, the Master of the Rolls (the senior judge in the Court of Appeal) to investigate the high cost of civil litigation in the UK. Jackson had produced his [preliminary report](#) on 8 May 2009. The final report deals with the whole range of civil litigation in the UK but there is a separate section on defamation and privacy cases together with an analysis of the libel and privacy cases that were brought in 2008 (Appendix 17). The changes recommended by Jackson go a significant way towards reducing the imbalance that has, since 2000, led to ever increasing Claimant costs with the result that claims often had to be settled because of the ransom or blackmail effect of such costs.

Jackson's report is likely in very large measure to be adopted. The Lord Chief Justice (the well-named Lord Judge) described it "*as a remarkable analysis*" and Lord Neuberger hoped that it would be adopted by the Ministry of Justice.

At the Ministry of Justice the Lord Chancellor and Secretary of State for Justice, Jack Straw MP, described it as "*a remarkable piece of work*" and in particular singled out Jackson's recommendations regarding After The Event insurance (ATE) and Conditional Fee Agreements (CFA) as "*interesting and constructive proposals*".

The Ministry of Justice (MoJ) has itself produced on 19 January 2010 a paper entitled [Controlling Costs in Defamation Proceedings](#). This is a consultation document and requires response by 16 February 2010. The key proposal on which the MoJ wants views is whether the success fee should be capped at 10%. That is to say a significant reduction on the present 100%. It is also less than the 25% cap recommended by Lord Justice Jackson. It may be that the MoJ has in mind that the 10% success fee could be recoverable from Defendants whereas Jackson's 25% cap would have to be paid by the Claimant and would not be recoverable from the Defendant.

These steps follow the earlier MoJ report published on 24 February 2009 *Controlling Costs in Defamation Proceedings*. That was followed by the MoJ's response to that consultation document published on 24 September 2009 which resulted in rule changes about which I wrote in October. Those changes were fairly modest compared to the recommendations of Lord Justice Jackson in that they introduced a 42 days cooling off period before an ATE policy could be taken out, so that Defendants had the opportunity of settling claims before becoming liable to pay the ATE premium. Claimants were also then required to notify Defendants that they had taken out an ATE. There were also procedures put in place to control costs in libel actions.

The MoJ has also set up an expert panel of journalists, in-house lawyers and Claimant and Defendant media lawyers to report on concerns that the current law was having a "*chilling effect*" on freedom of expression. That working group is expected to report by the middle of March.

Additionally the Parliamentary Culture, Media and Sport Select Committee is due to report shortly.

The most dramatic changes suggested by Jackson LJ relate to CFAs and ATE. Jackson was distinctly unimpressed by the CFA regime, it was "*the major contributor to disproportionate costs*" and he was particularly scathing about ATEs "*the present system for achieving costs protection for Claimants is in my view is that it is the most bizarre and expensive system that it is possible to devise*" Jackson took into account representations by Claimant lawyers that CFAs did result in access to justice for Claimants with limited means who were thereby able to take on powerful media organisations. However, Jackson did observe that CFAs were used indiscriminately and could equally well be used by wealthy celebrities.

What Jackson in effect has proposed is turning the clock back to 2000 before the introduction of the Access to Justice Act 1999, when ATEs and CFA success fees became recoverable from Defendants.

At the same time he has built in safeguards for Claimants

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to enable them to bring libel claims against powerful media organisations which certainly was not easy prior to 2000. A balance has therefore had to be struck between two conflicting situations, Claimants' access to justice and disproportionate costs falling upon Defendants. The way he suggests this is achieved is as follows:

- ◆ Success fees in CFAs and ATEs will no longer be recoverable by successful Claimants from Defendants. Claimants will have to bear the expense of success fees and ATEs themselves. This is a very considerable significance for Defendants as success fees were almost invariably 100% resulting in Claimant lawyers happily charging up to £1,000 per hour. ATEs were expensive involving £67,000 premium for £100,000 of cover and were of limited value to Defendants, as there were many exemption clauses and a real risk that Claimants would not in any event take out sufficient ATE cover to protect the Defendant's exposure to costs.
- ◆ Success fees in CFAs will be capped at 25% of the damages awarded or recovered in the case, furthermore they (and ATE premiums) will have to be paid by the Claimant out of the sum he or she recovers. Jackson considered that this was not unreasonable bearing in mind that libel claims are about the vindication of reputation rather than compensation for continuing loss, as might be the case in personal injury. It was not in his view unreasonable to expect the Claimant to pay for the benefit of having had his lawyer act on this contingent basis. Jackson also considered that this arrangement would not impact in any significant way on Claimants' access to justice. Jackson noted that in many jurisdictions abroad Claimants were not able to recover their own legal costs at all and therefore had to pay them out of the damages they had recovered and that was not thought to be a bar to bringing such claims. Jackson envisaged that henceforward CFAs would be a matter of negotiation between the Claimant and his lawyers. He would be likely to enter into an agreement that the success fee would be X% of the lawyers' base costs subject to a cap which would be Y% of the damages (with a maximum of 25%). That in fact was roughly the way that CFAs worked when they were originally introduced before the floodgates were opened in 2000 in

favour of avaricious Claimant lawyers, happily clocking up copious extremely well-paid hours.

Jackson realised that there needed to be some counterbalance to these changes which should assist the Claimants.

- ◆ He recommended that damages in libel and privacy cases should be increased by 10%. This would produce a larger pool out of which success fees or ATE premiums could be paid.
- ◆ Defendants who had rejected lower settlement offers by Claimants than the court and ultimately awarded in court should also find that the damages were increased by 10% in addition to the existing regime permitting indemnity costs with interest of up to 10% over base rate being awarded on those costs.
- ◆ He also suggested a regime of qualified one way costs shifting which is not perhaps quite as complicated as it sounds. Jackson felt that this was a better and less expensive way of achieving the social objectives of striking a fair balance between Claimant and Defendant in litigation than the existing regime of CFAs and ATE. What it means is that before an unsuccessful Claimant is ordered to pay the Defendants costs the court should, bearing in mind that ATE insurance is likely to be less used in the future in view of its cost and that it will not be recoverable from Defendants, therefore take account of the financial resources of all the parties to the proceedings and the conduct of the parties in the litigation. This means that the court will have a degree of discretion before it awards costs and it may often result in Defendants recovering only a small fraction of the costs that they have had to incur. Any exercise of discretion is open to the criticism that it reduces certainty, but on the other hand, that formula is one that was used for 50 years under the Legal Aid and Assistance Act 1949, when the court had to decide what proportion of the costs should be borne by an unsuccessful legally aided litigant.
- ◆ Defendants will unquestionably do better as a whole under the Jackson regime, albeit that they will not recover all of their costs against the Defendant. Under

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the existing system with recoverable CFAs and ATEs the costs burden on Defendants is so crippling that Defendants were having often to settle cases against the justice of the situation. This Jackson proposal means that Claimants will still have access to justice in that they will be able to bring their case to court knowing that the judge will take those factors into account before awarding crippling costs against them if they do not succeed.

In Jackson's recommendations which apply to all civil litigation in England, he recommends a much greater degree of costs control by judges with caps on the amount of costs that can be awarded in smaller claims. He also envisages the creation of a Costs Council which would supervise and regulate the costs of civil litigation.

Although it was very much on the periphery of his terms of reference, Jackson felt that the inherent right to trial by jury in libel actions should be reconsidered. He noted that jury actions tended to cost 20-30% more than trials by judges alone. He also observed that there was an increasing tendency for cases to be heard by judges.

In 2008 there had been four contested libel actions heard by a jury and four by a judge alone. In 2009 at the time that Jackson wrote his report, there were four heard by a jury but 9 heard by judge alone. One of the advantages of trial by judge alone was that one had a reasoned judgment against which it was possible to appeal if there was an injustice.

Interestingly, Jackson also discovered the extent of contingent libel litigation in Ireland. Over 90%, and probably 95% of Irish privacy and libel cases were conducted on, as he put it, a "*no foal, no fee basis*". It was rather as we had all thought.

Jackson also analysed 154 libel and privacy cases which were resolved by settlement or judgment in 2008. The Claimants incidentally were successful in all 154 cases. 27 of these (17.5%) were conducted with CFAs. In the 16 cases where the overall costs were known to exceed £100,000, 11 of those cases (70%) were being conducted with CFAs. Jackson appears to have concluded from the statistics that the degree of risk said by Claimant lawyers to justify an uplift of 100% was baloney. However, being a judge that was not quite the word he used. He felt the level of success fees was disproportionate to the risk involved.

The statistics for 2008 showed that of the 27 CFA cases none failed and almost all were settled. In those CFA cases

Claimant costs averaged 314% of the damages awarded whereas the defence costs were 125%. There were 200-250 libel claims started in the English High Court every year (with probably ten times that number which were resolved without the need for court proceedings).

The final irony of these controversies is that Claimant lawyers have established a body called Lawyers for Media Standards, committed to preserving freedom of speech. They have, with the help of two academies, produced a report with a suitably Shakespearean title "[*Something Rotten in the State of Libel Law*](#)."

Have the scales really fallen from their eyes – not for the first time I suggest readers do not hold their breath!

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

MLRC's 50-State Surveys from Oxford University Press

EMPLOYMENT LIBEL & PRIVACY LAW 2010

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New MLRC Bulletin Examines Media Trials and Damages Over Last 30 Years

Trends continue: Increasing media victory rate, decreasing punitive awards

After 30 years and over 600 trials, the MLRC's latest Report on Trials and Damages has some good news: the media victories continue to rise –the percentage of media wins in the 2000s (52.1%) is much higher than the percentage in the 1980s (37.3%). Published earlier this month, MLRC Bulletin 2010:1 analyzes the media libel and privacy trials of 2009 and the statistical trends in trials in the 30 years since MLRC began compiling trial data.

There were only nine media trials in 2009. Media defendants won three and lost six trials. The average award in 2009 was \$4.6M (skewed by two very large verdicts).

Trials of 2009 – Defense Verdicts

Chapman v. Journal Concepts, Inc. (D. Haw. jury verdict Mar. 5, 2009).

A Hawaiian federal jury returned a verdict in favor of local magazine publishers after the subject of an article brought suit. The subject, a surfer and shaper of surfboards, took exception to the author's description of his adventures in ordering a custom surfboard from him. The jury found no false statements.

Howard v. WLOX-TV (MISS. Cir. Ct. jury verdict Sept. 30, 2009).

A Missouri state jury found unanimously in favor of the defendant, a television station that had run an "Action Report" in which a homeowner alleged that a building contractor had done "shoddy work" and walked off the job after demanding more money.

Stewart v. NYT Broadcast Holdings (Okla. Dist. Ct., Okla. County jury verdict Jan. 20, 2009).

An Oklahoma state jury found in favor of several local television stations and newspapers, all of which had broadcast or published a "crime stoppers" report using a press release issued by the Norman Police Department that showed images of the plaintiff.

Trials of 2009 – Plaintiff Verdicts

Strange v. Entercom Sacramento LLC (Cal. Super., Sacramento County jury verdict Oct. 29, 2009)

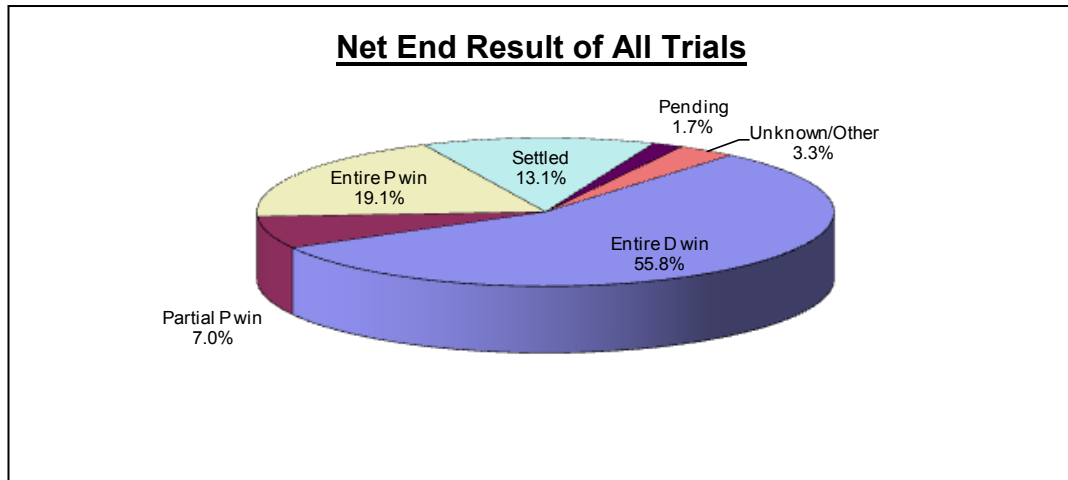
A California state jury returned one of the largest verdicts this Report has ever seen (at \$16,577,118, it is the 8th largest award) in the "Wee for Wii" case, in which a 28-year-old mother of three died after taking part in a radio show contest requiring participants to drink large amounts of water without urinating. The employees involved settled the case, so the jury verdict for wrongful death was only against the corporate parent.

Kennedy v. Times Publ. Co. (Fla. Cir. Ct., Pinella Co. jury verdict Aug. 28, 2009)

A state jury in Florida found for the doctor-plaintiff after a newspaper accused him of being "under federal investigation on charges of misusing money and sexual harassment." They awarded \$5.5M in compensatory damages, and \$5M in punitive damages.

Tan v. Le (Wash. Super. Jury verdict Apr. 16, 2009)

A Washington state jury found for the plaintiff, a former lieutenant in the South Vietnamese army who now leads a Washington Vietnamese community. The defendants, another Vietnamese organization, had



accused Tan in their newsletter and on their website of being a communist sympathizer. The jury awarded \$225K to Tan, and \$85K to his organization.

Trujillo v. Guaracao (Pa. C.P. jury verdict Apr. 2, 2009)

A Philadelphia jury awarded \$210,000 total to the plaintiff, the president of the Hispanic Chamber of Commerce. The local newspapers had alleged that his appointment as president was the result of a conspiracy among chamber members.

Stewart v. Smith (Ga. State. Ct. jury verdict Nov. 18, 2009)

A Georgia state jury awarded \$100,000 to the plaintiff, who claimed a character in the novel *The Red Hat Club* was identifiable as her, and that she was defamed by the character's antics. She also alleged that private facts about her were revealed. A Georgia Court of Appeals decision in 2008 had dismissed many of Stewart's claims, and the jury rejected all but her libel claim.

West v. Morehead (S.C.C.P jury verdict June 2, 2009)

A South Carolina state jury verdict awarded \$40,000 total to the plaintiff, a local lawyer who alleged she was defamed by an article about a divorce proceeding that suggested the lawyers involved would "turn on their own clients if the retainer is juicy enough."

Trends

Our report this year shows a continuation of trends we have noted before. Over the past 30 years: Plaintiffs are winning at trial less and less – in the 1980s the percentage of wins was 62.7%; by the 2000s it dropped to 47.9%.

Furthermore, punitive damages have dramatically dropped across the 30-year history of the report – in the 1980s, punitives constituted 61.2% of the award – but only 10.7% of the initial award in the 2000s. (However, compensatory awards have risen significantly – from an average of \$594,387 in the 1980s to an average of \$2,483,612 in the 2000s.)

At the conclusion of all proceedings – after trial, post-trial motions, and appeals – defendants totally won in 55.8 percent of cases, meaning that plaintiffs ended up with no damages in these cases. In 7.0 percent of cases, plaintiffs ended up winning some damages, but less than the amount initially awarded at trial. And plaintiffs fully won 19.1 percent of cases, meaning the initial damages amount awarded to them after trial survived through to the end of the case.

Google AdWords Upheld in Europe, But the Battle Isn't Over Yet

By Niri Shan and Justine Wilkie

In September 2009, MLRC published an article that considered the American and European approaches to the legality of keyword advertising. See “Search Engine Keyword Advertisements: An International Checkerboard of Rulings,” MLRC Bulletin [2009:3](#). At that time, the position in Europe was unclear and European lawyers and trademark owners were awaiting a decision from the European Court of Justice (ECJ) on a case against Google’s AdWords program that had been referred to the ECJ by the French Cour de Cassation.

The ECJ is the highest court of the 27 member European Union and is empowered to hear references from national courts on matters of European Community law, such as trademark regulation.

On March 23, 2010, the ECJ gave its ruling in the [Google France](#) references (Cases C-236/08, C-237/08 and C-238/08), shortly followed by a ruling on a reference from the Austrian Supreme Court, [Bergspechte](#) Case C-278/08, also involving the Google AdWords program.

In summary, the ECJ held that Google does not infringe the trademarks in question by selling keywords to unauthorized advertisers or arranging their display as sponsored links, on the basis that Google itself is not making relevant use of those trademarks. However, the ECJ has not ruled out future challenges to Google AdWords (or other search engines’ keyword advertising programs) where the search results cause actual trademark confusion to Internet users.

Google France Cases

The facts of the three joined French references were as follows:

[Louis Vuitton](#) – Google France was held liable for trademark infringement because (a) the entering of Louis Vuitton’s trademarks into Google’s search engine triggered advertisements for counterfeit Louis Vuitton products, and

(b) Google offered advertisers the possibility of combining Louis Vuitton’s trademarks with words such as “replica” and “imitation.” This decision was upheld on appeal, before it was appealed to the Cour de Cassation, which subsequently referred questions to the ECJ.

[Viaticum Luteciel](#) – Google France was also held liable for trademark infringement when the entering of Viaticum and Luteciel’s trademarks (BDV, BOURSE DES VOLS and BOURSE DES VOYAGES) triggered advertisements offering similar or identical products, even though the products were not infringing themselves, as they bore the trademarks of Viaticum and Luteciel’s competitors. On appeal, Google was also held to be an accessory to trademark infringement. Google then appealed to the Cour de Cassation, which again referred questions to the ECJ.

[CNRRH](#) – Google France, along with two advertisers, were held liable for trademark infringement in relation to the EUROCHALLENGES trademark in similar circumstances to the Viaticum Luteciel decision (i.e. where the keyword triggered advertisements for similar or identical products which did not bear

the EUROCHALLENGES trademark, but instead bore the marks of CNRRH’s competitors). The decision was upheld and Google appealed to the Cour de Cassation, which again referred questions to the ECJ.

It is widely accepted that to constitute trademark infringement, four conditions must be satisfied, namely the use must be: 1) in the course of trade; 2) without the consent of the trademark owner; 3) in relation to goods and services; and 4) it must affect the functions of the trademark. See *Céline SARL v Celine SA* (Case C-17/06)

In respect of Google’s liability, while the ECJ held that Google was acting in the course of trade, it held that it does not, itself, use the trademarks. Instead, it permits its clients to use the trademarks and, as such, Google is not directly liable for trademark infringement.

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Advertisers, on the other hand, were found to satisfy the first three *Celine* conditions (use in the course of trade, without consent and in relation to goods and services). Accordingly, advertisers may be liable for trademark infringement where their use of the trademark as a keyword affects the functions of that trademark.

In this regard, the ECJ was of the view that the two relevant functions in such circumstances are the origin and advertising functions. In respect of the origin function, this could be affected if the advertisement does not enable the user, or enables them only with difficulty, to ascertain whether the advertised goods and services come from the trademark owner or a connected party (for example, where the advertisement is too vague). As regards the advertising function, the ECJ held that it is not adversely affected by keyword advertising as such, as the proprietor will still appear in the natural search results and the visibility of the proprietor is therefore guaranteed.

In its judgment, the ECJ also considered whether Google could rely upon the hosting defence contained in the E-Commerce Directive and held that Google is an information service provider for the purpose of that Directive. However, the ECJ held that it is for the national courts to decide whether Google is precluded from claiming the benefit of the hosting defence because it has knowledge of or control over the content of the advertising.

BergSpechte

Two days after the ECJ gave its ruling on the Google France references, it gave a further ruling on keyword advertising in the BergSpechte reference from the Austrian Supreme Court.

Bergspechte owns the figurative mark below, which is registered in classes 25 (clothing) and 41 (education and entertainment). A competitor, trekking.at Reisen, purchased EDI KOBLMÜLLER and BERGSPECHTE as keywords and BergSpechte obtained an interim injunction from the Austrian courts. When the action reached the Austrian Supreme Court, it referred two questions to the ECJ asking (a) whether use of keyword advertising by an advertiser constitutes trademark infringement and (b) whether the location and labelling of the sponsored link affected the liability.

In respect of the first question, the ECJ followed its earlier judgment in Google France and held that liability depends on

whether the use of the trademark as a keyword affects the functions of that trademark. However, the ECJ did not answer the second question regarding location and labelling of search results on the basis that it did not consider that an answer would be useful for resolving the underlying dispute.

The Future?

While the ECJ has held that Google does not infringe a trademark by selling keywords to unauthorised advertisers or arranging their display as sponsored links, the ECJ has left the door open for trademark owners to challenge Google AdWords (or other search engines' keyword advertising programs) in two main instances:

1) Challenges against unauthorised advertisers: Trademark owners will still be able to challenge unauthorised use of their trademarks as keywords where the text of the sponsored advertisement suggests that the advertiser is authorised by, or otherwise connected with, the brand owner, or is too vague for reasonably informed and attentive Internet users to determine whether there is such a connection.

This means that brand owners will need to monitor the text or appearance of sponsored advertisements and then take action, on a case by case basis, in Europe when the advertisements do not make it sufficiently clear that the advertiser is not connected with the brand owner.

2) Complaints to Google: There are also two other situations in which Google (and other search engines) could potentially be liable:

First, where a search engine plays a neutral (i.e. a merely technical, automatic and passive) role in the keyword selection and display process, it may still be held liable after the trademark owner has put it on notice of an unauthorised advertiser's infringement if it does not expeditiously remove or disable the infringing data.

If the search engine is notified of an alleged infringement by a trademark owner, it should remove the allegedly infringing data from the advert text expeditiously, although there is no current guidance as to what is 'expeditious'. If the unauthorised advertiser considers that the search engine's decision to remove the infringing data is unjustified, it could presumably appeal to the search engine and, potentially the appropriate courts. If the unauthorised advertiser prevailed in such circumstances, it seems likely that the search engine would reinstate the data in question.

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Second, if the search engine does not play a neutral role in the keyword selection and display process (e.g. potentially, where the search engine is involved in the selection of infringing keywords or the drafting of ad text), the ECJ appears to suggest in the Google France judgment that the search engine could potentially be liable for contributory infringement, subject to the relevant national laws.

While the ECJ held that the search engine does not itself use the trademark and is therefore not directly liable for trademark infringement, the Court recognized that the search engine “permits” use of the trademark. By recognizing this, the Court has paved the way for contributory infringement by the search engine under national laws (if applicable)

where an advertiser is found liable for direct trademark infringement.

European trademark lawyers and brand owners alike are now waiting to see if the ECJ’s rulings will cause Google to change their AdWords policies throughout Europe. As it stands, the UK and Ireland currently have different policies than the rest of Europe, but this will surely change now that the ECJ has finally ruled on this highly contentious issue. It will also be interesting to see the extent to which an influx of new litigation in relation to keyword advertising arises now that the law is slightly clearer on the liability of search engines and advertisers.

Niri Shan and Justine Wilkie are with Taylor Wessing LLP in London.

Court Refuses to Convert “Garden-Variety” Copyright Claim into §1202 DMCA Claim

Uses of Semi-Nude Photograph of Radio Shock Jocks Were Fair

By Itai Maytal and David S. Korzenik

A photographer’s effort to convert his “garden-variety” copyright infringement claim, involving a semi-nude photograph of two radio shock jocks, into a potentially more lucrative Digital Millennium Copyright Act (“DMCA”) §1202 claim was blocked last month by a New Jersey federal district judge.

In [*Murphy v. Millennium Radio Group LLC, et. al.*](#), No. 08-1743, 2010 WL 1372408 (D.N.J. Mar. 31, 2010), United States District Judge Joel Pisano granted summary judgment to defendants radio shock jocks and their radio station on all counts for their online use and discussion about a copyrighted photograph. The suit alleged violations of the DMCA, copyright infringement and defamation. By ruling that the removal of a fine-print gutter credit did not amount to a DMCA violation under section 1202 of the statute, Judge Pisano confirmed that the DMCA does not supplant the original Copyright Act and cannot be used in this manner to expand possible recovery by a plaintiff.

Judge Pisano dismissed Plaintiff’s copyright claim after finding the defendants’ uses of his photograph on their website were fair use. He dismissed plaintiff’s defamation

claim after finding that statements made about the plaintiff by the defendants were either rhetorical hyperbole or otherwise not capable of defamatory meaning.

Background

This case arose from a photograph taken by plaintiff Peter Murphy of Defendants Craig Carton and Ray Rossi, hosts of the “Jersey Guys” show on WKXW 101.5 FM. Murphy, a freelance photographer, took Carton and Rossi’s photograph for *New Jersey Monthly* Magazine, which named them the best shock jocks of New Jersey in 2006. The photograph shows Carton and Rossi standing side-by-side seemingly nude, except for a placard with the station’s name covering their mid-sections. *New Jersey Monthly* published the photograph in its March 2006 print edition, but not online, as part of a special awards feature entitled “Best of New Jersey.” At the time the photograph was taken, Murphy was an independent contractor for the magazine.

Shortly after publication, WKXW posted the photograph of Carton and Rossi on its own website after scanning the

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print version from *New Jersey Monthly*. No copyright notice or watermark appeared on either of the two pages of the magazine on which the photograph was printed. Instead, credit in fine print appeared in the side of each page (the “gutter” of the printed page) where Murphy, along with other photographers, was credited by name. A *New Jersey Monthly* magazine employee, who composed the page, inserted the credit using Adobe InDesign software. Plaintiff claimed that this software made the credit here “copyright management information” under section 1202(c) of the DMCA. Defendants asserted that they did not remove any information in copying the photograph and they expressly identified *New Jersey Monthly* as the source of the image.

After some visitors to the radio station’s website sent altered versions of the photograph, the station invited more visitors to contribute, so as to allow fans to react to the work. As many as 28 visitors made submissions to the site. For example, one visitor altered the photograph by putting Carton and Rossi in bikini tops and replacing the station’s logo on the placard with “2007 Jersey Girls Calendar.” The station displayed the altered photographs on its site as thumbnail images until Murphy’s lawyer sent a cease-and-desist letter in June 2006, claiming copyright infringement and DMCA claims and demanding compensation.

Murphy alleged in his complaint that shortly after their receipt of his letters, defendants Rossi and Carton for 45 minutes of live broadcast proceeded to “impugn his personal

integrity” by describing him as a “‘a man not to be trusted’ in a business environment”; “a man who ‘will sue you’ if you have business dealings with him”; and a “man with whom ‘a person should avoid doing business.’” He alleged in his complaint that Carton and Rossi also “discussed the manner in which he had them pose for the photograph and derogatorily inferred he was a homosexual.” Following the filing of his copyright and defamation suit against the two shock jocks and Millennium Radio Group, the owner of their radio station, the Defendants moved for summary judgment on all of his claims.

DMCA Claim Under 17 U.S.C. §1202(b)

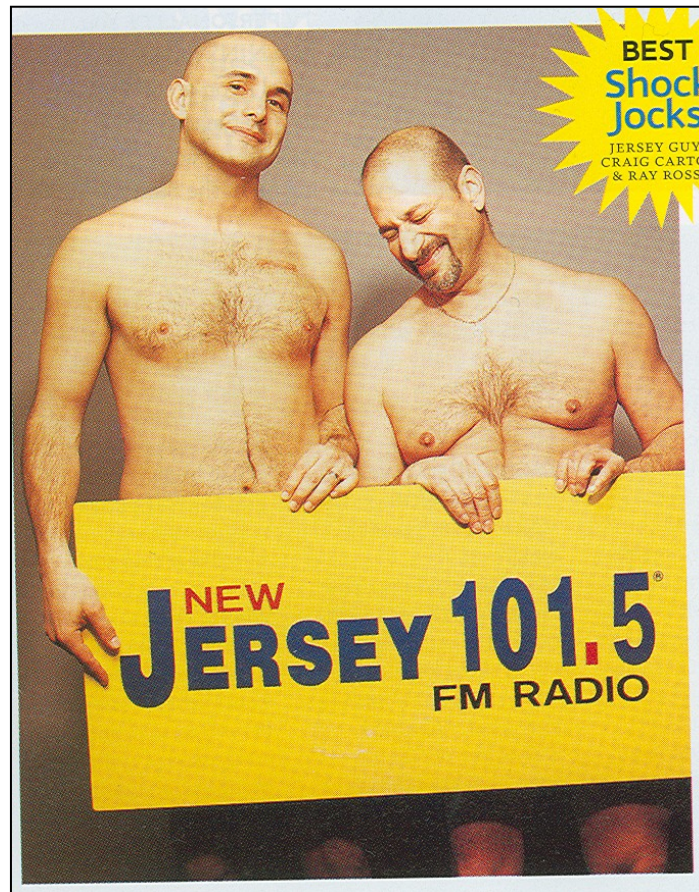
Section 1202 of the DMCA bars the removal or alteration of “copyright management information” (“CMI”) from a copyrighted work with the intent to commit copyright infringement. 17 U.S.C. §1202(b). Thus, the removal or alteration of CMI without a showing of intent to “induce, enable, facilitate, or conceal” copyright infringement will not be a violation of the statute. CMI is defined by Section 1202(c)

in eight categories of

information about authorship, ownership and permitted uses of a work that are components of “rights management functions” or “rights management systems.” One of those categories involves, in relevant part, “the name of, and other identifying information about, the author of a work.” 17 U.S.C. §1202(c)(2).

In his complaint and opposition papers, plaintiff asserted

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Judge Pisano dismissed Plaintiff’s copyright claim after finding the defendants’ uses of his photograph on their website were fair use. He dismissed plaintiff’s defamation claim after finding that statements made about the plaintiff by the defendants were either rhetorical hyperbole or otherwise not capable of defamatory meaning.

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that defendants' posting of his photograph, but not the gutter credit line, amounted to intentionally removing CMI under 17 U.S.C. §1202(b), which is a violation of his rights under the DMCA. Defendants disputed Plaintiff's characterization noting that the information at issue in the case (1) was nothing more than a photography credit in a print magazine (not even in digital form); (2) a fine print credit not even located on or next to the photo in question; (3) one located in the gutter of the page (already removed and remote from the photo that it was crediting); and (4) most significantly, not part of any automated or technological copyright management or protection system.

Defendants also noted that even if the DMCA did apply, that WKXW and the other defendants lacked the kind of intent required by §1202 to be liable, as they expressly credited *New Jersey Monthly* as the source of the photograph. See *Kelly v. Arriba Soft Corp.*, 77 F.Supp.2d 1116, 1122 (C.D. Cal. 1999), *aff'd in part and rev'd in part on other grounds*, 280 F.3d 934 (9th Cir. 2002).

Defendants also cautioned that if plaintiff's DMCA argument were to succeed, every photograph published without its original credit would give rise to a violation of the statute, arguably allowing for expanded remedies and extension of rights not otherwise granted under the Copyright Act of 1976. For example, untimely registered works would still be entitled to statutory damages and attorneys' fees if a DMCA 1202 claim was viable. Plaintiff had not timely registered his photograph here. Further, while the Copyright Act permits recovery of one award of statutory damages for each work infringed, regardless of evidence of widespread distribution, the DMCA appears to permit recovery of statutory damages for "each violation" of §1202. 17 U.S.C. §1203(c)(3)(B).

As the term "each violation" is undefined in the statute, and unclear to courts, it could be abused by copyright plaintiffs. Statutory damages for DMCA claims can also range from a minimum of \$2,500 to a maximum of \$25,000 per violation (17 U.S.C. §1203), which is more than the standard statutory damages for copyright claims of \$750 or more per infringement. 17 U.S.C. §504. In addition, some plaintiffs claim that fair use is not a defense to any DMCA claim under section 1201 or 1202. The irony here, as Defendants asserted, is that parodies rarely ever retain copyright notices or credits.

District Court Decision

Judge Pisano agreed with the Defendants that the fine-print gutter credit was not CMI. Persuaded by the opinion of then New Jersey Federal District Judge, now Third Circuit Judge, Joseph Greenaway Jr., in *IQ Group Ltd. v. Wiesner Publishing*, 409 F. Supp.2d 587 (D. N.J. 2006), Judge Pisano held that the DMCA did not apply.

The *IQ Group* court concluded — after an exhaustive review of the DMCA's own definition of CMI, its legislative history, law review articles by experts on the intersection of copyright and new technology; a report by the Working Group on Intellectual Property Rights; and treaties of the World Intellectual Property Organization, of which the DMCA was the implementing statute — that "to come within §1202, the information removed must function as a component of an automated copyright protection or management system." *Id.* at 597. The court explained that these are "technological measures that can control access and reproduction of works, and thereby manage the rights of copyright owners and users." *Id.* For example, encryption technologies, digital signatures and watermarking are measures that address copyright management concerns and could be governed by §1202 of the DMCA. See *Id.* at 594.

Judge Pisano held that the fact that "a *New Jersey Monthly* employee used a software program to compose the page and insert the gutter credit did not bring this case into the scope of the DMCA." The DMCA did not cover copyright management "performed by people" but rather "technological measures of automated systems." Otherwise, Judge Pisano concluded that every reproduction of a magazine photograph without its original credit would cause a violation of the DMCA, converting "virtually all garden-variety copyright infringement claims" to DMCA claims, and "supplanting the original Copyright Act." Judge Pisano went further to note that as an added section the Copyright Act, the DMCA was intended to supplement, not supplant, the act. Judge Pisano did not address the intent of the Defendants in his dismissal of Plaintiff's claims under the DMCA.

Status of Debate over Scope of Protectable CMI under 17 U.S.C. §1202

With this decision, Judge Pisano joins a growing consensus in federal courts that the statutory protection of

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§1202 is triggered only when CMI exists as a result of an automated copyright protection or management system. See e.g., *IQ Group, Ltd. v. Weisner, supra*; *Silver v. Lavandeira*, No. 08 Civ. 6522, 2009 WL 513031 (S.D.N.Y. Feb. 26, 2009), *Textile Secrets Int'l Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp.2d 1184 (C.D. Cal. 2007); *Jacobsen v. Katzer*, 609 F.Supp.2d 925, 934 (N.D. Cal. 2009)(finds for copyright plaintiff, but appears to follow holding of *IQ Group*). What is common among these cases is that they largely reached their conclusions about the scope and applicability of §1202 after exhaustive analysis of the intent and purpose of the DMCA, as manifest in the statute's express language, its legislative history and the surrounding legal scholarship and documents. These decisions provide a service to artists, authors, publishers and other copyright holders by reinforcing the contours of copyright law.

Several courts have interpreted §1202 more expansively, such that they do not limit the DMCA to technological measures of automated systems. See e.g., *Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454 (S.D.N.Y. 2009); *Fox v. Hildebrand*, No. CV 09-2085, 2009 WL 1977996 (C.D. Cal. July 1, 2009); and more confusingly *McClatchey v. The Associated Press*, No. 3:05-cv-145, 2007 WL 776103 (W.D. Pa. March 9, 2007).

However, these cases tend to treat the issue of what is protectable CMI in a cursory manner with little explanation, and the 1202 issue is ancillary to other issues. These cases tend to endorse the application of section 1202 of the DMCA without examining the meaning of the statute or its legislative history. By doing so, they leave copyright plaintiffs with the unwarranted ability to use §1202 claims as a bargaining tool in pushing settlements of questionable copyright claims.

Fair Use Exception to the Copyright Act – 17 U.S.C. §107

Defendants also prevailed at summary judgment on plaintiff's copyright infringement claims relating to the 28 altered photographs submitted by visitors to their website as well as their own use of the unaltered photograph. In ruling against the claim, Judge Pisano considered each of the statutory factors of the fair use analysis: (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.

Judge Pisano concluded that the fair use factors, considered as a whole, weighed in favor of the defendants. The fact that, under the first factor, the new uses of the photograph were either for a different purpose or fundamentally transformative in nature, coupled with the fact that they had no credible effect on the value of the original copyrighted work, the fourth factor, led Judge Pisano to dismiss plaintiff's copyright claims on fair use grounds. Judge Pisano found the third and fourth factors neutral in the analysis given that the case involved parody.

Defamation

Judge Pisano also dismissed Murphy's defamation claims, finding that the bulk of the claims amounted to "nothing more than rhetorical hyperbole," and that a false accusation of homosexuality is no longer capable of defamatory meaning in New Jersey. For a full discussion of the defamation claim in this decision, please refer to the companion piece in this issue, "False Allegation of Homosexuality No Longer Actionable, Says NJ Federal Court."

Conclusion

While Judge Pisano's fair use analysis does not create new law in copyright, his decision on the DMCA claim in this dispute helps further resolve an ongoing debate in federal courts of what constitutes protectable copyright management information.

By endorsing the viewpoint held by other courts that section 1202 of DMCA covers only "technological measures of automated systems," this decision helps solidify the boundary between the Copyright Act and the DMCA, without depriving copyright plaintiffs the ability to recover reasonable damages from meritorious copyright claims.

Plaintiff has filed a notice of appeal.

David S. Korzenik of Miller Korzenik Sommers LLP represented the Defendants as to the copyright claims, supported by firm associates Mona Houck and Itai Maytal. Thomas Cafferty, Nomi Lowy and Lauren James-Weir of Scarini Hollenbeck LLP were counsel to the Defendants as to the libel claim. Plaintiff was represented by Maurice Harmon of Harmon & Seidman LLC.

New York Court Rejects Prior Restraint in Copyright Case

By Laura M. Leitner

On March 5, 2010, Judge Paul G. Gardephe of the United States District Court for the Southern District of New York denied a request for a preliminary injunction that would have barred the Canadian Broadcasting Corporation (CBC) from using any of the videotape it had taken at a New York fashion show put on by designer Peter Nygård. *Nygård International Partnership v. Canadian Broadcasting Corporation*, No. 09-CV-10298(PGG).

Knowing that the CBC was working on a documentary about his business practices, Nygård sought an injunction on the theory that the CBC's use of its own videotape of the event would violate a copyright Nygård held in the fashion show itself.

Ruling from the bench after an evidentiary hearing, Judge Gardephe found the potential future infringement of a copyright to be an insufficient basis for imposing a prior restraint against a news organization. He also held that an injunction was inappropriate for the further reason that Nygård had failed to establish a likelihood of prevailing on its claim of copyright infringement, for multiple reasons.

This lawsuit was only one part of a broader legal strategy to frustrate the CBC's newsgathering by Nygård, one of the richest men in Canada. Nygård also sued the CBC in Canada, alleging that it was tortiously interfering with confidentiality agreements between Nygård and his employees simply by interviewing them. Plaintiff's extraordinary efforts to impede the CBC proved unsuccessful. Its hour-long report about Nygård was broadcast on the CBC news magazine, "The Fifth Estate," on April 7, 2010.

Background

In December 2009, plaintiff Nygård International Partnership filed suit against the CBC in New York, asserting claims for copyright infringement and trespass. The claims arose out of a fashion show held by Nygård as part of the grand opening of its new "flagship" store in Times Square last November. Although the event was open to the public

and many members of the press were invited, Nygård alleged that only pre-approved reporters were allowed to photograph the fashion show because confidential and proprietary designs were displayed. It asserted that the CBC's presence was both unauthorized and surreptitious.

Plaintiff submitted a sworn statement from its director of communications claiming that, upon discovering the CBC crew at the fashion show, she told them they were violating Nygård's copyright and forced them to leave, and averring that the reporters then evaded security to sneak back in and continue filming illegally.

The allegations came as a complete surprise to the CBC and its reporters, who had attended the event and filmed portions of the fashion show in the ordinary course, without incident.

The CBC flatly denied that its journalists had done anything wrong, directly disputing Nygård's factual presentation. The CBC submitted its own sworn statements explaining that the camera crew had been welcomed at the fashion show by a Nygård press representative, denying that the communications director had ever confronted them, and denying that the crew was ever asked to leave at any time by any one.

The CBC also noted that Nygård's claims of confidential information were belied by the fact that the fashion show was held in a store that was open to the general public, and that the model's "runway" went outside the store onto the Broadway Mall in Times Square.

On January 21, 2010, Nygård moved for a preliminary injunction and an expedited hearing, on the ground that the CBC was about to publish the allegedly infringing video it had taken of the fashion show. The CBC cross-moved to dismiss, and an evidentiary hearing on both motions was held on March 5, 2010.

At the hearing, the CBC presented live testimony from the crew that had taken the video, and also introduced Nygård's deposit copy of the fashion show that the CBC had obtained from the Copyright Office, unbeknownst to Nygård.

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Nygård had itself oddly failed to provide the court with a copy of the tape to establish the nature of the allegedly infringed work, but the reasons for this failure quickly became evident at the hearing.

The Nygård videotape not only demonstrated many non-copyrightable elements in the purportedly copyrighted fashion show, but it also refuted Nygård's factual allegations about a supposed trespass by the CBC reporters. The video submitted to the Copyright Office included images of the CBC crew throughout the fashion show, setting up its microphone, and interacting with various Nygård employees. The audio picked up on Nygård's video of conversations involving the CBC crew was also inconsistent with the sworn testimony of the Nygard witnesses.

District Court's Decision

Obviously moved by what it had seen, the court promptly denied a preliminary injunction from the bench. Judge Gardephe noted that while Nygård was now objecting to the CBC recording of the event, it had attempted to maximize the publicity at the time and even held the fashion show on the sidewalks of Time Square in broad daylight.

Although Nygård argued that it had controlled media coverage by requiring all journalists to sign special agreements, the court found it significant that Nygård produced not a single copy of the agreement in the course of the hearing to substantiate its terms or to establish the nature of the restrictions imposed.

The court underscored that to obtain an injunction Nygård was required to show irreparable harm that would follow if no injunctive relief were granted and either "a likelihood of success on the merits or a serious question going to the merits to make them a fair ground for trial with a balance of hardships to be decidedly in plaintiff's favor."

Before applying this standard to the record facts, however, Judge Gardephe noted that the specific injunction Nygård sought would constitute a prior restraint against a news organization.

The court thus found a heavy presumption against the constitutional validity of the injunction being sought, and took note that Nygård was unable to cite a single federal case where a news organization had been enjoined from using

videotape taken by its own journalists, on a theory of copyright infringement.

The court then turned to the issue of irreparable harm. Judge Gardephe noted that irreparable harm has sometimes been assumed when a valid copyright is infringed, but found no clear evidence that Nygård held a valid copyright in the fashion show itself. Even if Nygård had a valid copyright, the court continued, the presumption of irreparable harm could be rebutted, and the CBC had successfully done so in this case.

The court found that there had been no confusion in the marketplace for Nygård's fashion show (if such a market exists) because no part of the CBC's recording had yet been broadcast, and it was unclear how much of the CBC video would ever be broadcast.

The court also found that no confidential or proprietary information would be disclosed if the CBC used its videotape and that Nygård had failed to demonstrate any other irreparable injury "relate[d] to its copyrightable interests." And it found Nygård's allegation of potential, future irreparable injury entirely too speculative to justify a preliminary injunction, given that the CBC had not yet made any actual use of the allegedly copyrighted material.

Turning to the likelihood of success, the court held that Nygård had failed to demonstrate that a non-scripted event like a fashion show is copyrightable, as distinct from a photograph or video of the event. In any event, Judge Gardephe concluded, the CBC was likely to have a strong case for fair use, if and when it used the video in a news program.

After rejecting Nygård's request for an injunction, the court requested additional briefing from Nygård. Noting that the hearing had revealed "many, many flaws in the case that's been brought," the court instructed Nygård to consider whether it intended to proceed, and if so, to explain within one week why the case still had merit given the testimony and evidence presented at the hearing.

Nygård promptly withdrew its complaint and terminated the action.

David A. Schulz, Robert Penchina, and Laura M. Leitner of Levine Sullivan Koch & Schulz, L.L.P. represented the Canadian Broadcasting Corporation. Plaintiff Nygård International Partnership was represented by Bart A. Lazar and Donald Dunn of Seyfarth Shaw LLP.

Supreme Court Reverses Second Circuit (And 200 Other Cases) And Holds Copyright Registration Mandatory But Not Jurisdictional

By Charles S. Sims

In 2000, in the wake of the Second Circuit's reversal of district judge Sonia Sotomayor's grant of summary judgment for the publishers and databases in litigation filed by freelance author Jonathan Tasini, various groups of freelance authors filed four class action lawsuits, hoping to capitalize on the *Tasini* holding. Five years later, the parties reached a settlement agreement resolving all those claims, which was approved by the district court but vacated by the Second Circuit in 2007, on a jurisdictional ground that the Court raised *sua sponte*. This month the Supreme Court unanimously reversed the Second Circuit and breathed new life into the settlement agreement that had been stymied by the Second Circuit's whim. [Reed Elsevier, Inc. v. Muchnick](#), reversing *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116 (2d Cir. 2007).

Background

Beginning in the 1980s, publishers began licensing their periodicals to LexisNexis and similar databases. The complete contents were delivered with representations that they had the right to do so and promises to indemnify the databases against claims for copyright infringement. [New York Times Co. v. Tasini](#), 533 U.S. 483 (2001), established that the overarching ground on which the publishers had relied for nonexclusive electronic rights, 17 U.S.C. § 201(c) did not grant them that right; but even without that arrow in their quivers any publisher still might well have electronic rights to any given article on a variety of bases, including written licenses, oral licenses, licenses implied by conduct, estoppel or waiver, and others. Notwithstanding the strength of those defenses, fact-intensive litigation involving millions of articles was not an attractive prospect for database companies and publishers. And so when District Judge George Daniels, to whom the post-*Tasini* class actions were assigned by the Judicial Panel on Multidistrict Litigation, asked the parties if they would mediate the freelance claims, they agreed to do so.

The parties jointly engaged Ken Feinberg (a few months before Attorney General Ashcroft engaged him for the 9/11 compensation project), and mediation commenced. Four years later – after working through the disputes between the plaintiffs and defendants, and then between the databases defendants and publishers over how to fund any settlement – all the parties to the district court litigation reached a settlement that they enthusiastically supported. However, a California attorney whose email address ended in “@classobjector.com” appeared, representing ten cranky authors, and began to file a stream of motions objecting to the settle-ment and the procedures underway to secure the court's approval.

After the district court rejected all the objections and approved the settlement, it granted the parties' motion for final approval and entered final judgment. The objectors appealed, complaining that unregistered works should be compensated more highly and that authors of unregistered works should have had their own class representative.

At argument, Judge Straub focused nearly exclusively on jurisdiction, and repeatedly asserted his belief that the provision generally requiring registration before institution of infringement claims, 17 U.S.C. § 411(a), comprehensively deprived the district court of jurisdiction to approve any settlement in which the parties compensated authors for works in which copyright had not been registered, even though the consolidated cases had been properly instituted in full compliance with § 411(a). He appeared unmoved by counsel's arguments that all the named plaintiffs *had* registered their works, and by their reliance on authority that courts with properly instituted cases have jurisdiction to settle claims that they lack jurisdiction to try.

Months later, Judges Straub and Winter issued a decision vacating Judge Daniels' judgment approving the settlement, and broadly holding that because the provision requiring registration-before-instituting-suit is “jurisdictional,” district courts may not approve settlements in which unregistered works are compensated. Judge Walker dissented, agreeing

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that the district court had not exercised jurisdiction to resolve claims for unregistered works, and instead had simply approved a private settlement in cases properly before him.

After an unsuccessful petition for rehearing en banc, the settlement parties filed a petition for certiorari, which the petitioners and objectors both urged be granted. After conferencing the petition ten times, the Court granted review, rewriting the question presented to one that the parties had never briefed: whether § 411(a) restricts subject matter jurisdiction. Because the authors and objectors agreed that the district court had jurisdiction to approve the settlement, the Court obtained the necessary adversity by appointing a law professor to represent the Second Circuit's judgment.

Petitioners commenced their work by persuading the Register of Copyright and the Solicitor General to support their position. With that flank covered, and assurance that the Library of Congress and Register would not be arguing that affirmance was necessary to preserve the benefits (to them) of registration, success looked increasingly plausible. Oral argument, delivered on the second day of the term, seemed to go well, and none of the questioning seemed to evidence any substantial support for the Second Circuit's decision.

The Decision

A year to the day from the cert. grant, Justice Clarence Thomas handed down a unanimous judgment, and an opinion in which five justices fully joined. Justice Ginsburg, for herself and Justices Breyer and Stevens, concurred in the result, differing with the majority only on a minor non-copyright point (whether a particular decision, which the whole Court agreed was not decisive, should be distinguished on a different ground than the ground Justice Thomas's majority adopted).

The Court recognized that it was disagreeing with more than 200 decisions of courts of appeals and lower courts in concluding that registration was mandatory but not a condition to subject matter jurisdiction. But following a recent string of cases in which it had held that various other provisions of law are mandatory but not "jurisdictional", the

Court unanimously held that § 411(a), while important and subject to firm enforcement on motion of a defendant, was not a condition precedent to subject matter jurisdiction, which Congress conferred for copyright infringement cases by 28 U.S.C. § 1338 and 1331. The court relied especially on *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) and its predecessors, which held that statutory claim processing rules or threshold filing conditions are not jurisdictional unless Congress expressly so announces.

Because the Court agreed that *Arbaugh* was controlling, neither the majority opinion nor the concurrence addressed many issues that the parties had briefed, including (a) whether the petitioners would have prevailed even if § 411(a) were jurisdictional, (b) whether district courts may, or must, enforce § 411(a) by dismissal of infringement claims asserted for unregistered works if the defendant does not assert failure to comply with § 411(a) as a defense. (In virtually every infringement case, defendants are quick to assert failure to register where the terms of § 411(a) have not been complied with, and have enormous incentives to do so, so that question will not often arise.)

While the decision does seem to afford defendants protection from infringement suits where § 411(a) hasn't been complied with, it also affords defendants the option of reaching a class-wide settlement, if they want to go down that path.

Next Steps in In re Literary Works

When the case returns to the Second Circuit 25 days after the decision, the Second Circuit will reactivate the appeal, and presumably ask the parties whether they seek any supplemental briefing or argument. In the meantime, the plaintiffs are making efforts to persuade the objectors – who have already delayed payments to the authors by nearly four years – to withdraw their appeal. Once the appeal is concluded, one way or the other, if the settlement survives the parties will proceed to implement it.

The settlement agreement affords publishers the right to review asserted claims. They may well find it expedient to exercise that right, particularly as to those freelance authors who have submitted claims (for hundreds of works) that total in the five or six figures. The claims administrator reports that claims have been lodged for over 300,000 subject works, for an initial value (which may be reduced by claim review) of over \$8 million.

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Impact on Copyright Infringement Litigation

The principal impact of the Court's decision on copyright infringement cases generally is modest: henceforward, motions to dismiss for lack of registration should be labeled as motions lodged under Rule 12(b)(6), rather than Rule 12(b)(1). But those motions will be granted if the complaint seeks to litigate over unregistered works. Nothing in the decision suggests that defendants are now exposed to having to litigate infringement cases for unregistered works.

While the Court's decision is short and it did not explore the ramifications of its holding, nothing in the decision suggests registration is not mandatory, or that a district court has any discretion whatsoever when a defendant moves to dismiss for failure to register a claim consistent with § 411(a). The brief for the United States makes that point strongly, as did petitioners' briefs; and the opinions by Justice Thomas and Justice Ginsburg contain no hints at all that § 411(a) is not mandatorily enforceable on defendant's timely motion. Section 411(a) means what it says and is fully enforceable by a defendant who chooses to invoke it.

While the decision does seem to afford defendants protection from infringement suits where § 411(a) hasn't been complied with, it also affords defendants the option of reaching a class-wide settlement, *if they want to go down that path*. The Court's decision does not entirely exclude the possibility that a district court might have the discretion, or even the obligation, to dismiss for failure to comply with § 411(a) in any event – that was a question Justice Thomas's decision leaves open – courts will most likely read *Reed Elsevier* to make § 411(a) enforceable but generally waivable at defendants' option.

The circumstances in which defendants would want to waive are almost certainly sufficiently few and constrained so that the public benefits secured by § 411(a) are unlikely to be significantly lost by giving users and owners, collectively, the means to resolve longstanding, intractable problems with class action settlements. Notably, the plaintiff's § 411(a)-derived inability to litigate over unregistered works on a class basis should go far to preventing the class action vehicle from being used extortionately, as is so often the case in other areas of the law.

Finally, the decision likely will permit declaratory actions for non-infringement notwithstanding the defendant's refusal

to register a work asserted to be protected and infringed, contrary to such decisions as *Stuart Weitzman LLC v. Microcomputer Resources Inc.*, 542 F.3d 859 (11th Cir. 2008) (dismissing declaratory judgment claim on unregistered United States work on subject matter jurisdiction ground).

In short, the Supreme Court seems to have reached a highly useful result, paving the way for approval of the *Literary Works* settlement, and generally handing parties the opportunity to resolve broad scale infringement disputes on a class basis, if the defendants seek that kind of resolution.

Charles S. Sims, a partner with Proskauer Rose LLP, argued the case for petitioners before the Supreme Court. Professor Deborah Jones Merritt argued the cause for amicus curiae in support of the judgment below (appointed by the Court).

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Court of Appeals for the Federal Circuit to Postal Service: “Lick That!”

Reverses Fair Use Finding, Despite Dissent

By Toby Butterfield

When the United States government spends millions of dollars to commission a war memorial, one might assume it retains the right to put an image of a sculpture in that memorial on postage stamps honoring the war’s veterans. But things were not that simple in a recent decision resolving a long dispute between the United States government and sculptor Frank Gaylord. The Court of Appeals for the Federal Circuit held that the use of a photograph of the Korean War Veterans Memorial on a commemorative stamp was not a fair use. [Gaylord v. United States](#), No. 2009-5044, 2010 WL 653272 (Fed. Cir. Feb. 25, 2010), reversing [95 Fed. Cl. 59](#) (Ct. Claims 2008).

The Army Corps of Engineers arranged for the Government to control all copyrights in the memorial, but its contractor Cooper-Lecky Architects swiftly found itself in a dispute with Gaylord, the artist it commissioned to sculpt a series of statues for the memorial. Cooper-Lecky eventually settled its dispute with Gaylord by acceding (over strenuous objections by the Army Corps of Engineers) to Gaylord’s assertion of copyright ownership in the statues. The Postal Service obtained a license from a photographer to create a stamp from his photograph of the statues, only to learn that Gaylord maintained that the photographer had no right to do so. Since Gaylord’s copyright ownership was not on appeal, the Federal Circuit decision centered on a rejection the government’s fair use defense.

The Federal Circuit’s analysis of the “purpose and character of the use” shows that court to be less willing than the Second Circuit to accept a copyright defendant’s assertion that he made fair use of a copyrighted work because he was commenting upon it.

Background

In 1986, Congress enacted legislation to create a Korean War veterans memorial. The Government, via the American Battle Monuments Commission and the Army Corps of Engineers, selected Cooper-Lecky Architects as the prime contractor for the memorial, and Cooper-Lecky in turn sponsored a competition to select a sculptor. Frank Gaylord won that competition, and was paid \$775,000 to complete the sculpture, which he did between 1990 and 1995, with some suggestion and criticism from Cooper-Lecky, the Korean War Veterans Memorial Advisory Board and the Commission on Fine Arts. Gaylord did not construct the sculpture itself, but he created



The John Alli photograph used for the stamp.

models of 19 soldiers standing in formation, which Cooper-Lecky cast into the stainless steel statues which came to be known as “The Column.”

Copyright ownership in the sculpture became a thorny issue. While the prime contract between the Army Corps and Cooper-Lecky provided that the Government would hold all

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copyrights in all resulting work, in January, 1993, Cooper-Lecky signed a subcontract with Gaylord omitting that provision and stating that copyright ownership was to be determined.

Starting in 1993, Gaylord applied for and obtained copyright registrations for “The Column,” and in January, 1994, Cooper-Lecky and Gaylord amended their agreement to say that Gaylord would own the copyright. The Government disputed Gaylord’s copyright from the beginning, but according to the trial court opinion, the American Battle Monuments Commission withdrew its copyright claims in May, 1994. In February, 1995, Gaylord agreed Cooper-Lecky could license “The Column,” but terminated that agreement as well as his prior agreement with Cooper-Lecky later that year following a licensing dispute.

Subsequently, an amateur photographer’s photograph taken at the memorial focusing on “The Column” under snow gained much publicity. Gaylord ultimately licensed the photographer to exploit the photograph, receiving royalties under their separate agreement. The photographer agreed to license his photograph to the US Postal Service for use on a stamp, and paid Gaylord the agreed licensing fee. Gaylord nevertheless sued the USPS, claiming that the photographer’s license to the USPS provided rights to reproduce the photograph, but not the sculpture depicted in it.

The trial court accepted Gaylord’s copyright registrations as *prima facie* evidence of Gaylord’s ownership, but for reasons not made clear in its decision, did not further address the possibility that the Government, rather than Gaylord, should have been the sole copyright holder. Further, it rejected arguments that the Government was a joint author of “The Column” based on its guidance, suggestion and criticism while Gaylord developed his models of what would become the statues. Instead, the trial court credited the Government’s argument that the stamp made fair use of “The

Column.” The Federal Circuit reversed that conclusion, prompting a strenuous dissent from the Second Circuit’s Judge Newman, sitting by designation.

Fair Use Analysis

The Federal Circuit’s opinion is a good reminder that the four “nonexclusive” fair use factors are used as an overall balancing test where no single factor is consistently dispositive. Here, the Federal Circuit was convinced that the first three factors – “purpose and nature of use,” “nature of the copyrighted work,” and “amount and substantiality of the portion used in relation to the copyright work as a whole,” weighed sufficiently in Gaylord’s favor that it didn’t matter that the stamp had no market impact on Gaylord’s copyrighted work.

Purpose and Character of Use: Courts often seem to consider multiple sub-factors within this first fair-use factor, and here the Federal Circuit focused at the expressive purpose of the stamp, the extent to which it transformed the original work, and the extent to which the work had a commercial purpose.

The Court first reasoned that the stamp had the same purpose as the original sculpture – to honor the veterans of the Korean War. The court contrasted the situation with the one in *Blanch v. Koons*, 467 F.3d 244 (2d. Cir. 2006) in which the Second Circuit accepted artist Jeff Koons’ declaration stating that he intended to transform the purpose of a fashion photograph by incorporating it into a painting, thus commenting on such images in consumer culture and media.

The Court also did not believe that the use of the photograph on the stamp was “transformative” of the original sculpture because of aesthetic elements the photographer added to his photograph. The image on the stamp featured only part of the column of the soldiers, was taken in the snow and used subdued lighting and a monochromatic feel. But the

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The United Postal Service Stamp.

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court rejected the argument that these factors constituted a transformation of the work by creating a “surrealistic environment... where the viewer is left unsure whether he is viewing a photograph or statues of actual human beings.” That surreal quality was contributed largely by the sculpture itself, the court reasoned.

In a moment that may be destined for copyright infamy, Judge Moore quipped that “nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.” The analysis emphasizes that it is the end users intent, not the intervening artist’s, which a court will analyze. The court might have ruled differently had the defendant been the photographer, who undeniably used his own artistic efforts to create the photograph, rather than the Postal Service, which merely licensed it and printed it on its stamp.

The court also found that the stamp – which generated \$17 million in sales – was a commercial use rather than an educational or non-profit use, notwithstanding the fact that sales by the United States Postal Service raised revenue only for the Government. In contrast, in *Blanch v. Koons*, the Second Circuit ruled that Koons’s painting did *not* have a commercial purpose, although a large bank corporation had commissioned it.

Nature of the Copyrighted Work: The Federal Circuit found that Gaylord’s sculpture was clearly a creative work, noting that under the test from *Campbell v. Acuff-Rose Music*, 510 U.S. 569, more leeway is given for fair use of a factual or informational work than for a creative work. Further, the fact that The Column is “part of a national monument—perhaps the epitome of a published work,” *Gaylord* at *6, was not enough to tip the balance toward fair use.

Amount and Substantiality of the Portion Used: The trial court had found that while the stamp depicted 14 of the 19 soldiers in “The Column,” a substantial portion of the work, the substantial use was mitigated by the ways the stamp transformed the expression of the work and by the resulting lessened importance of the work to the purpose of the stamp. The Federal Circuit rejected this reasoning; having found that the stamp was not sufficiently transformative for fair use, it also disagreed that sculpture had any reduced importance to the stamp. “The Column constitutes the focus — essentially the entire subject matter — of the stamp . . . Although the snow and muted coloring lessen the features of the solid sculptures, the stamp clearly depicts an image of The Column.” *Gaylord* at * 6. This, the court said, weighed

against fair use.

Market Impact: The Federal Circuit agreed with the trial court that the stamp had effectively no negative impact on either the value of The Column – which it may even have increased – or the market for derivative works. Thus the Court implicitly made clear that market impact is unnecessary to a finding against fair use.

Judge Newman’s Dissent

Judge Newman’s dissenting opinion argues that Gaylord did not have the right to sue the federal government, as its contract with Cooper-Lecky should have been resolved to give the Government and not Gaylord copyright in the work. Judge Newman reasoned that Gaylord’s suit was barred both by the statute under which Gaylord brought the suit, 17 U.S.C. §1498(b) and by another statute which provides that those working in the service of the U.S. Government, whether or not employees, do not acquire rights in the result of their work.

The majority opinion does not decide how the Copyright Act could grant Gaylord rights in his work despite the contradictory provisions of another federal statute. The majority said they did not address these issues because they were not raised on appeal. The result, Judge Newman says, “unreasonably and unfairly impacts the end users of the Memorial” and “produces a chilling effect on the public’s ability to use the Memorial as intended.”

Conclusion

It seems ironic at least that after paying to create and providing by contract that no one else would own any copyright in the public memorial, the United States Government was reduced to arguing that its use of a licensed photograph of it was a fair use. The court’s conclusion, and the indemnity obligations that photographers may face as a result, is a cautionary tale that no licensee should merely accept that a licensor truly has the right to license all the rights they purport to grant.

Anyone reproducing photographs taken in public places can not assume that portrayal of publicly commissioned art is protected by fair use. As Judge Newman wrote in dissent, this decision will have a chilling effect on the right of both amateur and professional photographers to reproduce their photographs, even when they depict national monuments.

French Court Rules That Google Books Violates French Law

By Delphine de Chalvron
and Jean-Frédéric Gaultier

On December 18, 2009, Google, Inc. and Google France were ordered to pay damages of 300,000 € (approx. \$419,000 U.S.) for digitizing and making available on the Internet certain French books as part of its Google Books project.

The French publisher, Editions la Martinière, initiated an action before the Paris Civil Court seeking an order prohibiting Google, Inc. and Google France from digitizing certain books and making some pages thereof, including the cover pages, available on the Internet for referencing purposes, without the authorization of the authors.

A crucial factor in the case was the determination of the applicable law. French copyright exceptions are more restrictive than US copyright law. After declining to apply US law, the French court ruled that Google's digitization was an act of reproduction that violated the French Intellectual Property Code. The short-quotation exception under French copyright law raised by Google in defense was rejected by the Court.

Choice of Law Analysis

After noting that the applicable law can be that of the territory of the event causing liability or that of the territory where the damage was suffered, the Court acknowledged the fact that the extracts at issue were made available in France on a website, accessible under a ".fr" domain name (<http://books.google.fr>), written in French, referencing French books and thus intended for the French public. The Court thus considered that France had the closest links with the litigation and consequently decided to apply French law to the whole dispute, despite the facts that books had been digitized in the US, and Google's servers are located there.

With respect to making the pages at issue available to the public on the Internet, the position of the Court is in line with the majority of current French case law with respect to Internet litigation: when there is a link with French territory (e.g. the website is intended for the French public, written in

French and/or products can be ordered for delivery in France), French Courts tend to consider that French law is applicable. See, e.g., TGI Paris, March 11, 2003, *SA BDMultimedia v/s Monsieur Joachim HORNIG*, JurisData n° 222875; TGI Paris Jan. 7, 2005, RLDI, 2005/2, n°54; TGI Paris, ord. Réf., July 8, 2005, *PMU v/s Eturef, Zeturf*, Comm. Com. Elect. 2005, comm.172, note Grynbaum confirmed in appeal Jan. 4, 2006.

However, this decision remains questionable regarding application of French law to the digitization of the books which took place in the United States. It is, further, in contradiction with the decision handed down by the Paris Civil Court on May 20, 2008 in a matter where Google was sued for reproducing on its Internet search engine "Google Image," accessible under the "google.fr" domain name, several works in small format. The Court decided to apply the law of the place of the event causing liability, namely US law, rather than the law of the place where the damage was suffered, taking into account the fact that the main activities at stake were the search engines business operated by Google, Inc. whose registered office is located in the United States, the place where all the decisions are taken.

The question of applicable law is very likely to be further discussed at appeal (which involves a *de novo* trial) as the outcome of the case for Google may depend on whether the fair use exception provided by US law applies.

In the Google Image decision of May 20, 2008 cited above applying US law, the Paris Court ruled that Google could benefit from the fair-use exception in view of the non-commercial character of the Google search engine, its free access, the small format of the reproductions and the positive impact of such reproductions on the notoriety of the authors and of their works.

In the present case, Google could not rely on US law and based its defense on the short-quotation exception provided for by Article L 122-5 -3 (a) of the French Intellectual Property Code. In accordance with this article, copyright owners cannot prohibit short quotations of their copyrighted

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work if they are justified by the informational, critical, scientific or educational purposes of the work within which they are incorporated.

This line of defense was rejected by the Court “*as the cover books are communicated to the public in their entirety, even though in a small format.*” Under French law, cover pages could be assimilated to a work of graphic art. This decision is therefore consistent with the position of the French Supreme Court, which considers that when works of plastic or graphic art are reproduced in their entirety even for information purpose (and subject to the exception provided by Article L522-5-9 of the Intellectual Property Code on the reproduction of works of plastic or graphic art made in press media to illustrate current affairs (news) exclusively), the said reproduction cannot qualify as a “short quotation” (e.g. reproduction of paintings in an auction catalogue (Cass. Ass. Plén. Nov. 5, 1993 Fabri vs. Loudmer); reproduction of paintings to report the opening of an exhibition (Cass. Civ. 1st, Nov 13, 2003, Société Nationale de Télévision France 2 vs. Fabri); reproduction of a coat to illustrate renovation works at the Fashion Museum (Cass. Civ. 1st, Jan. 25, 2005 Groupe Express vs. L et M Services)).

The Court further considered that the extracts from the books available on the Internet cannot fall within the scope of the short quotation exception either as “*the random selection of the extracts exclude any information purpose as provided for in Article L122-5-3 of the Intellectual Property Code.*” Here again, this decision is in line with the position of French

courts, which traditionally consider that the inclusion of a short quotation in a previous work for “educational, informational or scientific purposes” requires some intellectual input. See TGI Marseille, June 26, 1979 – TGI Paris, Feb. 11, 1988 - TGI Paris, May 1997.

In the present case, the court considered that the random character of the selection operated by Google excluded such intellectual work.

In any event, one may wonder why Google Books and Google Image should be treated differently, books and images being both copyrightable, both digitized in the US, and both displayed on google.fr website.

Last, the Court refused to take into account the Google Book Settlement Agreement put forward by the defendants, considering that it was not yet into force and that, in any event, it had not been demonstrated that it would be applicable to French books, since the Settlement Agreement refers to books published in the US, UK, Canada and Australia only.

Failing relevant provisions in the publishing agreements, it remains to be determined whether this Settlement Agreement would be enforceable in France against French publishers owning translation rights in US, British, Canadian or Australian copyrighted works or having transferred their translation rights over French copyrighted work for publication in UK, USA, Canada and Australia.

Delphine de Chalvron and Jean-Frédéric Gaultier are lawyers in the Paris office of Clifford Chance.

English Court of Appeal Refuses to Enforce US Copyright Judgment or Hear US Copyright Infringement Claim

By Loretta Pugh

Late last year the English Court of Appeal handed down its judgment in the case of [Lucasfilm Limited v Ainsworth](#) [2009] EWCA Civ 1328, better known as the “Star Wars” or “Stormtrooper helmet” case.

This article will concentrate on the parts of the judgment that addressed whether the English Courts have jurisdiction to enforce US copyright and whether the English Courts would enforce a US monetary judgment made in earlier US proceedings.

Background

In 2004 Mr Ainsworth set up a website selling certain replica helmets and armor, the originals of which had been used as costumes in the 1977 “Star Wars” film. His website emphasised that he made the original helmets and armor for the film and that his replica helmets were produced from the original molds used to make the helmets seen on the screen.

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Ainsworth advertised his replicas in the US and some of his products were sold and delivered to US customers. These activities attracted the attention of Lucasfilm, the production company associated with the Star Wars movie series. In 2005, proceedings were commenced against Ainsworth in the US District Court, Central District of California, claiming relief in respect of copyright infringement, unfair competition and trademark infringement.

Ainsworth unsuccessfully challenged the California district Court's jurisdiction, but did not participate further. On 26 September 2006, a default judgment was ordered against him in the sum of \$5 million for copyright infringement, \$5 million for trademark (Lanham Act) infringement and unfair competition, and an additional \$10 million to treble the Lanham Act damages. This was despite Ainsworth's admitted sales in the US being worth merely \$14,500. Lucasfilm was also awarded injunctive relief.

As Ainsworth was resident in England, Lucasfilm sought to enforce its US judgment in England. If that failed, Lucasfilm sought to claim through the English Courts in respect of infringements of US copyright.

The English Case at First Instance

At first instance (being the first trial that considered the matters in question), Lucasfilm sought to enforce its US judgment in England to the extent of the damages awarded, but without the trebling effect, i.e. to confine its claim to \$10 million. One of the defenses posed by Ainsworth to this claim was that he did not submit to the jurisdiction of the US Courts and did not have sufficient presence in the US to enable Lucasfilm to rely on the judgment in an English action.

Of key concern was whether Ainsworth's actions constituted sufficient "presence" in the US for the US judgment to be relied on in an English Court. The Court at first instance found not. The judge found that authorities required there to have been a physical presence in the US and that advertisements in the US, a website accessible in the US and sales to US customers were not sufficient to amount to a physical presence.

In order for Lucasfilm to claim successfully for direct enforcement of US copyright infringement, the judge would have to find infringement in the US under US copyright law.

The judge firstly considered whether the English Court had jurisdiction to hear such a claim.

The judge held that a claim for infringement of a foreign copyright should be justiciable in England. On the merits of the US claim, the judge held that copyright subsisted in the Stormtrooper helmets sold by Ainsworth because they were not utilitarian or functional under US copyright law. He also found that the US copyright had been infringed. This is in stark contrast with the judge's findings in respect of infringement in England under English copyright law. The judge held that because the Stormtrooper helmets were not "sculptures" under English copyright law they were not copyrightworks and thus there could be no infringement by Ainsworth under English copyright law.

The consequences of the determination that US copyright existed and had been infringed would have been followed through in a further hearing, however prior to that, the case was appealed.

The Court of Appeal Decision

Lucasfilm appealed the first instance finding that copyright did not subsist in the helmets under English law. The Court of Appeal upheld the decision of the judge at first instance on this point. In relation to the US issues, Lucasfilm appealed the decision not to enforce the US default judgment. Ainsworth cross-appealed the decision that the English Court could enforce the US copyright.

Enforcement of the US Judgment

In determining whether the US judgment could be enforced, the Court of Appeal, like at first instance, looked at whether Ainsworth had sufficient "presence" in the US.

Lucasfilm contended that Ainsworth's website had been particularly targeted at US customers and this indicated presence in the US. Prices were quoted in US dollars before being expressed in sterling. No other currencies were quoted. Also, shipping charges for the US (and Canada) were specified before shipping charges to the UK and elsewhere.

The Court considered whether a website was fundamentally different from other means that have enabled businesses to present themselves and their products where they are not themselves present, for example such as

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advertisements, the post, telephone and fax. The Court decided that there was no difference. Indeed, it went on to state that the omnipresence of the internet would suggest that it does not create, outside the jurisdiction in which the website owners are present, that presence necessary to suggest allegiance to the laws of another country, which has been recognised as necessary for the enforceability of that country's judgments in the English Courts.

Accordingly, the Court dismissed Lucasfilm's appeal on this point.

Enforcement by English Courts of US Copyright

It was undisputed between the parties that Lucasfilm owned US copyrights in the helmets and armor and that Ainsworth had infringed them. What was to be decided was whether the English Court had jurisdiction to hear a claim in respect of those US copyrights. Having determined that there was no binding authority on the point, the Court had to decide itself whether claims for infringement of foreign, non-EU (or Lugano) copyrights are justiciable under English law.

The Court found that such claims are non-justiciable. Its reasoning included the following:

- ◆ Infringement of an IP right (especially copyright which is largely unharmonized between the US and UK) is essentially a local matter involving local policies and local public interest. It is a matter for local judges.
- ◆ Extra-territorial jurisdiction will involve a restraint on actions in another country – an interference which prima facie a foreign judge should avoid.
- ◆ If national courts of different countries all assume jurisdiction, there is far too much room for forum-shopping.
- ◆ Those concerned with international agreements about copyright have refrained from putting in place a regime for the international litigation of copyrights by the courts of a single state. A system of mutual recognition of copyright jurisdiction and of copyright judgments could

have been created, but it has not.

The Court of Appeal was not impressed by the supposed difference in principle between questions of subsistence of the copyright and its infringement, i.e. that although a court may not have jurisdiction over the former; it should, over the latter. It is said that questions as to subsistence and registration, call in to question a sovereign act, whereas infringement does not. However, adjudicating on infringement will itself often require the foreign court to decide on the scope of the right granted by the foreign sovereign state. Questioning the scope of intellectual property rights granted by a sovereign state in a foreign court carries with it the foreign court ruling on the scope of a sovereign act, which is not different in kind from ruling on its validity. It makes no difference whether the right is one which requires registration.

The Court of Appeal concluded that for sound policy reasons the supposed international jurisdiction over copyright infringement claims does not exist. If it were to be created it should be by treaty with all the necessary rules, for example about mutual recognition.

Comment

The Court of Appeal brings an uneasy outcome for Lucasfilm. Not only is it unable to enforce its US copyright judgment in England, the English Court of Appeal has declined jurisdiction to hear Lucasfilm's claim in respect of infringements of US copyright. As a result Lucasfilm has no financial remedy against Mr Ainsworth for the infringing acts committed by him in the US, which the US Court amounted to \$20 million in damages.

This may well be seen as an unsatisfactory position, but unless or until a treaty is agreed to alter the justiciability of foreign copyright infringements and/or enforcement of foreign judgments in the circumstances of this case, it is a position that may well arise again and arguably undermines the value of intellectual property rights in certain cases.

Loretta Pugh is an associate at Taylor Wessing LLP in London. Lucasfilm was represented by Michael Bloch QC and Alan Bryson (instructed by Harbottle Lewis). Ainsworth was represented by Alastair Wilson QC and George Hamer (instructed by Simmons Cooper Andrew LLP).

Blogger Not a Journalist Under New Jersey Shield Law

Difference Between “New Media” and “News Media,” According to Court

By Bruce S. Rosen

While bad facts often beget bad law, a New Jersey appellate court has stymied a website operator’s attempt to stretch those bad facts to enable her to fall within the New Jersey shield law – one of the strongest in the nation. [*Too Much Media, LLC v. Shellee Hale*](#) (A-0964-09T3 April 22, 2010).

While the court provided one of the few available roadmaps to determine whether a blogger fits within a shield law, its criteria for determining who is entitled to shield protection misunderstands the journalistic process and New Jersey’s shield law as well.

The defendant Shellee Hale, a website operator and “life coach” in the State of Washington, uploaded purportedly defamatory posts on Oprano.com, a website involving the adult entertainment industry. The posts criticized Too Much Media, LLC (“TMM”), suggesting that the company, which had been subject to a data security breach, and its principals, were involved in fraud and selling personal information, and may have physically threatened those who attempted to expose them.

Hale alleged that she has formed her own website to investigate the online adult entertainment industry, was collecting information for that purpose, and had visited the Washington State Attorney General’s office to make them aware of her investigation.

After TMM and its principals filed suit in New Jersey alleging defamation, false light and trade libel, Hale answered and then asserted NJSA 2a:84A-21, the Newperson’s Privilege to avoid being deposed. The trial court found a certification provided by Hale concerning her journalistic activities to be not credible and “a sham,” and ruled that she was not part of news media or and did not have an intent to disseminate news and was thus not entitled to shield protections.

In response to claims that the plaintiff was seeking

presumptive damages, the trial court also ruled that Internet defamation should be classified as slander, and that as a result plaintiff could be entitled to presumptive damages. A consortium of media entities filed an amicus brief arguing that Internet defamation is libel, not slander, and requires proof of concrete damages under New Jersey law; the appellate panel agreed with both points. The amici did not take a position on the shield issue.

Defendant Not Covered By Shield Law

The appeal court found that no matter how one looked at Hale’s activities in the context of new technology, they did not merit shield protection. “Simply put, new media should not be confused with news media,” Judge Anthony J. Parrillo wrote for the unanimous panel in a 48-page decision. While the ruling did not attempt to define news, it did attempt to define a news person under the shield law. Citing *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), which found websites protected by that state’s shield because they were functionally indistinguishable from traditional print publications. *O’Grady*, the court said, focused on the defendant’s actions in gathering, selecting and preparing materials for publication to a mass audience.

In coming up with its own criteria, the New Jersey panel looked to whether there were confidential sources involved; however the New Jersey shield goes far beyond confidential sources and protects the editorial process. The panel attacked Hale’s affidavit as self-serving, but these affidavits are provided in the ordinary course in the state by reporters seeking to invoke the shield.

The decision then notes how Hale failed to present credentials, proof of affiliation with a media entity, adherence to standards of professional responsibilities, editing, fact-checking and disclosure of conflicts, none of which are

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mutually exclusive of an intent to disseminate news to the public, and many of which, other than editing, are notably absent from most newspaper reporting in the state.

Further, the panel faulted Hale's failure to provide notes of her work, lists of meetings, and interviews with contacts or attempts to contact TMM, none of which are necessarily indicia of bona fide news gathering or journalism.

The court, which said that Hale's only proof that her site Pornafia qualifies as a new medium was a press release she issued months before her allegedly defamatory statements about her intent for the site, ruling that Hale did nothing but assemble the writings and postings of others, which is also indicative of many other websites and publications which some would argue were bona fide journalistic entities.

"[I]n view of the totality of the evidence, defendant has exhibited none of the recognized qualities or characteristics traditionally associated with the news process, nor has she demonstrated an established connection or affiliation with any news entity."

The court also ruled that Hale's posts on Oprano were outside any news gathering or dissemination process, and, citing language in *O'Grady*, determining that the posting of actionable material by a visitor to a website "may indeed constitute something other than the publication of news."

The court ruled that her posts were separate from Oprano and she did not represent herself as a journalist and analogized posts by site visitors to letters to the editor in traditional media.

The court also rejected further protection for Hale under the First Amendment, stating the New Jersey Shield Law underlies and extends beyond the protections of the First Amendment.

Libel Damages

The court restated previous New Jersey appellate holdings that libel damages require "concrete damages" to reputation without which the action could be dismissed at summary judgment, but ruled that for the purposes of a motion to dismiss, a plaintiff need only allege damages.

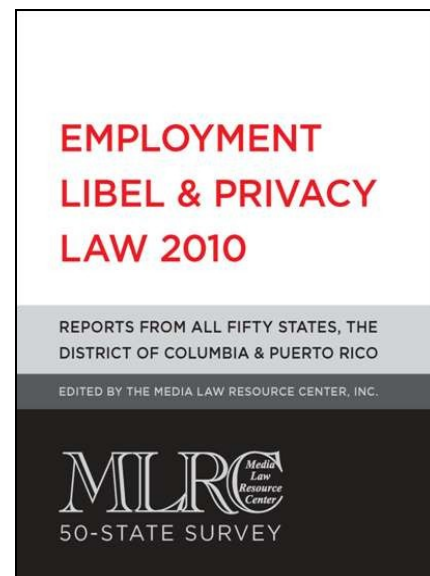
Finally, in the only part of the ruling that directly bolstered Hale's case – and one that may prove pivotal to further proceedings – the panel ruled that the trial court's ruling that plaintiffs need not prove actual malice was

premature and made without proper notice or a full record.

New Jersey law requires proof of actual malice where the subject matter of a report involves consumer or regulatory fraud, or matters involving public health or safety.

Bruce S. Rosen of McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, N.J., represented amici North Jersey Media Group, Inc., New Jersey Press Association, NBC Universal Inc., and the New York Times Company. Hale was represented by Jeffrey M. Pollock, Barry J. Miller and Joseph Scram III of Fox Rothschild's Princeton, N.J. office. Plaintiffs were represented by Joel N. Kreizman of Evans, Osborn and Kreizman of Oakhurst, N.J.

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Kentucky Court Refuses to Apply Shield Law to Online Commenter

But Adopts Heightened Standard to Protect Anonymous Speech Online

A Kentucky trial court recently granted a newspaper's motion to quash a subpoena seeking the identity of an anonymous online commenter accused of posting a defamatory statement to a news article. [*Clem v. An Unknown Person*](#), No. 08-CI-1296 (Cir. Ct. March 26, 2010) (Logue, J.). The court flatly rejected the newspaper's attempt to raise the state shield law as defense to the subpoena, but accepted that anonymous online speech is entitled to a higher standard of protection than provided by an ordinary discovery subpoena.

In August 2008 the *Richmond Register* published an article titled "You can buy it at the mall, but you can't wear it there." The article discussed an incident at the local mall involving a young college student, Kymbery Clem. Clem was ejected from the mall by security because her dress was too short. Ironically she had bought the dress at the mall the day before. The incident garnered national media attention and a lively debate in the comments section of the online article.

Clem filed a libel complaint against an anonymous poster writing under the screen name "12bMe" who wrote that the real reason Clem was ejected from the mall was that she exposed "her private parts" to a woman and child after the woman made a remark about the length of Clem's dress. Clem subpoenaed the *Richmond Register* for any and all identifying information about "12bMe."

The newspaper moved to quash on two grounds. First, it claimed the information sought was protected by the Kentucky Shield Law, KRS 421.100. The shield law provides in relevant part that "no person shall be compelled to disclose in any legal proceeding ... the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The judge flatly rejected that the commenter was covered by the statute, finding that doing so would extend the shield law beyond its purpose. "The posting was no procured or obtained by any reporter of the *Richmond Register* for purposes of publishing the information in the *Richmond Register*," the judge wrote. Moreover, the comment was posted the day after the article first appeared, online comments are "not controlled by the newspaper" and the newspaper does not "take any responsibility for the accuracy of the contents of the web posting."

However, the court accepted the newspaper's second argument that disclosure would violate the protection afforded anonymous speech. The judge surveyed the leading case law in the area, including *Dendrite v. Doe*, 775 A.2d 756 (NJ App. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); and *Solers v. Doe*, 977 A.2d 941 (D.C. App. 2009).

The court adopted the 5-part test set out by the District of Columbia Court of Appeals in *Solers*. This requires that before granting disclosure of the identity of an anonymous defamation defendant the court "1) ensure that the plaintiff has adequately pleaded the elements of a defamation claim; 2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served; 3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash; 4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control; and 5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit." *Solers* at 954.

The court noted that plaintiff would have to make a reasonable effort to notify the anonymous defendant before the suit could proceed.

Supreme Court Strikes Down Ban on Depictions of Animal Cruelty

Court Refuses to Create New Category of Unprotected Speech

By Jonathan Bloom

In a strongly worded opinion written by Chief Justice John Roberts, the U.S. Supreme Court rejected the government's bid to create a new category of unprotected speech and, by an 8-1 vote, struck down as unconstitutionally overbroad 18 U.S.C. § 48, a federal statute criminalizing the creation, sale, or possession of certain depictions of animal cruelty. *United States v. Stevens*, No. 08-769 (Apr. 20, 2010).

18 U.S.C. § 48 imposes criminal penalties (up to five years in prison) for creating, selling, or possessing with intent to distribute a depiction of animal cruelty if done for commercial gain in interstate or foreign commerce. "Animal cruelty" is defined as an act in which "a living animal is maimed, mutilated, tortured, wounded, or killed," when the conduct is illegal under federal or state law where the depiction is created, sold, or possessed with intent to distribute.

In a nod to the *Miller* obscenity standard, the statute exempts depictions that have "serious, religious, political, scientific, educational, journalistic, historical, or artistic value."

The legislative history reveals the primary purpose of the statute, enacted in 1999 but rarely used, to have been to outlaw so-called "crush videos" – gruesome depictions of small animals being crushed to death, often by women with bare feet or wearing high heels, which appeal to those with a specific sexual fetish.

The statute as passed, however, was not limited to crush videos, and Mr. Stevens was not prosecuted for making, selling, or possessing crush videos. A pit bull lover who wrote a book and sold videos extolling the virtues of the breed, he was instead prosecuted, convicted and sentenced to 37 months in prison for selling three videos depicting pit bulls engaged in dogfighting and attacking other animals as training for hunting wild boar. One of them contained footage of dogfights in Japan, where dogfighting is legal, and

others contained footage from the 1970s and 1980s of unknown origin.

The Third Circuit reversed. The court held that depictions of animal cruelty are protected by the First Amendment and that the government's attempt to extend to section 48 the reasoning of *New York v. Ferber*, 458 U.S. 747 (1982), which upheld a ban on child pornography, was flawed.

Applying strict scrutiny, the court found that the government did not have a compelling interest in restricting depictions of conduct that already was illegal in all fifty states and that the statute was neither narrowly tailored to prevent animal cruelty nor the least restrictive means of doing so. The court did not reach the question of whether the statute was overbroad.

U.S. Supreme Court Decision

The Supreme Court took the opposite approach: it held the statute invalid on overbreadth grounds without undertaking strict scrutiny analysis. After stating that the statute was content-based and thus presumptively invalid, the Court devoted the first section of its decision to a forceful rebuttal of the government's effort to avoid First Amendment scrutiny altogether by arguing that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." This argument, which helped galvanize the amicus effort in support of Mr. Stevens, proved to be a bad tactical error. The Court strongly condemned the government's proposed balancing test as "startling and dangerous." Slip op. at 7. As the Court explained:

The First Amendment's guarantee of free speech does not extend only to categories of speech that

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survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id. Rather, the Court stated that it has defined a few traditional “well-defined and narrowly limited” categories of speech that do not enjoy First Amendment protection: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.

The government’s “balancing test” argument rested on language in several Supreme Court decisions referring to categories of unprotected speech as being “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Slip op. at 7 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (2002)).

In *Ferber*, the last ruling in which the Court recognized a new category of unprotected speech (child pornography), the Court referred to “the evil to be restricted” outweighing the “expressive interests.” 758 U.S. at 763-64.

But such language, the *Stevens* Court explained, was “descriptive” and did not “set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.” Slip op. at 8.

The Court’s decision in *Ferber*, the *Stevens* Court explained, did not rest on “a cost-benefit analysis” but rather on the market for child pornography being “intrinsically

related” to the underlying sexual abuse. Slip op. at 8. “Our decisions in *Ferber* and other cases,” the Court declared, “cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” *Id.* at 9.

Although the Court left open the possibility of adding additional categories of unprotected speech in the future, it “reject[ed] the Government’s highly manipulable balancing test as a means of identifying them.” *Id.*

The worst fear of the First Amendment bar was thus definitively put to rest.

Having declined to create a new category of unprotected speech, the Court turned to Mr. Stevens’ facial challenge. As noted, rather than engaging in traditional strict scrutiny

analysis, as the Third Circuit had, the Court invoked the overbreadth doctrine.

In the First Amendment context, a law can be invalidated as overbroad on its face if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” Slip op. at 10 (quoting *Washington*

State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

To avoid this problem, the government’s argument as to section 48 depended on a reading of the statute as limited to “extreme material,” in particular crush videos and animal fighting videos.

But the Court found it to be far broader. “We read § 48 to create a criminal prohibition of alarming breadth,” the Court stated. Slip op. at 11.

First, the statute “nowhere requires that the depicted conduct be cruel.” *Id.* It therefore covered, *inter alia*, hunting and humane slaughter. Second, it requires that the conduct depicted be illegal where the depiction is create, sold,

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The Court’s emphasis on its traditional limited categorical approach to defining unprotected speech; its rejection of “serious” value as a precondition to First Amendment protection; its scorn for prosecutorial discretion as a basis for upholding a facially overbroad speech restriction; and its embrace of the overbreadth doctrine as an independent basis for facial challenges in the First Amendment context all should prove important weapons against efforts to restrict various types of unpopular or disfavored speech.

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or possessed with intent to sell, but, the Court pointed out, many federal and state laws concerning the proper treatment of animals, such as hunting and fishing rules and livestock regulations, are “not designed to guard against animal cruelty.”

The statute, however, made no distinction between such laws based on the reason for the conduct being illegal. The problem was exacerbated, in the Court’s view, by the fact that a depiction of conduct that was legal where it was created, such as a hunting video, can violate section 48 if it finds its way into a jurisdiction where the conduct is illegal, as is true of hunting in the District of Columbia. Slip op. at 13.

The statute’s “exceptions clause” does not cure the overbreadth problem, the Court found, for several reasons. First, the government’s contention that material other than crush videos, depictions of animal fighting (other than bullfighting), and “perhaps other depictions of ‘extreme acts of animal cruelty,’” relied upon “an unrealistically broad reading of the exceptions clause.” Slip op. at 15.

Specifically, the government’s assertion that any depiction with “at least some minimal value” or more than “scant social value” would not be prosecuted was inconsistent with the statute, which requires that there be “serious” value. The trial court had interpreted the statute in its jury instructions to require that the material be “significant and of great import,” and the Court pointed out that the government had defended those instructions. Slip op. at 16. (Indeed, Stevens – to no avail – presented expert testimony at trial as to the educational value of his films.)

Second, the categories of “serious” value listed in the statute did not include “entertainment” value, a category into which, the Court found, most hunting videos would fall. That created a problem to which several Justices alluded during oral argument: “The Government offers no principled explanation why . . . depictions of hunting or depictions of Spanish bullfighting would be *inherently* valuable while those of Japanese dogfights are not.” *Id.* (emphasis in original).

Finally, on a more fundamental level, the Court rejected the government’s argument that incorporating a variant of the “serious value” prong of the *Miller* obscenity standard answered any First Amendment objection. *Miller*, the Court explained, did not reflect a determination that a showing of “serious” value is “a general precondition” to protecting speech. Slip op. at 17.

Most of what we say every day, the Court observed, lacks the type of “serious” value required by section 48, but is “still sheltered from government regulation.” *Id.*

In a parting shot, the Court lambasted the government’s reliance on an assurance that it would exercise its prosecutorial discretion to apply the statute only to depictions of “extreme” cruelty. That assurance, in the Court’s view, implicitly acknowledged the problems with a “more natural” reading of the statute.

Moreover, the Court declared, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” Slip op. at 18.

The Court pointed out that the prosecution of Mr. Stevens was itself at odds with President Clinton’s 1999 signing statement, in which he stated that his administration would interpret the statute to cover only depictions of “wanton cruelty to animals designed to appeal to a prurient interest in sex.” The Court also declined to adopt a narrowing construction to conform to the government’s proposed reading, as doing so would require “rewriting, not just reinterpretation.”

The Court concluded by observing that the markets for crush videos and dogfighting videos were “dwarfed by the market for other depictions, such as hunting magazines and videos,” that it found to be within the scope of § 48.” The Court, accordingly, held the statute invalid as substantially overbroad, expressly not reaching the question of whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.

The lone dissenter, Justice Alito, would not have engaged in the “strong medicine” of overbreadth analysis but, instead, would have remanded to the Third Circuit for consideration of whether the statute constitutionally could be applied to Stevens’ videos.

He defended section 48 as having been enacted “not to suppress speech, but to prevent horrific acts of animal cruelty,” and he disagreed that the record demonstrated that the statute was substantially overbroad, accusing the majority of relying on “fanciful hypotheticals.”

Justice Alito would have construed the statute as limited to depictions of conduct is illegal for the specific purpose of preventing animal cruelty – which would exclude hunting.

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He and would have found that any overbreadth under his reading of the law was not substantial.

He also would have held that depictions of hunting fall with the exceptions clause as having serious, scientific, educational, or historical value.

In the second half of his dissent, Justice Alito made the case that the statute is constitutional as applied to crush videos and to depictions of “brutal animal fights” based on the *Ferber* rationale, namely, that drying up the market for the depictions is necessary to eliminate the underlying conduct. In this respect, Justice Alito was, in effect, making the case for upholding a narrower law.

* * *

Stevens is a an important decision in several respects beyond its invalidation of a poorly drafted speech restriction. The Court emphatically underscored several important First Amendment principles – in terms that reflect the libertarian suspicion of government power held by members of the Court’s conservative wing.

Justice Roberts’s majority opinion is animated by a strong antipathy to the “trust us to do the right thing” defense of section 48 offered by the government.

The Court’s emphasis on its traditional limited categorical approach to defining unprotected speech; its rejection of “serious” value as a precondition to First Amendment protection; its scorn for prosecutorial discretion as a basis for upholding a facially overbroad speech restriction; and its embrace of the overbreadth doctrine as an independent basis for facial challenges in the First Amendment context all should prove important weapons against efforts to restrict various types of unpopular or disfavored speech, including depictions of violence. Having these principles articulated with such force by the Chief Justice, writing for a near-unanimous Court, is especially encouraging.

Jonathan Bloom is counsel to Weil, Gotshal & Manges LLP. He and Weil, Gotshal partner Bruce Rich wrote an [amicus brief](#) in the case on behalf of the Association of American Publishers, Inc., other members of the Media Coalition, and several other media organizations in support of Mr. Stevens. Patricia Millet of Akin Gump argued the case for the defendant to the Supreme Court.



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Supreme Court Takes On Major First Amendment Cases

Does First Amendment Bar Restrictions on Violent Video Games?

The Supreme Court this month agreed to review whether a California violent video game statute violates the First Amendment. See *Video Software Dealers Ass 'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *rev. granted*, (U.S. April 25, 2010) (No. 08-1448). Last year a Ninth Circuit panel unanimously affirmed summary judgment in favor of the Video Software Dealers Association and Entertainment Software Association on their challenge to California Civil Code sections 1746-1746.5 (the “Act”), which would have imposed restrictions and a labeling requirement on the sale or rental of “violent video games” to minors.

The Ninth Circuit held that the law was an invalid content based restriction on speech and that California failed to demonstrate a compelling interest to justify the statute. In addition the court held that the labeling requirement constituted unconstitutional compelled speech because it would have reflected the State’s opinion as to which games were excessively violent. The court notably rejected California’s argument that an obscenity standard could be applied to the sale of video games to minors.

California’s petition for review contained the following two questions:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?
2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

In its petition for review, California argues that: “In the limited context of distribution to minors, expressive material can be so excessively violent that, just like sexual material, it deserves no First Amendment protection. Accordingly, this Court should consider whether extremely violent material can be obscene as to minors even without a sexual element, and whether *Ginsberg v. State of New York*, 390 U.S. 629 (1968), should thus be extended to apply to such material.”

Paul M. Smith of Jenner & Block LLP in Washington, D.C. represents the Video Software Dealers Association and Entertainment Software Association. The petition for cert. is available [here](#). The brief in opposition to cert. is available [here](#).

Does *Hustler v. Falwell* Apply to Private Figure Distress Claims?

The Supreme Court also agreed to review a Fourth Circuit decision reversing a \$5 million damage award for intrusion, intentional infliction of emotional distress and conspiracy against a fringe religious group, notwithstanding what the court termed its “distasteful and repugnant” speech outside of a soldier’s funeral. *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *rev. granted*, (U.S. March 8, 2010) (No. 09-751).

Last year the Fourth Circuit, citing to *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), held that phrases such as “God Hates Fags” and “Priests Rape Boys” could not be understood to assert verifiable facts about the plaintiff (a

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grieving father of a dead soldier), and that a reasonable person would interpret the statements as “hyperbolic rhetoric intended to spark debate” about issues of public concern. In an interesting footnote, the Fourth Circuit stated that it did not recognize a media/nonmedia distinction regarding speech on matters of public concern that does not contain provably false factual assertions.

The plaintiffs petition contains the following questions.

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?
2. Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly?
3. Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from unwanted communication?

The defendant Westboro Baptist Church, Inc., founded and run by Fred W. Phelps from Topeka Kansas, has held numerous protests outside of soldier funerals to publicize their belief that “God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military.” The plaintiff did not see defendants at the funeral of his son, but later saw footage of the event. He brought suit under Maryland law, alleging invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress, civil conspiracy, publicity given to private life, and defamation. The last two claims were dismissed at summary judgment in an unpublished, cursory opinion.

After a trial on the remaining three claims in October 2007, the jury found the defendants liable for \$2.9 million in compensatory damages and a total of \$8 million in punitive damages. On post trial motion, the district court flatly rejected defendants’ claim that their speech was entitled to absolute First Amendment protection. Citing to the Supreme Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the district court stated that there is no absolute First Amendment right for speech by private individuals against other private individuals. The district court found sufficient evidence for a reasonable jury to conclude that defendants’ invaded plaintiff’s privacy and intruded upon his seclusion during a time of bereavement. The court, however, remitted the punitive damages to \$2.1 million. 533 F. Supp. 2d 567 (D. Md. 2008), *rev’d*, 580 F.3d 206.

Plaintiff’s petition to the Supreme Court argues that:

The question of whether *Hustler Magazine, Inc. v. Falwell* is applicable to private individuals versus private individuals requires resolution by this Court. If *Hustler Magazine* is applied in this fashion, the victimized private individual is left without recourse. Complicating matters further, the Fourth Circuit has allowed Phelps (in this instance) to dictate what is a matter of public concern. Indeed, the Fourth Circuit’s analysis encourages individuals to engage in “loose, figurative or hyperbolic language” to afford more First Amendment protection -- even if that language is targeted at another private individual at a private religious funeral -- it encourages harsh rhetoric. Put succinctly, the Fourth Circuit has extended *Hustler* to private versus private individuals, allowed speakers to subjectively determine what is a matter of public concern, and afforded more First Amendment protection to speech that is outrageous.

Plaintiff is represented by Sean E. Summers, Barley Snyder LLC, York, PA; and Craig Trebilcock, Shumaker Williams, York PA. The defendants were represented on appeal by Margie Jean Phelps, Topeka, KS. Plaintiff’s cert.

Citizens United: Campaign Cataclysm or Politics as Usual?

By Jerianne Timmerman

On January 21, the Supreme Court announced its long-awaited decision in [Citizens United v. Federal Election Commission](#), No. 08-205. The closely-divided Court overruled its precedent in two cases and overturned federal law restricting the political speech of, and spending on campaign advertising by, corporations and labor unions. As a result, corporations and unions may now expressly advocate for the election or defeat of a federal candidate without limitation as to the types and amounts of monies expended, the proximity to the election, or the medium chosen.

This decision will affect campaigns for federal office in myriad ways and significantly restrict Congress' ability to enact further campaign finance reform legislation. As the Court broadly stated, the "First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker and the content of the political speech." *Citizens United* also has legal and practical implications for media entities, particularly broadcasters.

A Quick Primer on Federal Election

Law Restrictions on Corporate and Union Speech

Prior to the *Citizens United* decision, federal law prohibited corporations and unions from using their general treasury funds to make independent expenditures (*i.e.*, expenditures not coordinated with a campaign) for speech that expressly advocates the election or defeat of a federal candidate through any form of media, or for speech that is an "electioneering communication." 2 U.S.C. § 441b. An electioneering communication is "any broadcast, cable, or satellite communication" that even "refers to a clearly identified candidate for Federal office"; is made within 30 days before a primary or 60 days before a general election; and is publicly distributed. 2 U.S.C. § 434(f)(3)(A).

Although barred from using general treasury funds for express advocacy or electioneering communications, corporations and unions could establish a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. 2 U.S.C. § 441b(b)(2). The monies

received by these segregated funds are limited to donations from stockholders and employees of the corporation (or members of the union).

In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the Supreme Court narrowly upheld the ban on electioneering communications that Congress had adopted in the Bipartisan Campaign Reform Act of 2002 (BCRA). The Court in *McConnell* relied on the earlier holding in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that political speech may be banned based on the speaker's corporate identity. In *Austin*, the Court upheld 5-4 a Michigan law that prohibited corporate independent expenditures that supported or opposed any candidate for state office, given the government's interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." 494 U.S. at 660.

The Challenge from Hillary: The Movie

In January 2008, Citizens United, a nonprofit corporation, released *Hillary: The Movie*, a 90-minute documentary critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's Presidential primary elections. Anticipating that it would make *Hillary: The Movie* available on cable television through video-on-demand within 30 days of primary elections in 2008, Citizens United produced television ads to run on broadcast and cable television to encourage viewers to purchase the film.

Concerned that both the film and the ads would be covered by Section 441b's ban on corporate-funded independent expenditures, thereby subjecting it to civil and criminal penalties, Citizens United in December 2007 sued in federal court. It sought declaratory and injunctive relief against the FEC, arguing that Section 441b was unconstitutional as applied to *Hillary: The Movie*. The federal district court denied Citizens United's motion for a preliminary injunction and then granted the FEC's motion for summary judgment.

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Citizens United sought Supreme Court review. Following oral argument in the case in March 2009, the Court requested the parties to file supplemental briefs addressing whether it should overrule either or both *Austin* and the part of *McConnell* that addressed the facial validity of 2 U.S.C. § 441b. The Court heard reargument in early September 2009.

The Court's Decision Rejecting Limits on Corporate Political Speech

As an initial matter, the Court addressed whether Citizens United's claim that Section 441b cannot be applied to *Hillary: The Movie* may be resolved on other, narrower grounds. In an opinion by Justice Kennedy, and joined by the Chief Justice and Justices Scalia, Thomas, and Alito, the majority concluded that various narrower arguments were not sustainable under a fair reading of the statute and that the case could not be resolved on a narrower ground without chilling political speech.

In this regard, the Court focused on the complexity of the FEC's regulations, including its multi-factor test for determining whether a communication was the functional equivalent of regulable express advocacy. Indeed, the Court went so far as to equate the FEC's complex regulatory scheme with a prior restraint (perhaps an interesting precedent for future claims that other complex governmental regulatory schemes chill speech).

Turning to the constitutional issues, the majority stressed that Section 441b was an outright ban on speech, backed by

criminal penalties. Focusing on the particular importance of speech as "an essential mechanism of democracy," the Court stated that "political speech must prevail against laws that would suppress it." An examination of both "history and logic" leads to the conclusion that "in the context of political speech," the government may not "impose restrictions on certain disfavored speakers," including corporations.

In his concurring opinion, Justice Scalia, joined by Justices Alito and Thomas, stressed the point that the First Amendment "is written in terms of 'speech,' not speakers," and thus its "text offers no foothold for excluding any category of speaker," including corporate ones.

Applying strict scrutiny, the Court then rejected all three interests asserted by the government to justify Section 441b's restrictions on speech, finding none of them compelling.

First, the Court rejected the "anti-distortion" rationale adopted in *Austin*. The majority reasoned that the "rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speakers' identity."

Of particular interest to media entities, the majority further reasoned that the "anti-distortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of

media corporations." Although media corporations were exempted from Section 441b's otherwise generally applicable prohibition on corporate political speech, Chief Justice

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As an initial matter, the Court addressed whether Citizens United's claim that Section 441b cannot be applied to *Hillary: The Movie* may be resolved on other, narrower grounds. In an opinion, the majority concluded that various narrower arguments were not sustainable under a fair reading of the statute and that the case could not be resolved on a narrower ground without chilling political speech.

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Roberts and Justice Alito stressed in their concurring opinion that “this is simply a matter of legislative grace.”

The Court also found insufficient here the traditional interest asserted by the government to justify campaign finance restrictions – preventing corruption or its appearance. The majority determined this rationale insufficient because independent expenditures by corporations or others (which, by definition, are not coordinated with a campaign) do not represent the same risk of *quid pro quo* corruption (or its appearance) as do direct contributions to candidates or parties.

Finally, the Court quickly dispensed with the third rationale offered by the government – its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. The majority noted that this rationale would allow the government to ban the political speech of media corporations. In addition, the Court found the rationale to be both underinclusive (the electioneering communications prohibition banned corporate speech in only certain media at certain times) and overinclusive (the statute covers corporations with only single shareholders).

Concluding that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations,” the Court overruled *Austin*. With *Austin* set aside, the Court found invalid the federal laws limiting corporate independent expenditures (whether made for express advocacy or electioneering communications). As a consequence, the Court also overruled the portion of *McConnell* that had upheld BCRA’s ban on electioneering communications.

The vigorous dissent by Justice Stevens, and joined by Justices Ginsburg, Breyer and Sotomayor, took issue with the majority’s “proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its ‘identity’ as a corporation.” The dissenting Justices found “the distinction between corporate and human speakers” in the “context of election to public office” to be “significant,” and rejected the majority’s “conceit that corporations must be treated identically to natural persons in the political sphere” as “inaccurate” and “inadequate to justify the Court’s disposition of this case.” In particular, the dissent argued that the majority’s approach to corporate electioneering “marks a dramatic break from our past,” noting that Congress had placed special limitations on campaign spending by corporations since 1907 and contending that the

majority relied primarily on individual dissenting opinions to overrule or disavow a large body of case law.

Disclosure Requirements Upheld

Citizens United further challenged BCRA’s disclaimer and disclosure requirements. These provisions (1) obligate corporations spending more than \$10,000 on electioneering communications within a calendar year to file detailed disclosure statements with the FEC, and (2) require third-party political ads (*i.e.*, ads other than those made or authorized by the candidates themselves) to include a statement identifying the person or entity responsible for the content of the ad. *See* 2 U.S.C. § 434(f) and 441d(d)(2). *McConnell* had previously upheld these provisions against a facial challenge.

By an 8-1 vote with only Justice Thomas disagreeing, the Court upheld these disclosure requirements as applied to *Hillary: The Movie* and the broadcast and cable ads for the movie. Noting that “disclosure is a less restrictive alternative to more comprehensive regulations of speech,” the Court rejected Citizens United’s claims that BCRA’s requirements were underinclusive because they applied only to ads in certain media; were not justified by the government’s asserted informational interest; and could chill donations to organizations by exposing donors to retaliation. The Court explained that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages,” including corporate ones.

Impact of Citizens United on Broadcast Regulation

Unexpectedly, the majority opinion contains language casting some doubt on the long-standing rationales for affording broadcast television and radio lesser constitutional protection than print or other electronic media. Citizens United contended that Section 441b should be invalidated as applied to movies such as *Hillary* shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do ads on conventional television. The Court rejected this argument, explaining at length that

any effort by the Judiciary to decide which means of communications are to be preferred

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for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639 (1994). Courts, too, are bound by the First Amendment. *We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.* (emphasis added).

As legal commentators have pointed out, this language calls into question the "second-class First Amendment status" of broadcast television and radio stations – which, of course, has been based on "constitutional lines" drawn according to the "particular media or technology used to disseminate" political and other speech. *See* Eugene Volokh, *Citizens United on the Second-Class First Amendment Status of Broadcast TV and Radio?*, volokh.com (posted Jan. 21, 2010). The lesser First Amendment protections afforded to broadcasters has resulted in the courts upholding myriad types of broadcast regulation, from the Fairness Doctrine (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)) to limits on the ownership of media outlets (*FCC v. NCCB*, 436 U.S. 775 (1978)) to indecency restrictions (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

Many practitioners and scholars have long been critical of the rationales (including the supposedly unique scarcity of broadcast spectrum and pervasiveness of the broadcast media) used to justify lower levels of First Amendment protection for over-the-air radio and television. The above language from *Citizens United* will no doubt be cited in cases (including broadcast indecency cases currently pending in the Second and Third Circuit Courts of Appeal) to support arguments that constitutional distinctions based on technological differences should be eliminated, especially given continuing rapid changes in communications technologies.

Campaign Cataclysm or Politics as Usual?

Press coverage and pundit reaction to the Court's decision has ranged from predictions of the death of democracy to shrugs of "politics as usual" to celebrations of the vindication of First Amendment rights. Although the ultimate impact of the *Citizens United* case on political advertising, campaigns and election law will not be known with certainty for some time, some initial predictions can reasonably be made now.

Impact on Political Advertising

The decision allows corporations and unions to make unlimited independent expenditures, at any time and in any media, to engage in both issue advocacy and express advocacy (*i.e.*, a direct appeal to vote for or against a federal candidate). A very large number entities may now purchase political advertising without restriction, including unions and for-profit corporations big and small, non-profit corporations and tax-exempt political entities organized as corporations.

As a result, it is highly likely that the number of political ads disseminated via all media will increase – particularly ads on broadcast stations in the periods just before elections that BCRA had previously restricted. However, it is also likely that many traditional business corporations will choose not to engage in direct political advertising, especially publicly traded corporations with large numbers of shareholders and board members (not to mention customers) with diverse political views. A number of commentators have stated that national trade associations (*e.g.*, the U.S. Chamber of Commerce) will be more likely than individual companies to increase their spending on political ads. Some have also speculated that smaller corporations that did not expend the resources to set up PACs may become more involved in political advocacy because they can now do so directly.

Impact on Campaigns, Elections and Future Legislation

Although a number of commentators have decried the expected flood of corporate money into the political system as a result of the *Citizens United* decision, others have contended that the "floodgates were already open." Nathaniel Persily, *The Floodgates Were Already Open: What Will the Supreme Court's Campaign Finance Ruling Really Change?*,

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slate.com (posted Jan. 25, 2010). The Supreme Court had already narrowed the applicability of BCRA's restrictions on corporations and unions in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007). Even under pre-*Citizens United* law, corporations were not forbidden from promoting their political agendas – among other avenues, they could establish PACs for engaging in political advocacy. And BCRA and other campaign finance laws do not restrict corporations' and unions' use of resources for lobbying federal office holders, in contrast to advocating for or against their election.

Nonetheless, the implications of the *Citizens United* decision and its reasoning on campaigns and elections in the U.S. will be significant, especially over time, for several reasons. First, the Court's rationale casts great doubt on the continued validity of similar campaign finance laws enacted by almost half of the states. See Ian Urbina, *24 States' Law Open to Attack After Campaign Finance Ruling*, New York Times (Jan. 23, 2010). Although the Court's decision does not overturn all these state laws, these laws will in time be subjected to court challenge or repealed by state legislatures. Thus, elections for state offices, including state judicial elections, will be directly affected by *Citizens United*.

Second, *Citizens United* will affect political parties. Many observers have opined that political parties' power relative to outside groups funded by corporations and unions has diminished, especially given that BCRA's severe restrictions on the ability of parties to raise and spend soft money remain in place (at least for now). With more entities and groups advocating for and against candidates and issues, parties and candidates will tend to have less control over federal election campaigns and the messages expressed in them. This has led some commentators also to predict an increase in negative and inaccurate political ads funded by outside groups.

Third, the reasoning behind *Citizens United* leads one to wonder if other campaign finance restrictions may also be vulnerable. For example, the long-standing ban on direct corporate and union contributions to candidates for federal office remains, as do BCRA's limitations on parties' solicitation and spending of soft money. The Supreme Court, however, has considerably narrowed the range of governmental interests sufficient to sustain these or other types of campaign finance regulation. Future challenges to at least some of the remaining campaign finance restrictions appear almost certain.

Fourth, the Court's rationale obviously restricts the ability

of Congress to enact new campaign finance reform legislation. Although President Obama stated that his Administration will get to work immediately with Congress to develop a bipartisan response to *Citizens United*, their options appear limited.

Various proposals already have been proffered, such as requiring shareholders to vote their approval before corporations could use treasury funds for campaign expenditures. The government could ban campaign expenditures by corporations substantially owned by foreigners or by the U.S. subsidiaries of foreign corporations. Suggestions have been made to prohibit corporations with government contracts, or those taking federal bail-out money, from engaging in campaign advocacy, although proposals along these lines may raise issues of unconstitutional conditions.

More likely to survive constitutional challenges post-*Citizens United* would be increased disclosure requirements. Most radically, some have called for the public financing of congressional elections and enhancing the public financing arrangements for presidential elections. That option appears unlikely to be enacted in the near future, particularly given the public's apparent lack of support for public financing – only a small and declining number of citizens participate in the voluntary and cost-free public financing of presidential campaigns through the checkoff on the income tax form.

One Certainty – This Debate Will Continue

The controversy over the Supreme Court's recent decision is merely the latest chapter in the century-long effort to limit the role of money in U.S. elections. Many strongly believe that campaign finance restrictions are necessary to temper the corrupting influences of well-funded special interests in our political system. Others believe that campaign finance laws are largely ineffective in addressing these concerns. As Justice Kennedy wrote in *Citizens United*, “[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.”

As this election year progresses, the impact of the Court's decision on campaigns and on this continuing debate will become more clear. One thing is certain – *Citizens United* has made the 2010 campaign even more interesting, whether it turns out to be a cataclysm or just politics as usual.

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Supreme Court Addresses Right of Access to Voir Dire

Courts Must Independently Consider Alternatives to Closing Court Proceedings

By Amanda M. Leith

In a *per curiam* decision handed down in January, the Supreme Court ruled that trial courts have an obligation to consider, *sua sponte*, alternatives prior to closing a court proceeding, if the none of the parties propose alternatives. [Presley v. Georgia](#), 558 U.S. __ (Jan. 19, 2010). The Court's ruling affirmed that *voir dire* proceedings are subject to a public right of access, under both the First and Sixth Amendments, regardless of whether any party has asserted the right.

Background

The *Presley* ruling arose in the context of a criminal trial in which the courtroom was cleared before the potential jury pool was brought in. Before starting jury selection, the trial court observed a man seated in the gallery and instructed that he must leave the courtroom because prospective jurors were about to enter. Upon questioning him, the court learned that the man was the defendant's uncle and reiterated that he could not be in the courtroom during jury selection and would, in fact, have to leave that floor of the courthouse.

In response to an objection from defendant's counsel to the exclusion of the public, the court responded that "there just isn't space for them to sit in the audience," as each of the rows would be occupied by the 42 prospective jurors, and defendant's uncle could not "sit and intermingle with the members of the jury panel."

Following his conviction, defendant moved for a new trial based on the exclusion of the public from the juror *voir dire*. He presented the trial court with evidence that 14 prospective jurors could fit in jury box and that the remaining 28 could have fit in the seating on one side of the gallery, leaving adequate room for the public without risk of intermingling.

The trial court denied defendant's motion, stating that "it preferred to seat jurors throughout the entirety of the courtroom, and 'it's up to the individual judge to decide . . . what's comfortable.'"

On appeal, the Georgia Court of Appeals agreed, finding "no abuse of discretion," where "the trial court explained the

need to exclude spectators at the *voir dire* stage of the proceedings" and permitted the public to return when those proceedings were concluded. *Presley v. Georgia*, 658 S.E.2d 773 (Ga. App. 2008). The Georgia Supreme Court also affirmed, with two justices dissenting, finding that "the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during *voir dire*." *Presley v. Georgia*, 674 S.E. 2d 909 (Ga. 2009). The court rejected defendant's argument that trial court was required to consider alternatives to closing the courtroom. Noting that "the United States Supreme Court has not provided clear guidance regarding whether a court must, *sua sponte*, advance its own alternatives to closure," the court found that it was defendant's obligation "to present the court with any alternatives that he wished the court to consider," and as he had not done so, the trial court had not abused its discretion by failing to independently raise its own alternatives.

Decision

The United States Supreme Court reversed, holding that courts have an affirmative obligation to consider less restrictive alternatives, *sua sponte*, prior to closing a court proceeding.

The Court's ruling strongly endorsed the scope of the public access right recognized in its earlier rulings. Citing *Press-Enterprise I*, 464 U.S. 501 (1984) and *Waller v. Georgia*, 467 U.S. 39 (1984), the Court noted that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question," and declined to say "whether or in what circumstances the reach or protections of one might be greater than the other," but found that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." The Court held therefore, that the Georgia Supreme Court correctly had assumed that

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the Sixth Amendment right to a public trial extends to *voir dire* proceedings.

The Court then considered the standards courts must apply before excluding the public from any stage of a criminal trial. It found “[t]he conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court’s precedents but also from the premise that ‘the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’”

The Court held that “[t]he public has a right to be present whether or not any part has asserted the right,” and thus “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”

The Court observed that nothing in the record demonstrated the trial court could not have accommodated the public during juror *voir dire* and suggested several possible alternatives, including reserving one or more rows for the public; dividing the jury venire panel; or instructing prospective jurors not to interact with audience members.

Finally, the Court considered defendant’s second claim of error: whether the trial court had identified any overriding interest sufficient to justify the closure of *voir dire*. It

observed that “[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors.

If broad concerns of this sort were sufficient to override a defendant’s constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course.”

The Court thus reaffirmed that a “particular interest, and threat to that interest, must be ‘articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’”

The Court ultimately found, however, that it need not rule on this claim of error, because “even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure,” and the failure to do so was sufficient to warrant reversal.

Justices Thomas and Scalia filed a dissenting opinion, asserting that the Court’s precedents were not clear and thus the case should not have been decided summarily.

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An Analysis In Favor of Camera Access

A Deeply Split Supreme Court Bars Cameras in Prop. 8 Same-Sex Marriage Trial

By Jeff Glasser, Thomas R. Burke
and Rochelle L. Wilcox

By a 5-4 vote, on January 13, 2010, the U.S. Supreme Court prohibited video coverage to five overflow federal courtrooms of proceedings in a federal non-jury civil trial taking place in San Francisco involving a federal constitutional challenge to California’s Proposition 8, which banned same-sex marriage. [*Hollingsworth v. Perry*](#), 558 U.S. ___ (Jan. 13, 2010).

Notwithstanding the Supreme Court’s extraordinary intervention, open trial proceedings themselves are being observed, blogged and “tweeted” real time by a large collection of reporters covering these high profile trial

proceedings.

In an unsigned, 17-page “per curiam” opinion representing the views of Chief Justice John G. Roberts, Jr. and Justices Antonin Scalia, Clarence Thomas, Anthony M. Kennedy and Samuel A. Alito, Jr., the majority observed, “It would be difficult – if not impossible – to reverse the harm of those broadcasts.” The Court’s majority was critical of U.S. District Chief Judge Vaughn Walker and what it called his “eleventh hour” decision to “allow the broadcasting of this high-profile trial,” agreeing with the defendants that witnesses, including paid experts, might suffer harassment and be “less likely to cooperate in any future proceedings” if

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video footage of the otherwise open trial proceedings was allowed to be seen in five overflow courtrooms in Portland, Pasadena, Seattle, Chicago and Brooklyn.

The 10-page dissent, written by Justice Stephen G. Breyer and joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Sonia Sotomayor, accused the majority of “micromanag[ing]” Judge Walker. “The Court today issues an order that will prevent the transmission of proceedings in a nonjury civil trial of great public interest to five other federal courthouses,” Justice Breyer wrote for the dissenting justices. “The majority’s action today is unusual. It grants a stay in order . . . to intervene in a matter of local court administration that it would not (and should not) consider. It cites no precedent for doing so. It identifies no real harm, let alone ‘irreparable harm’ . . . and the public interest weighs in favor of providing access to the courts.”

More than four decades after televisions became ubiquitous in American living rooms, fifteen years after the Internet was adopted into general use by the population, two years after members of the public were able to ask the presidential candidates questions over

YouTube during one of the debates, and at a time when all 50 states allow cameras in the courtroom for at least some proceedings and 42 states and two federal district courts give judges discretion to televise civil non-jury trials, the Supreme Court majority in *Perry* stubbornly clung to the notion that the broadcasting of “sensitive” lower court proceedings to even five overflow courtrooms was harmful and suggested in dicta that it must be stopped.

Not only were the majority’s statements regarding televising trials gratuitous (the majority admitted the issue was not before them), but the majority nevertheless intruded into the kind of administrative issue that has been left to the exclusive province of the Circuit Judicial Councils – including the Judicial Council of the Ninth Circuit – for decades.

On a technical level, the Supreme Court’s holding was narrow: the trial on the constitutionality of Proposition 8

could not be streamed live to five overflow courtrooms because the Northern California district court did not give the public adequate notice and an opportunity to comment on the change to Local Rule 77-3. This local rule merely administratively authorized the Northern District of California to participate in the Ninth Circuit’s recently announced pilot program for experimenting with the use of cameras in certain civil, non-jury cases. The rule change was not specific to the *Perry* trial. The local rule change garnered some 138,574 comments during the nine days allowed for comments (all but 32 of them in favor of electronically transmitting the proceedings).

Nevertheless, in what will surely be remembered as one of the most heavily voted upon and closely-watched changes to a federal district court’s local rules, the Supreme Court held that the nine-day period for comments (five business days) was insufficient. The minimum period under federal

law was 30 days, the Court stated, and the attempted invocation by the district court of the “immediate need” exception to the 30-day period for rules changes was unjustified.

If the Supreme Court’s holding is taken at face value, then the issue of cameras in Ninth Circuit district courtrooms is still

likely to recur later this year: district courts in the Ninth Circuit can notice rule changes allowing camera coverage on a pilot basis for 30 days of comment, adopt the revisions, and select cases for public broadcast. Yet those cases chosen for broadcasting through the pilot program are likely to see challenges from opponents of camera coverage emboldened by the Supreme Court’s dicta in *Perry*. Without any specific evidence and in a summary proceeding, the Supreme Court was willing to credit the claims of Proposition 8 proponents that streaming live video of the trial to five courtrooms in other federal courthouses around the country would jeopardize the security of defense witnesses participating in this non-jury trial. (Oddly, a day before signing on to the majority opinion in *Perry*, Justice Clarence Thomas had criticized the majority’s use of a similar summary proceeding

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Not only were the majority’s statements regarding televising trials gratuitous (the majority admitted the issue was not before them), but the majority nevertheless intruded into the kind of administrative issue that has been left to the exclusive province of the Circuit Judicial Councils for decades.

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in *Presley v. Georgia* to decide that the First Amendment affords a right of access to jury voir dire.)

The Supreme Court majority made this assertion even though dozens of journalists and bloggers are live blogging and tweeting the witnesses' public testimony at the Proposition 8 trial and beaming their observations to the public across the country. Given these instantaneous digital forms of communication, it would seem that the camera ban is an ineffective remedy for the stated safety and security concerns of these expert witnesses. Despite the flimsiness of the asserted countervailing interest and the ineffectiveness of the majority's camera ban, these safety and security interests carried the day with the Supreme Court, and are likely to be raised again in future appeals of the broadcasting issue.

A related enduring mystery is why Justice Anthony M. Kennedy, who has been a champion of the public's rights of access to court proceedings, would sign on to the majority's per curiam opinion. After all, it was Justice Kennedy who testified before Congress in 1996 that one "can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom, and it is the outside coverage that is really the problem. In a way, it seems perverse to exclude television from the area in which the most orderly presentation of the evidence takes place." And it was then-Judge Kennedy who authored one of the most cited opinions in the Ninth Circuit on the public's right of access to courts, finding in *Associated Press v. District Court* that even a 48-hour delay in the release of presumptively public court records relating to car maker John DeLorean's alleged drug use "is a total restraint on the public's first amendment right of access even though the restraint is limited in time."

The most benign explanation for Justice Kennedy's apparent turnabout is that Justice Kennedy was offended by the Ninth Circuit's and the district court's lack of fealty to the set procedures for changing court rules. The Supreme Court majority opinion in *Perry* begins by stating that it was staying the broadcast of the Proposition 8 trial to other courthouses "without expressing any view on whether such trials should be broadcast." In turn, the second section of the *Perry* opinion states, "We do not here express any views on the propriety of broadcasting court proceedings generally." These statements and context would suggest that Justice Kennedy and the others in the majority were focusing on the narrow procedural issue rather than the broader substantive

issue of whether federal courts should broadcast court proceedings.

Yet this explanation for Justice Kennedy's joining in the majority seems incomplete, as Kennedy joined the majority opinion that went well beyond the technical issue and instead sought to cabin district court judges' discretion in determining whether to broadcast court proceedings. The majority opinion signed by Justice Kennedy makes no effort to analyze what incremental harm was created by Judge Walker's plan to broadcast the trial proceedings to the five overflow courtrooms. One is left with the distinct impression that the majority, including Justice Kennedy, simply did not want wider distribution of *these* particular trial proceedings – or the inherent national debate that allowing the trial proceedings to be observed outside of San Francisco might engender.

Despite the majority's initial claims that the Court was not passing judgment on the propriety of broadcasting federal court proceedings, the majority asserts at the end of the opinion that "high profile" and "sensitive" court proceedings – those that provoke "intense debate" or are "divisive" – are not fit for broad public consumption through broadcasting. By taking this stance, the majority seeks to turn any public right of access to view federal court proceedings on television and the Internet into a hollow right, as under the Supreme Court's reasoning anything that falls within the nebulous terms "high profile" or "sensitive" would not be fit for broadcasting.

Contrary to this circumscribed view and of what the public can see and hear, in high-profile cases it is often critical that the public be given true access to proceedings to judge for themselves the fairness and conduct of the proceedings. As one New York state court observed in allowing camera coverage of the racially divisive, high profile, and extremely sensitive trial of four policemen who had shot an unarmed man, Amadou Diallo, "denial of access to the vast majority will accomplish nothing but more divisiveness while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary." If the public's understanding of the judicial process is not enhanced in *Perry*, a case that involves a high profile federal due process challenge that will decide whether gays and lesbians have a right to marry in California, one

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wonders how allowing cameras in a more mundane trial will advance the public's interest.

While some may argue that the Supreme Court majority's dicta could prove problematic for media organizations seeking to broadcast federal court proceedings, the common-sense principle recognized by the New York court in *People v. Boss* and by the vast majority of other state courts around the country – that broadcasting of proceedings affords the greatest number of people the ability to judge for themselves the conduct of public court proceedings – is far more reasoned and reflective of a judicial system that values transparency and openness. The Supreme Court's swift action in *Perry* brought a startling end to the first case sought to be televised under the Ninth Circuit's pilot program, but the Ninth Circuit's experimental program will live on – at

least to provide camera coverage to a boring non-jury civil trial in the near future.

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Comcast v. FCC: Defining the Limits of Federal Regulatory Authority over Internet Services

By Jerianne Timmerman

Ancillary (an•cil•lar•y) adj. 1. subordinate: often with *to* 2. that serves as an aid; auxiliary. *Webster's New World Dictionary of American English* (3rd college ed.)

It's not often that a judicial decision opining on an arcane regulatory law issue – the extent of a federal agency's "ancillary" jurisdiction – spawns dramatic, even apocalyptic, headlines. But that occurred earlier this month following the D.C. Circuit Court of Appeals' ruling in [Comcast Corp. v. FCC](#), No. 08-1291 (Apr. 6, 2010), that the Federal Communications Commission lacked authority to regulate an Internet service provider's network management practices. *See, e.g.,* Ryan Singel, *Court Drives FCC Towards Nuclear Option to Regulate Broadband*, wired.com (Apr. 6, 2010); Elie Mystal, *D.C. Circuit Quietly Ruins the Internet for Everybody*, [abovethelaw.com](#) (Apr. 6, 2010).

Although one may well question whether the court's decision merited these extreme reactions, it is clear that the *Comcast* case will have significant impact on the FCC's efforts to adopt and enforce net neutrality regulations, as

well as to implement portions of its recently-released National Broadband Plan. The court's ruling may also lead to congressional efforts to provide the FCC with clearer regulatory authority over the providers of Internet services.

Background of the Dispute: Reasonable Network Management or Improper Discrimination?

In 2007, several subscribers to Comcast's high-speed Internet service learned that the company was interfering with their use of peer-to-peer networking applications. These programs allow users to share large files directly with one another and consume significant amounts of bandwidth.

Two non-profit advocacy organizations filed a complaint against Comcast with the FCC and, together with a coalition of public interest groups and academics, a petition for declaratory ruling. Both filings asserted that Comcast had violated the FCC's Internet Policy Statement.

Adopted in 2005, that statement included the principles that "consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use

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services of their choice.” *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14986, 14988 (2005). Comcast defended its actions as necessary to manage scarce network capacity.

In 2008, the FCC, by a 3-2 vote of the Commissioners, issued the order ultimately challenged by Comcast. *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 (2008). As an initial matter, the FCC not only concluded that it had jurisdiction over Comcast’s network management practices, but also that it could resolve the dispute through adjudication rather than through a rulemaking. On the merits, the FCC found that Comcast had impeded consumers’ ability to access the content and use the applications of their choice, and that because Comcast had several available options it could use to manage network traffic without discriminating against peer-to-peer communications, its method of bandwidth management contravened federal policy. Because by then Comcast had agreed to adopt a new system for managing bandwidth demand, the FCC ordered it to make a set of disclosures describing the details of its new approach and its progress toward implementation. The FCC added that an injunction would issue should Comcast either fail to make the required disclosures or renege on its commitment.

Comcast complied with the FCC’s order, but petitioned for judicial review, making three arguments. First, it contended that the FCC failed to justify exercising jurisdiction over its network management practices. Second, Comcast argued that the FCC’s adjudicatory action was procedurally flawed because it circumvented the rulemaking requirements of the Administrative Procedure Act and violated the notice requirements of the Due Process Clause. Finally, it asserted that parts of the FCC’s order were so poorly reasoned as to be arbitrary and capricious. The D.C. Circuit reached only Comcast’s jurisdictional challenge.

The Court’s Decision: Delineating the Meaning of Ancillary

In the Communications Act of 1934, as amended, Congress gave the FCC express and expansive authority to regulate common carrier services, such as landline telephony (Title II of the Act); radio transmissions, including broadcast radio and television and cellular telephony (Title III); and

cable services, such as cable television (Title VI).

In the *Comcast* case, the FCC did not claim that Congress gave it express authority to regulate Comcast’s Internet service. In fact, the FCC had previously determined that cable Internet service is neither a “telecommunications service” covered by Title II of the Act, nor a “cable service” covered by Title VI, but an “information service.” *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 (2002), *aff’d*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Accordingly, the FCC rested its assertion of authority over Comcast’s network management practices on Section 4 (i) of the Act, which authorizes the FCC to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154 (i). The Commission’s section 4(i) power is referred to as its “ancillary” authority, which the agency

may exercise . . . only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.

American Library Ass’n v. FCC, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

Comcast conceded that the FCC’s action satisfied the first requirement because the company’s Internet service qualified as “interstate and foreign communication by wire” within the meaning of Title I of the Communications Act. 47 U.S.C. § 152(a). The FCC argued that its exercise of authority over Comcast’s network management practices was “reasonably ancillary” to its “effective performance” of its responsibilities under several provisions of the Communications Act. The D.C. Circuit, however, found that the FCC’s action did not satisfy this second requirement set forth in *American Library*.

In a unanimous opinion, the court declared that each and every assertion of ancillary authority by the FCC must be “independently justified” and rejected the provisions cited

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by the Commission as providing this authority. These statutory provisions fell into two categories: those that the parties agreed set forth only congressional policy and those that at least arguably delegated regulatory authority to the FCC.

After reviewing a series of earlier Supreme Court and D.C. Circuit cases, the court reaffirmed its doctrine that “policy statements alone cannot provide for the Commission’s exercise of ancillary authority.” The court explained that this “derives from the ‘axiomatic’ principle that ‘administrative agencies may [act] only pursuant to authority delegated to them by Congress’” (quoting *American Library*, 406 F.3d at 691).

While “statements of congressional policy can help delineate the contours of statutory authority,” they “are not delegations of regulatory authority.” Thus, the court rejected as bases for the FCC’s Comcast order the congressional policy supporting user control of the Internet in Section 230 (b) of the Act and the policy supporting rapid and efficient communications service in Section 1 of the Act.

The FCC had maintained that congressional policy by itself created the “statutorily mandated responsibilities” needed to support the exercise of Section 4(i) ancillary authority. The court rejected this argument as inconsistent with prior case law and explained that, if accepted, “it would virtually free the Commission from its congressional tether.”

The court’s decision repeatedly stressed that ancillary jurisdiction has to be ancillary to *something* – and that something is an express delegation of authority from Congress (such as that in Titles II, III or VI).

The Commission also relied on a number of statutory provisions that at least arguably included delegations of authority. However, after examining each of these provisions in turn, the court concluded that these provisions, for a variety of substantive and procedural reasons, could not support the FCC’s exercise of ancillary authority over Comcast’s network practices. For example, the FCC relied on Section 706(a) of the 1996 Telecommunications Act, which directs the agency to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .” 47 U.S.C. § 157 nt.

As the court pointed out, however, in an earlier, still-binding decision the FCC had ruled that Section 706 did not constitute an independent grant of authority, and the Commission could not depart from that earlier conclusion

without explanation. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

The court rejected the FCC’s assertions of authority under other statutory provisions because the Commission had not developed these arguments in the Comcast order, and the agency was required to defend its action on the grounds actually advanced in the order. With regard to yet other provisions cited by the Commission, the court found that the provisions’ terms were either too limited, or unconnected to the Commission’s action, to support the authority exercised in the Comcast order.

In sum, the court found that the Commission had failed to tie its assertion of ancillary jurisdiction over Comcast’s Internet service to any “statutorily mandated responsibility,” *American Library*, 406 F.3d at 692, and thus granted Comcast’s petition for review and vacated the FCC’s order.

The Commission’s Options

In response to the D.C. Circuit’s decision, the FCC asserted that it is “firmly committed to promoting an open Internet” and stated that the court had “in no way disagreed with the importance of preserving a free and open Internet; nor did it close the door to other methods for achieving this important end.” Advisory, *FCC Statement on Comcast v. FCC Decision* (April 6, 2010).

In fact, the FCC currently has a pending rulemaking proceeding seeking public comment on draft rules to preserve the open Internet. *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009). Assuming the agency does pursue the adoption of net neutrality-type regulations, the FCC has several options for addressing its jurisdictional problem, but they all present legal and political challenges following the *Comcast* decision.

The Commission could appeal the *Comcast* decision, either to an *en banc* hearing of the full D.C. Circuit and/or to the Supreme Court. The appeals process would be time consuming and the odds that the Supreme Court would agree to hear the case are not high. A number of legal commentators have expressed doubt that the agency would prevail, given the unanimity and reasoning of the D.C. Circuit opinion focusing on the jurisdictional question. *See, e.g., Paul Feldman, In the Wake of Comcast: Quo Vadis?*, CommLawBlog (posted Apr. 7, 2010).

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The Commission could also ask Congress to enact legislation specifically providing the agency with the authority to adopt net neutrality regulations. This option would be the most direct way to resolve questions about the FCC's jurisdiction.

Passing legislation would not be done quickly, especially given the upcoming congressional elections, even assuming that such legislation could ultimately be approved. Legislation to expand the regulatory authority of the FCC (especially over the Internet) would be highly controversial on Capitol Hill and would face strong opposition from Internet service providers.

Contrary to some media reports, the D.C. Circuit did not foreclose the possibility of FCC regulation of broadband Internet service generally or of FCC imposition of net neutrality regulations specifically.

The court's decision left open the possibility for the agency to strengthen its argument for ancillary jurisdiction under Title I of the Act.

For example, the Commission could attempt to reverse its interpretation of Section 706 to conclude that it did constitute an independent grant of authority (and thus arguably would be sufficient to support the exercise of ancillary jurisdiction), or could further develop its arguments about its authority under provisions that the agency did not originally advance in its order against Comcast.

But in light of the *Comcast* case, legal commentators note that it would likely be an uphill battle for the FCC to strengthen its argument for ancillary jurisdiction sufficient to withstand the inevitable court appeals, if the FCC were to impose net neutrality regulations based on its ancillary jurisdiction. See, e.g., Feldman, *In the Wake of Comcast*; M. Martin and M. Stern, *Court Overturns FCC's Net Neutrality-Based Decision Against Comcast: What Happens Next?*, K&L Gates Newstand (Apr. 8, 2010).

Alternatively, the FCC could reverse its 2002 decision treating broadband Internet service as an information service and reclassify it as a telecommunications service regulable under Title II of the Act. A number of proponents of net neutrality have urged the FCC to pursue this course of action.

However, it appears that this approach would be controversial among the FCC Commissioners and members

of Congress and would undoubtedly lead to extensive litigation. The FCC would clearly face challenges in justifying to a reviewing court its about face on the appropriate regulatory classification for Internet services.

Implications for the National Broadband Plan

On March 16, the FCC released its National Broadband Plan, an ambitious plan to ensure that all people of the U.S. have access to fast broadband services.

Beyond affecting the FCC's ability to adopt net neutrality-type requirements for Internet service providers, the *Comcast* decision also makes it more difficult for the FCC to implement various aspects of the National Broadband Plan that would rely on ancillary jurisdiction. Following the court's decision, numerous press reports indicated that the FCC was considering changes to the Plan, including specifically those recommendations aimed at improving broadband access and adoption in rural areas; connecting lower-income Americans, Native American communities and those with disabilities; supporting small business use of broadband; strengthening public safety communications; cyber security; and consumer protection and privacy.

Future Legal and Political Developments

The full legal and political ramifications of the D.C. Circuit's decision are not yet known, in large part because it is not yet known how the FCC intends to proceed in its net neutrality rulemakings and in its implementation of the National Broadband Plan following the *Comcast* case. Whatever course the FCC ultimately chooses, further litigation seems a certainty and legislation a possibility. Again, the *Comcast* case demonstrates the difficulty that administrative agencies and Congress (and, indeed, the law generally) experience in trying to keep pace with technological developments. At bottom, the jurisdictional issues facing the FCC are so complex because the agency is attempting to apply a 20th century law to 21st century technologies.

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Second Circuit Holds that the Fed Must Disclose Borrowers and Loan Terms

The Second Circuit this month affirmed that FOIA requires the Board of Governors of the Federal Reserve System to disclose the names and terms of loans to private financial institutions who borrowed money from the Fed under its emergency loan programs in response to the financial crisis. [*Bloomberg L.P. v. Board of Governors of the Federal Reserve System*](#), No. 09-4083 (2d Cir. March 19, 2010) (Jacobs, Leval, Hall, JJ.), *affirming*, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (Preska, J.). The Second Circuit rejected the Board's argument that the information was covered by FOIA's Exemption 4, which protects "privileged or confidential" financial information submitted by a "person" which is defined to mean a person or entity other than an agency.

In response to the recent financial crisis, the Fed significantly increased the amount of public money it lends to private financial institutions. Before the crisis, during the week ending August 8, 2007, the average outstanding loan balance through the Fed's discount window was approximately \$1 billion. During the week ending October 8, 2008, after changes to the Fed's loan programs, the average outstanding loan balance increased to more than \$400 billion. While the Fed disclosed the aggregate loan amounts, it kept the terms of each loan, including the name of the borrower and the collateral, secret. In an effort to lift the Fed's veil of secrecy, on May 20, 2008, Bloomberg News submitted to the Board a FOIA request for records that would reveal, on a loan-by-loan basis, the name of the borrower, the amount and duration of the loan, and the collateral for the loan. FOIA required the Board to respond by June 18, 2008. On November 7, 2008, still awaiting a response from the Board, Bloomberg sued for access to the records.

In a letter dated December 9, 2008, the Board informed Bloomberg that it was withholding 231 pages of reports that summarized the terms of the loans. The Board asserted that the records were exempt from disclosure under FOIA Exemptions 4 and 5 and that any records with the Federal Reserve Bank of New York were not covered by the request or subject to FOIA. The Board maintained that position before the District Court.

Following cross-motions for summary judgment, the District Court ruled that the reports were not exempt from disclosure and that certain New York Fed records must be searched. In doing so, the District Court held that the documents were not obtained by a "person," but rather reflected governmental activity. The District Court also ruled that the Board had failed to satisfy its burden of proving that disclosure would cause competitive harm to the borrowers.

The Board, together with The Clearing House Association L.L.C. (an association of banks that intervened after the District Court's decision), appealed to the Second Circuit, contending that Exemption 4 protects the records from disclosure. On appeal, the Board relied on three primary arguments. First, it argued that the requested information was not a record of governmental activity but rather was information obtained from "person;" i.e., the borrowers. Second, the Board contended that the information was confidential because its disclosure would stigmatize the borrowers and harm their competitive positions. Third, the Board argued that under the so-called "program effectiveness test," the documents should be shielded from disclosure because release would impair the Board's ability to discharge its statutory mandate to effect monetary policy. In affirming the District Court order, the Second Circuit agreed with Bloomberg that the information in question was not obtained by a person but rather constituted a record of governmental activity. In that regard, the Court held: "The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons."

In addition, the Court declined to adopt the "program effectiveness" test, concluding that the addition of a new FOIA exemption should come from Congress, not the courts: "The statute as written by Congress sets forth no basis for the exemption the Board asks us to read into it. If the Board believes such an exemption would better serve the national interest, it should ask Congress to amend the statute."

The Fed must now choose between producing the records and seeking either a rehearing before the Second Circuit or review by the Supreme Court.

Florida Courts Crawl Toward The Digital Age

By Carol LoCicero

On March 18, 2010, the Florida Supreme Court issued an opinion adopting a new court rule governing access to court records. [*In re Amendments to Florida Rule of Judicial Administration 2.420*](#), No. 07-2050, 2010 WL 958075 (Fla. March 18, 2010).

The rule impacts all categories of records – civil, criminal and appellate. The rule was first amended in 2007 to address problems with super sealed cases (where hundreds of court files were sealed and the existence of the cases wiped from the docket). The most recent rule revisions are an outgrowth of the Court’s effort to permit electronic access to imaged court records via Clerk web sites.

In 2002, The Court issued a moratorium on online access to court records, shutting down a number of web sites operated by Clerks that were providing public access to court records. Adoption of the revised rule is a “step closer to providing the public electronic access to court records by providing a mechanism that will allow clerks of court to more readily identify confidential information that must be screened from public view.” *Id.* at *5.

Here’s how Rule of Judicial Administration 2.420 will work generally:

First, the rule lists 19 categories of records that are automatically closed by statute, including adoption files, juvenile court records, commitment proceeding records and probate inventories. There is also an exemption for Social Security numbers. Filers bear the obligation of notifying Clerk’s Offices that records within this list are being filed. The Court adopted a notification form. Non-parties are to be notified whenever a record is filed under seal that contains information involving them.

Otherwise, whenever closure is sought for records outside the listed records, a motion must be filed. Rule 2.420 adopts the same motion procedure for most civil, criminal and appellate records. A Motion to Determine Confidentiality of Court Records must be filed and docketed. Unless the parties agree to closure, a hearing must occur (except in the rare cases involving appellate records). The Court has discretion to hold a hearing, even if the parties agree to closure.

Journalists following cases should review the case docket periodically to ensure that no closure motions have been filed. If any have, the journalist should notify its counsel so that the motion can be opposed, if desired.

The Rule basically codifies closure standards in Florida case law. It also specifies the findings the Court must make prior to closure and what provisions any closure order must contain.

Once an order is entered, it must be posted for at least 30 days. Florida clerks are already posting these orders online and at the courthouse in civil matters. Again, it is important that journalists – particularly those routinely covering the courts – know where clerks in their coverage areas are posting closure orders so that the journalist can review any closure orders entered on a routine basis.

For limited categories of criminal records, a restricted motion practice has been created. The restricted motion procedure can be used whenever there is a request to determine the confidentiality of criminal court records that pertain to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information. There will be only a limited docket entry of a “motion.” The actual motion to close will be sealed.

Journalists must pay particularly close attention to the docket in criminal matters and inquire about docket entries involving “motions” if they suspect a defendant is entering into a plea agreement which requires the defendant to provide evidence to the State.

To address super sealer concerns, the Rule continues to require at least a Case No. to reveal the existence of a case so that no cases completely disappear from the public docket.

These are some of the highlights of Rule 2.420. The rule is quite lengthy and can be confusing. The procedures for determining confidentiality of court records do not go into effect until October 1, 2010.

Only time will tell if the rule helps to correct problems – or engenders more closure motions. As of yet, there is no timetable for statewide electronic access to court records. A pilot program is currently underway in Manatee County,

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where court records are available publicly via Clerk Chips Shore's website at www.manateeclerk.com.

Carol LoCicero, a partner at Thomas & LoCicero PL in Tampa, Florida, represented a consortium of news organizations in the rule proceedings.

Update: Permanent Injunction Entered Requiring Same-Day Access To Civil Court Filings *Awards \$250,000 Attorneys' Fees*

By Rachel Matteo-Boehm and Katherine Keating

Capping off a resounding victory for timely access to court records in an era where many state and federal courts are increasingly asking the media to wait to review new records until they are posted online, the District Court for the Southern District of Texas entered an agreed permanent injunction and final judgment in favor of Courthouse News Service, ordering that the Harris County District Clerk's Office provide same-day access to case-initiating documents filed in most civil cases.

Courthouse News, a nationwide legal news service for lawyers and the news media, had been sending reporters to the Harris County Civil District Courts on a daily basis for almost ten years to review and report on new case-initiating civil petitions at the end of the day on which those petitions were filed. In early 2009, newly elected Harris County District Court Clerk Loren Jackson instituted a policy under which civil filings could be accessed only through the Clerk's web site. Reporters were no longer permitted to review petitions in paper form at the courthouse. Most filings, however, were not available on the Clerk's web site until two to five court days after filing.

After Courthouse News' efforts to resolve the issues by working with Clerk Jackson and other court officials proved unsuccessful, Courthouse News filed an action in the U.S. District Court for the Southern District of Texas under 42 U.S.C. § 1983 against the clerk and his chief deputy in their official capacities. Courthouse News' action alleged that the two-to-five day delay in access to court records amounted to

a complete denial of access and thus violated both the First Amendment and common law right of access, as well as violations of Texas' constitution and statutes.

In July 2009, the Judge Melinda Harmon issued a preliminary injunction ordering restoration of same-day access. *Courthouse News Service v. Jackson*, Civil No. 09-CV-01844, 2009 LEXIS 62300 (S.D. Tex. July 20, 2009). In her preliminary injunction order, Judge Harmon recognized that "[t]here is an important First Amendment interest in providing timely access to new case-initiating documents" and rejected the argument that delays in access were justified by the clerk's asserted need to fully process new case-initiating documents before allowing the media to review

Under an Agreed Permanent Injunction and Final Judgment entered by the Court on March 2, 2010, the Clerk and his agents are permanently enjoined from denying Courthouse News same-day access to case-initiating documents filed in civil cases, except in certain limited circumstances...

them, finding that "the 24 to 72 hour delay in access is effectively a denial of access and is, therefore, unconstitutional." *Id.* at *11, 14. See *Texas Clerk Required to Provide Same Day Access To Civil Court Filings Under First Amendment*, MLRC

MediaLawLetter, July 2009, at 40. Following Courthouse News' posting of the \$1,000 bond mandated by the Court, the Clerk's Office began providing same-day access to new petitions, in accordance with the preliminary injunction order.

Two months later, in October 2009, defendants moved to dismiss the action on the grounds that since the Clerk's Office was complying with the preliminary injunction and same-day access had been restored, the matter was now moot. Following a hearing in December 2009, Judge Harmon rejected this argument, agreeing with Courthouse News that

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“the violation of its and the public’s right of access to newly filed case-initiating documents under the First Amendment of the United States Constitution ... is ‘capable of repetition, yet evading review,’” and that even the voluntary cessation of allegedly illegal conduct does not deprive a tribunal of the power to hear and determine a case, especially where there is nothing to stop the defendant from reverting to its old behavior.

In her December 18, 2009 written order denying the motion to dismiss, Judge Harmon observed:

The cessation of the delay by Defendants in providing first-day access to the public was far from voluntary, as evidenced by testimony at the preliminary injunction hearing. Moreover it was effected only in response to this Court’s Order of Preliminary Injunction, as Defendants have conceded in their motion and again during the hearing. The Court finds that Defendants have failed to show when delays could not “reasonably” be expected to recur, no less demonstrate that such is “absolutely clear.” Their attitude toward curing the alleged obstruction during negotiations with Plaintiff and throughout this litigation can at best be described as indifferent, irresponsible, and even recalcitrant.

Courthouse News Service v. Jackson, 2009 LEXIS 118351, at *2-3 (S.D. Tex. Dec. 18, 2009).

Shortly thereafter, defendants agreed to the entry of a stipulated permanent injunction – something that Judge Harmon herself had suggested near the end of the hearing on the motion to dismiss. Under an Agreed Permanent Injunction and Final Judgment entered by the Court on March 2, 2010, the Clerk and his agents are permanently enjoined from denying Courthouse News same-day access to case-initiating documents filed in civil cases, except in certain limited circumstances (such as when a petition has been properly filed under seal, a petition seeks a TRO or other similar immediate relief, or when the Clerk’s office is closed for business due to a true emergency).

The court also found Courthouse News to be the prevailing party for the purposes of an award of attorneys

fees under 42 U.S.C. § 1988 and ordered defendants to pay Courthouse News’ attorneys fees of more than \$250,000.



UPCOMING EVENTS

NAA/NAB/MLRC 2010

Media Law Conference

September 29-October 1

Chantilly, VA

For more information,

[click here.](#)

MLRC Annual Dinner

November 10

New York, NY

DCS Annual Meeting

November 11

New York, NY

MLRC/Southwestern Law School Entertainment and Media Law Conference

Charting the Unknowns: Digital Entertainment, Content Regulation and Crisis Management

MLRC and Southwestern Law School held their 7th Annual Entertainment and Media Law Conference in Los Angeles, California, earlier this month. The conference's three panels discussed developments in digital entertainment; content regulation by the FCC, FTC, and Congress; and recent high-profile crises that have impacted studios, networks and production companies.

MLRC thanks the Planning Committee: Vincent Chieffo, *Greenberg Traurig*; David Cohen, *ABC*; Kent Raygor, *Sheppard Mullin Richter & Hampton*; and Steve Rogers, *Showtime Networks Inc.*

We thank the sponsors for their generous support: Chubb Group of Insurance Companies; Davis Wright Tremaine; Fox Rothschild; Frankfurt Kurnit Klein & Selz; Hiscox Media Insurance; Lathrop & Gage; Leopold, Petrich & Smith; Sidley Austin.

And thanks to the moderators and panelists.

PANEL 1: THE NEW FRONTIER IN DIGITAL ENTERTAINMENT

Moderator: David Halberstadter, *Katten Muchin Rosenman*

Panelists: Steve Rogers, *Showtime Networks Inc.*; Leon Schulzinger, *CBS*;
and Anthony Segall, *Rothner, Segall, Greenstone and Leheny*



Photos by Liz Reinhardt, Southwestern Law School

Left to right: Segall, Schulzinger, Rogers, Halberstadter

PANEL 2: SEX, MINORS AND VIDEOTAPE

Moderator: Jonathan Anshell, *CBS*

Panelists: Elizabeth Casey, *Fox*; Jim Dietle, *Playboy*; and Alan Simpson, *Common Sense Media*



Left to right: Dietle, Simpson, Casey, Anshell

PANEL 3: CATASTROPHES: CASE STUDIES – CAN ATTORNEYS WORK WELL WITH OTHERS TO MANAGE AND SURVIVE BIG PROBLEMS?

Moderator: Alonzo Wickers, *Davis Wright Tremaine*

Panelists: Hope J. Boonshaft, *Hill & Knowlton*; Karen Magid, *Paramount*; and Vincent Chieffo, *Greenberg Traurig*



Left to right: Chieffo, Magid, Boonshaft, Wickers