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

Libel Reform, CFA's, Phone Hacking Scandal, Super Injunctions, ECHR Updates

By David Hooper

Underlining the fact the last few months in the United Kingdom has been largely about what is to happen rather than what has happened, one of the most significant developments was the statement on 9 July by Lord McNally, Minister of Justice in the new coalition government, about the government's plans for libel reform. This arose during the second reading of the Defamation Bill introduced by Lord Lester of Herne Hill QC on 9 July about which I have written earlier.

Lord McNally said that the Lord Lester's Bill had helped in formulating the government's thinking. He recognised the need to strike a balance between freedom of expression and the protection of reputation which he indicated was a difficult and sensitive exercise. However, Lord McNally stated that the government was committed to reforming the law on defamation. They wanted the investigative journalism and scientific research to be able to flourish without the fear of unfounded lengthy and costly libel actions. Hearing these words Lord Lester was moved to observe that he "*wondered if I'm alive at all or whether I'm in heaven, because I never thought to have a reply of that kind*".

The upshot is that the government will, in March 2011, publish a Defamation Bill. The government does not rule out the possibility of legislation including provisions relating to the law of privacy. The government, however, may take the view that the development of the law of privacy is something better left to the judges. There has not been the underlying research and debate regarding legislative changes to the law of privacy to the extent that there has been in relation to the law of libel. The government continues the consultation process prior to the publication of the new Defamation Bill in March 2011.

The likelihood is that the bill will not go as far as Lord

Lester's bill, but it would probably include provisions for a single publication rule and a restriction on actions being brought beyond the normal one year limitation period by virtue of continued publication on the Internet. It does seem that government thinking has been influenced by the Simon Singh case (see MediaLawLetter [April 2010](#) at 44) and by the passing of the [Speech Act](#) in the USA, whose raison d'être was the deficiencies in the English libel law.

The government certainly wishes to find a solution which prevents continuing academic research and discussion being suppressed by powerful corporations and it wants to address the discrediting of the British libel laws by allowing cases to be brought against US publications which are not in any meaningful sense published in the UK and which have no real connection with events or people in this country. Precisely where it will strike the balance is difficult to predict. There is a lobby which argues that the number of cases of libel tourism is very small indeed, but that is to fail to take account of the cases which never come to court and those where the chilling effect of threatened libel litigation by foreigners with a distinctly controversial – or as English libel lawyers often like to say colourful – reputations can issue multiple lawyers' letters to ensure that criticism of them is muted and undeserved apologies are extracted.

It will be of interest to see how – if at all – the deterrent effect of such libel claims on investigative journalism and non-fiction books is addressed. I would certainly hope to see at least a higher threshold for being able to bring libel claims in this country and a change in the procedure for challenging permission being granted to serve proceedings out of the jurisdiction so that defendants have a realistic prospect of stifling the claim at its inception rather than being in the invidious catch-up position of trying to get the permission to

The likelihood is that the bill will not go as far as Lord Lester's, but it would probably include provisions for a single publication rule and a restriction on actions being brought beyond the normal one year limitation period by virtue of continued publication on the Internet.

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serve proceedings out of the jurisdiction overturned.

Conditional Fees

The government is also seeking consultation on the recommendations made by Lord Justice Jackson in his "*Review of Civil Litigation Costs*." In defamation cases the key Jackson proposals were the radical reduction of the level of success fees and a trade-off for an increase in the level of damages which would offset the fact that success fees would no longer be recoverable from the defense, nor would the enormous premiums for After The Event insurance. Again it is unclear what the government will decide, but it may very well be that only a relatively modest success fee will be recoverable from defendants when they are found liable.

These success fees will be very significantly lower than the present 100% and the recoverable rates for the success fee are likely to start at a low figure and increase gradually as the case progressed to trial and the level of risk realistically assumed by the Claimant increases. To that extent the Jackson proposal may be modified with success fees still being recoverable from Defendants, but being much lower than at present and being graduated. The Jackson proposal of ATE insurance not being recoverable from Defendants is probably more likely to be adopted.

In the meantime, CFAs continue in place and cost judges still give the Claimants the 100% uplift that they seek and are reluctant to reduce the rates claimed by Plaintiffs. A recent example of this (on 30 July) was a decision of a costs judge Master Campbell in the case of *Peacock -v- Mirror Group Newspapers*. The libel claim was settled for £15,000 – a relatively modest sum. However, Peacock's lawyers, Carter-Ruck, had entered into a CFA after the initial exchanges over the article which was published in April 2008.

If the claim was settled before proceedings were issued the success fee would have been 25%, if it was settled after proceedings had been issued, the success fee would have been 50%. A success fee would, however, rise to 100% if the case extended beyond the period of 28 days after the service of the defence. The newspaper had published a number of disobliging references to the Claimant who was the former husband of a model who was said to have made allegations about the shortcomings of her previous husband. In the latter part of October 2009, the newspaper had put in a robust defense which included some particulars of justification.

In November 2009 the claim was settled, but unfortunately just outside the 28 day period after which the

success fee became 100%. It is possible – and in the nature of things is unlikely to know the thinking of the Claimant and his advisers – that the matters raised in the defense encouraged the Claimant to settle for the relatively modest sum of £15,000. The issue, however, was whether the Carter-Ruck Conditional Fee Agreement would be upheld by the court and whether the newspaper would be ordered to pay a 100% success fee.

The newspaper had argued that the success fee should be 53% to take account of the fact that the Claimant had a 70% prospect of success in the action. However, the costs judge took the view that the newspaper failed to take the opportunity to settle the case at an earlier stage and that the Claimant stood a better prospect of having the agreed success fee of 100% approved by the court if the matter had gone a long distance towards trial.

The case underscores the fact that where there are Conditional Fee Agreements, unless a case is definitely going to be taken to court, it is important to settle at a very early stage. The problem that media Defendants face is that by robustly defending cases they run the risk of providing grist to the mill of the Claimant's advisers who can then argue that there was a significant level of risk in the case for the Claimant thereby justifying their claim for an uplift.

And the amount of the costs in the Peacock case, where it will be recollected the damages were £15,000? With the 100% uplift (but subject to detailed assessment by the court) an eye-watering £380,271.24.

Hacks Hacking

Since the royal correspondent of the News of the World, Clive Goodman and an investigator, Glen Mulcaire were jailed for six months and four months respectively for hacking in to the voicemail system of members of the Royal Family, there has been a vigorous debate as to how extensive this practice was and the extent to which politicians and celebrities were routinely hacked into. The question was also did the editor know how his newspaper was obtaining the scoops.

The issue gained an added piquancy by the fact that the then editor who resigned in the wake of the scandal protesting that he had not know the unknown has become the director of communications for the new British Prime Minister David

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Cameron. In recent months the Guardian have published revelations that a number of journalists knew that the practice of such hacking was widespread and have claimed that Andy Coulson did indeed know how the scoops were backed up and what the source of the information was.

The task was not immensely difficult for an experienced hacker as most mobile telephone owners were either too lazy or too stupid to change the manufacturers' security code for their text messages or alternatively the telephone companies regularly gave out the pin numbers to the hackers who claimed that they had lost a note of the code, as they pretended to be the phone owner. As 91 such pin numbers were found during the search of the hackers' personal effects, the allegation was that this practice was very widespread.

The newspaper, and Coulson in particular, deny involvement in the wrongdoing which is attributed to a rogue reporter and they make the point that some of the informants of the Guardian and of the New York Times, who have also taken up the story, left the newspaper in less than happy circumstances. Some privacy claims have been settled by the News of the World for substantial six-figure sums, such claims are brought by a well-known publicity agent and purveyor of stories to the News of the World, Max Clifford, and by a former England football manager, and there must be a risk that other claims are in the pipeline.

The Culture Media and Sport Select Committee in the House of Commons commented on the "*collective amnesia*" of News of the World journalists in their recollections of the period. The matter was debated in Parliament on 9 September and has been referred to the Standards and Privileges Committee and is also the subject of an inquiry by the Home Affairs Select Committee. The reality is that to a lesser or greater extent there has been a whole scale disregard of data protection legislation by the English press, both tabloid and broadsheet.

However, whether the Select Committees will ever get to the truth of the matter in what is a distinctly shady and undocumented area of activity is very open to question. The solution appears to be in strengthening the data protection laws and rigorously enforcing them by significant prison sentences. A number of claims have been brought by

politicians, who it seems are to be joined in this litigation by some of the celebrities, claiming that the Metropolitan Police have breached their human rights seeking an order compelling the police to disclose the information they have about information concerning them in their possession. It seems unlikely that that litigation will get far as the courts do tend to fight shy of interfering with the exercise of discretion by the police in the investigation of crime. Raw politics – perhaps more than the law – will keep this alive.

Fair Comment

On 26 and 27 July the case of *Joseph –v- Spiller* was argued in the Supreme Court. A decision is expected in October. This was the first defamation case of the Supreme Court (previously the House of Lords) since the *Jameel* case in 2006. Media organisations were allowed to intervene. The case should define the extent to which an opinion article needs to establish the facts upon which the comment is based and the extent to which one can look outside the terms of the article in forming a view as to whether this was a matter of comment or an allegation of fact.

Here the issue was whether comments made by the former agent of a group who used to manage the group when they repudiated their agreement with him could be viewed as a comment notwithstanding the fact that a somewhat convoluted factual background was not set out in the comment, it had been viewed by Mr Justice Eady as an allegation of fact. The Court of Appeal had held that it was comment but it was not based on facts which were truly stated. The case is a good indication of the need to define the boundaries of fair comment and to reduce its complexity.

Another Supreme Court Decision on Reynolds?

A petition for permission to appeal has been lodged in the case of [Flood –v- Times Newspapers](#) on the basis that the decision of the Court of Appeal was retrograde and an impermissible departure from principle and that it overlooked the findings at first instance of Mr Justice Tugendhat. The Court of Appeal was strongly of the view that although the

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The reality is that to a lesser or greater extent there has been a whole scale disregard of data protection legislation by the English press, both tabloid and broadsheet.

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allegations were of public interest, they were very damaging to the police officer Flood's reputation – they concerned allegations of receiving corrupt payments from Russian oligarchs – and that there was a failure to verify the allegations.

The issue was the extent to which the paper should have published the leaked detail of the allegations but which subsequently were not upheld by the Independent Police Complaints Commission as opposed to merely reporting the fact of the allegation. The mere fact that allegations were made to the police and were being investigated did not in the Court of Appeal's view, give a licence to repeat those allegations. The extent of a positive obligation to verify the facts is the potential to weaken the extension of the Reynolds Defence in the *Jameel* case and is a worrying development for the media.

Super Injunctions

In April 2010 the Master of the Rolls (Head of the Court of Appeal) Lord Neuberger announced that he was establishing a committee to review the operation of super injunctions. These relate primarily to privacy claims. The case of the footballer, John Terry, where an injunction was ultimately refused by Mr Justice Tugendhat suggested that they were hitherto being granted too easily on evidence which fell short of what was required for such draconian remedies, which meant that not only would the identities of the parties and the evidence relied upon kept secret, but the fact of the proceedings could not be reported.

The Terry case also showed that Claimants were not giving sufficient notice to the relevant sections of the media who might be considering publication because as they would have an opportunity of making representations to the court at the initial proceedings rather than having to try and get the order which would by then have been obtained, set aside. It appears that Lord Neuberger's committee may be considering producing a template for the procedure to be followed and the form of the order which will be welcomed by all concerned. Statistics as to the number of super injunctions are very difficult to obtain but from the experience of in-house lawyers it looks as if there is on average about one super injunction per month.

Interlocutory injunctions are not normally granted in libel actions under the rule in *Bonnard –v- Perryman* where a

Defendant indicates an intention to defend the claim. However, on rare occasions a court can form the view that the defence has no prospect of success. This was the decision of Mr Justice Edwards-Stewart in the case of *Anna Mazola –v- Rich Kordowski* who ran the delightfully named site www.solicitorsfromhell.co.uk. In that case there was no attempt to justify what was alleged against the much maligned solicitor.

Sanoma Uitgevers BV –v- The Netherlands The Grand Chamber of the European Court of Human Rights 14 September 2010

This case which is discussed elsewhere in this issue of the MediaLawLetter is important in that it stresses the vital importance that the protection of sources affords to freedom of speech. Essentially the case followed the court's earlier decision on *Goodwin –v- The United Kingdom*, but it did emphasise the need for proper procedural safeguards to be in place before any disclosure order was made. Reading the case one gets the impression that the chance of the Dutch magazine taking photographs of illegal car racing – when they had blurred the identity of the participants – was seized upon by the police as a means of obtaining some evidence for an earlier use of one of the cars in a ram raid in order to identify the perpetrator.

The behaviour of the Dutch prosecutors was found to be unsatisfactory. There had been no balancing exercise between the need to protect sources and the prevention of crime. In consequence the court unanimously held that the requirement that the applicants provide their journalistic material to the prosecution was prescribed by law and therefore there was a breach of Article 10. It is an important and powerful statement of principle and one to be welcomed by those advising the media.

Polanco Torres -v- Spain Application 34147/06 21 September.

This is a potentially important decision in that it appears to hold at bay a line of argument that damage to reputation is part and parcel of a person's Article 8 privacy rights which would make claims that much easier to bring and lessen the scope of Article 10 arguments. In this case the Claimant was a judge in Cantabria who, with his wife, had unsuccessfully

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sued a newspaper when accused of unlawful dealings with a company. The libel action had been dismissed and the Claimant asserted that the dismissal of his libel action was in breach of the state's obligation to protect his right to reputation under Article 8.

The court rejected this argument and concluded that the journalist had been sufficiently diligent in his investigation of the story to fall within Article 10.

Readers should also keep an eye out for the hearing which starts on 13 October before the Grand Chamber by that perennial litigant *Von Hannover* (aka Princess Caroline of Monaco) and *Springer -v- Germany*. The first case as usual involved not overtly intrusive photographs of Princess Caroline. The Axel Springer case involved a ban on the publication of material about the arrest and conviction of an actor for possession of cocaine. They are cases in which [submissions](#) have been made by the British Media Lawyers' Association and should raise interesting questions about image rights, when publication of a photograph can be said to engage Article 8 and the need for balance between Article 8 and 10.

Judge in Charge of Jury List

With effect from 1 October, Mr Justice Tugendhat takes charge of the Jury List which effectively means that he is the judge who decides who hears which libel cases. In effect he also controls the issue of who resides over the substantive hearing of most privacy actions. Mr Justice Eady had held the position for eight years. He had brought to the job the specialist expertise of having been a libel lawyer, whereas previously the appointment had gone to a non-specialist senior judge nearing retirement.

It is essential a purely administrative appointment, but involving as it does, libel and privacy and defining their boundaries, tends to have a much higher profile than other corresponding judicial proceedings.

Mr Justice Eady has in recent years indicated a certain dismay at the criticisms that were levelled at him in the media. The law that Mr Justice Tugendhat will apply is, of course, the same one as that applied by Mr Justice Eady but there may be some difference in approach with a possible minor swing of the pendulum towards Article 10.

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European Court of Human Rights Reaffirms Source Protection Materials May Not Be Seized Absent Prior Impartial Review

By Erik Bierbauer and Joseph D. Murphy

The European Court of Human Rights (ECHR) held in a unanimous Grand Chamber decision issued on September 14, 2010 that a Dutch law permitting law enforcement authorities to seize journalistic materials without first conducting a hearing before an independent, impartial, and non-executive body violated journalists' right to keep source identities confidential. [*Sanoma Uitgevers B.V. v. The Netherlands*](#), App. No. 38224/03 (14 Sept. 2010) ("*Sanoma*").

Background

In 2002, Dutch authorities detained for several hours the editor-in-chief of the Dutch motoring magazine *Autoweek* and threatened to shut down the publisher's newsrooms for a police search if the magazine did not hand over photographs of an illegal street race taken by journalists for *Autoweek*. Police (who had been present at the race and ultimately intervened to stop it) claimed that they had reason to believe that a car used in the race had also been used in a string of unrelated bank robberies, and that they needed the photos to attempt to identify the race participants linked with the car. Race participants had allowed the journalists to observe and photograph the race on the condition that *Autoweek* would publish the photos in a way that preserved participants' anonymity. *Sanoma*, ¶¶ 9-14.

The magazine resisted handing over the photos but eventually did so under threat of the shutdown of *Sanoma*'s newsrooms, which would have impeded other *Sanoma* publications from covering the wedding of the Dutch crown prince that weekend. *Sanoma*, ¶¶ 15-22.

The Dutch Criminal Procedure Code (Article 96a) authorized the prosecutor to demand the photos. After *Autoweek* resisted, the prosecutor arranged a conference with the investigating judge assigned to the criminal matter, who acknowledged that it was not within his competence to review the prosecutor's order, but noted that he would have approved the seizure if it had been. A Dutch regional court subsequently found the seizure lawful, the Dutch Supreme Court declined to hear a full appeal, and the magazine filed

an application against the Netherlands with the ECHR.

In a 4-3 decision issued on March 31, 2009, a chamber of the Third Section of the ECHR ruled that the seizure had not violated the magazine's freedom of expression as protected under Article 10 of the European Convention on Human Rights. *Sanoma Uitgevers B.V. v. The Netherlands*, App. No. 38224/03, Eur. Ct. H.R. (Mar. 31, 2009) ("*Third Section*"). The majority downplayed the sources' interest in confidentiality, cited no evidence that the Dutch police had tried alternative means to obtain the information they sought, and characterized the detainment and threats of newsroom shutdowns as merely "a regrettable lack of moderation." *Third Section*, at ¶ 63. Many media observers feared that this decision signaled a shift in ECHR case law toward a less rigorous defense of source confidentiality in the context of law enforcement investigations, and the petitioners filed for appeal to the ECHR's Grand Chamber, which comprises seventeen judges, accepts only a small percentage of cases appealed to it, and whose decisions are not further appealable.

The ECHR has applied what amounts to a qualified reporter's privilege in confidential source cases since 1996, when the court recognized a right under Article 10 for journalists to keep sources confidential. *Goodwin v. United Kingdom*, App. No. 17488/90, 1996-II Eur. Ct. H.R. To overcome this right, any effort to compel disclosure of a source must be "prescribed by law," pursue a legitimate aim, and be "necessary in a democratic society." Since the *Goodwin* decision, the ECHR has emphasized the importance of source confidentiality to the "indispensable" watchdog role played by the press and found Article 10 violations where authorities have searched journalists' offices or homes or detained them in an attempt to identify the sources of leaked information. See *Tillack v. Belgium*, App. No. 20477/05, Eur. Ct. H.R. (Nov. 27, 2007); *Voskuil v. the Netherlands*, App. No. 64752/01, Eur. Ct. H.R. (Nov. 22, 2007); *Ernst and Others v. Belgium*, App. No. 33400/96, 39 Eur. H.R. Rep. 35, ¶¶ 11, 14 (2004); *Roemen and Schmit v. Luxembourg*, App. No. 51772/99, 2003-IV Eur. Ct. H.R.

Last December, while *Sanoma* was pending before the

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Grand Chamber, an ECHR panel upheld source protection in a case related to reporting based on leaks of a takeover bid by an international brewing company. The ECHR found that interests in disclosing the source and preventing future leaks were outweighed by the chilling effect disclosure would have on the press and its ability to work with anonymous sources. *Financial Times Ltd and Others v United Kingdom* [2009] ECHR 2065 (15 Dec. 2009).

The *Goodwin* line of cases is part of a wider, emerging recognition that sources of international law provide for a reporter's privilege. Rulings of international criminal tribunals, for example, have been supportive of a vigorous and broad reporter's privilege for journalists working in conflict zones. See *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (Dec. 11, 2002), known as the "Randal" decision for the name of the reporter involved, in which the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia broke ground by holding that war correspondents have a qualified privilege to refuse to testify; and *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355 (Mar. 6, 2009), in which the Special Court for Sierra Leone applied a qualified reporter's privilege test to reject a motion by defendant Charles Taylor, former president of Liberia, to compel a journalist to identify people who had helped him to report on the civil war in Sierra Leone.

In addition, source protection principles are increasingly recognized and analyzed by national courts and legislatures in Europe. In the United Kingdom, appeals arising out of the Saville Inquiry (the "Bloody Sunday" Inquiry) have confirmed the press's ability to maintain the confidentiality of source identities, and new laws in several Eastern European countries, including the Media Act in Croatia and the Law on Radio and Television Broadcasting in Romania, require special judicial proceedings before a journalist may be ordered to disclose a source.

ECHR Grand Chamber Decision

In *Sanoma*, the ECHR's Grand Chamber reversed the Third Section, reaffirmed *Goodwin*, and added an important new procedural safeguard for protecting source identities. The opinion observed that Article 10 protects the source's interest in remaining anonymous, the media's ability to

encourage anonymous sources to come forward in the future, and the public's interest in receiving information. *Sanoma*, ¶ 89. The Grand Chamber held that these interests could be adequately protected only by formal proceedings before the execution of a search warrant or disclosure order.

The proceeding must occur before an impartial body charged with a full balancing of interests and capable of rejecting police applications or limiting them so as to avoid compromising confidentiality. Subsequent judicial review does not suffice. *Id.*, ¶ 91. Without such prior review, the compelled disclosure of a confidential source could not be considered "prescribed by law" under *Goodwin* and therefore would violate Article 10. *Id.*, ¶100.

The Grand Chamber found that in *Sanoma*, neither the prosecutor's status as an officer of the court nor the informal consultation with the investigating judge was sufficient to protect *Autoweek's* and its sources' rights. The Grand Chamber held that a reviewing body must be independent, impartial, and non-executive to comply with Article 10. *Id.*, ¶ 90. There was no definitive ruling on whether a formal proceeding before an investigating judge, whose primary task generally is to gather as much information as possible, could ever satisfy the court's requirements.

In requiring impartial prior review of efforts to compel source disclosure, the ECHR endorsed procedural protections similar to those generally enjoyed by journalists in the United States, where the federal Privacy Protection Act, 42 U.S.C. § 2000aa, and some state shield laws, see, e.g. Cal. Pen. Code §1524(g); Or. Rev. Stat., Title 4, Ch. 44, §§ 44.510-.540 (1995), limit search and seizure of journalistic materials. (The seizure of materials from a *Gizmodo* reporter in California last spring notwithstanding.) Substantively, the ECHR's *Goodwin* test provides stronger protection for confidential source identities than journalists have in many U.S. jurisdictions.

The level of protection Article 10 provides for unpublished, non-confidential journalistic material remains unsettled. In 2005, in *Nordisk Film & TV A/S v. Denmark*, App. No. 40485/02, 2005-XIII Eur. Ct. H.R., the ECHR indicated that non-confidential journalistic work product is entitled to some degree of protection, without stating what that degree might be. In *Sanoma*, the Dutch government disputed whether *Autoweek* truly promised confidentiality to the street race participants. The Grand Chamber sided with the magazine, holding that there was "no need to require evidence of the existence of a confidentiality agreement

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beyond [*Autoweek's*] claim that such an agreement existed.” *Sanoma*, ¶ 64.

The Grand Chamber’s decision sets an important precedent for the 47 member states of the ECHR, which include not only Western European countries but Russia and many other former members of the Soviet bloc. The member states are bound by ECHR decisions, although national authorities do not always adapt quickly to ECHR precedents. Still, the *Sanoma* decision is excellent news for journalists in the Netherlands and other ECHR member states. Jens van den Brink of Kennedy Van der Laan, the firm representing *Sanoma*, commented: “With the *Voskuil* verdict this is the second time in three years the ECHR finds the Dutch government violated Article 10 in a reporter’s privilege case. This ruling comes at a particularly good point in time for our country, as a draft statute on the protection of journalistic sources is currently before the Dutch Parliament.”

The decision may also be particularly important in those member states without strong traditions of press freedom, where the authorities all too often display “a regrettable lack of moderation” in their dealings with journalists. The Dutch judge on the Grand Chamber panel, who had been part of the lower chamber majority finding no violation, wrote a separate concurrence explaining that he now had been persuaded to find a violation of Article 10 by a colleague who asked, “What would your answer have been if a similar case, with a comparable show of force by the police and the prosecution service, had been brought before us from one of the new democracies?” *Id.*, ¶ 5 (concurrence).

The Grand Chamber’s decision should make it less likely

for such cases to occur. As Geoffrey Robertson, QC, counsel to a coalition of media organizations and NGOs that intervened in the Grand Chamber proceedings, said, “This ruling was an acid test for the Court and for media freedom across Europe. It sets a high benchmark for protection of journalistic materials and will force police and prosecutors across Europe, from Russia to France, to change their practices.”

Mark Stephens of Finers Stephens Innocent, who helped lead the intervention effort, said, “In this respect, if no other, Europe has a firmer protection for free speech than the US and so today’s decision is very much to be celebrated. The judgment firmly demonstrates that European governments cannot use clumsy police work to make journalists the surrogates for law enforcement.”

Erik Bierbauer is a counsel and Joseph D. Murphy is an associate at Debevoise & Plimpton LLP, which represented CPJ as an intervener. Sanoma Uitgevers B.V. was represented in the Grand Chamber proceedings by Ilan de Vré and Otto Volgenant, of Kennedy Van der Laan in Amsterdam. The Kingdom of the Netherlands was represented by Mr R.A.A. Böcker and Ms. J. Jarigsmá, of the Ministry for Foreign Affairs, and Ms. T. Dopheide, of the Ministry of Justice. The Media Legal Defence Initiative and Guardian News Media Ltd, represented by Geoffrey Robertson, QC, of Doughty Chambers, and Mark Stephens of Finers, Stephens, Innocent LLP in London, as well as the Committee to Protect Journalists (“CPJ”), ARTICLE 19, and the Open Society Justice Initiative, intervened in the ECHR Grand Chamber proceedings. A number of media organizations supported the intervention.

Turkey Violated European Convention By Failing to Protect Journalist’s Life and Freedom of Expression

States Have Positive Obligation to Protect Journalists

On September 14, 2010, the European Court of Human Rights ruled that Turkish authorities failed in their duty to protect the life and freedom of expression of murdered journalist Firat (Hrant) Dink, in violation of Articles 2, 10 and 13 of the European Convention of Human Rights. [Dink v.](#)

[Turkey](#) (applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) (judgment available in French). A detailed ECHR Press Release in English discussing the judgment is available [here](#).

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The judgment creates a positive obligation on states to protect journalists and may provide persuasive authority worldwide for state's to provide better protection for journalists who are threatened because of the content of their expression.

Background

Firat Dink was a Turkish journalist of Armenian origin and editor-in-chief of a Turkish-Armenian newspaper, Argos. Between 2003 and 2004, Dink published a series of articles expressing his views on the identity of Turkish citizens of Armenian origin, arguing that the traumas suffered by the Armenians remained unresolved because the Turkish people ignored Armenians' need to have their status as victims of genocide recognized.

Dink described the Turkish element in Armenian identity as both a poison and an antidote. He extended the metaphor when explaining how Armenian identity could come to terms with its Turkish elements in his statement "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia, provided that the former are aware of it." Extremist national groups protested Dink's articles with demonstrations and threatening letters.

In February 2004, a national extremist filed a complaint against Dink for insulting Turkish people with his "blood poisoned by the 'Turk'" statement and the Istanbul public prosecutor charged Dink with violating the Turkish Criminal Code, which made it an offense to denigrate "Turkishness." Though an expert report concluded that Dink's statement did not denigrate Turkishness because the "poison" in his statement referred not to Turkish blood, but instead to the Armenian obsession with obtaining national recognition of their genocide, Dink was nevertheless found guilty. The Turkish court held that the public could not be expected to read the whole series of articles to grasp the real meaning of Dink's statements.

On January 19, 2007, Dink was shot and killed outside of his newspaper's offices in Istanbul. Criminal proceedings against 18 accused plotters, including the shooter, are still pending in Turkey.

ECHR Complaint

On December 18, 2007, Dink's family brought complaints alleging two violations of Article 2: that the State had failed in its obligation to protect Dink's life and failed to prosecute the local officials who should have protected him. The latter violation was also brought under Article 13 for a lack of effective remedy. They further alleged under Article 10, that Dink's conviction for denigrating Turkish identity had infringed his freedom of expression and made him a target for nationalist extremists.

Article 2 (Right to Life) / Article 13 (Lack of Effective Remedy)

The Court found that the Turkish security forces could reasonably be considered to have been aware of the intense hostility towards Dink in nationalist circles and the real and imminent threat of his assassination. Investigations had revealed that police in both Trabzon and Istanbul had been informed of the likelihood of an assassination attempt and of the identity of the plotters and yet police took no preventative actions. Therefore, there had been a violation of Dink's Article 2 right to life.

The Court also found a breaches of Article 2 in its "procedural aspect," and Article 13, as no effective investigation had been carried out into the failures to protect

Dink's life.

The Court cited the local officials' refusal to prosecute officers who took no protective action and those officers' subsequent lies to investigators, as manifest breaches of the duty to investigate and protect Dink.

Article 10 (Right of Freedom of Expression)

The Court concluded that the Turkish court had deliberately misinterpreted Dink's statements to indirectly punish him for criticizing the government's denial of the Armenian genocide, when it was clear that Dink's "poison" statement did not refer to Turkishness. Dink's conviction for denigrating Turkishness made him a target for extreme nationalists and the police, who had been informed of an

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The court declared that States have a "positive obligation" to protect an individual's freedom of expression against attack, including by private individuals.

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assassination plot, did not take steps to protect him.

Therefore, there had been interference with the exercise of Dink's right to freedom of expression. The Court found that Dink had been writing about an issue of significant public concern (pursuit of historical truth) and his right to expression should have been protected.

The Court declared that States have a "positive obligation" to protect an individual's freedom of expression against attack, including by private individuals, and that it was insufficient for a state to only refrain from interfering

with an individual's freedom of expression. The Court concluded that Turkey had failed to fulfill these "positive obligations" with regard to Dink's freedom of expression, in violation of Article 10.

Damages

The Court held, in respect of non-pecuniary damage, that Turkey was to pay 100,000 euros jointly to Dink's wife and children, 5,000 euros to his brother and 28,595 euros to the applicants jointly for costs and expenses.

Tenth Circuit Holds That Section of Uruguay Round Agreements Act Which Restored Certain Foreign Copyrights in the U.S. Does Not Violate First Amendment

By Al J. Daniel, Jr.

In the appeal by the government, the United States Court of Appeals for the Tenth Circuit somewhat surprisingly reversed the district court's holding that Section 514 of the Uruguay Round Agreements Act, 17 U.S.C. § 104A ("URAA"), violated the First Amendment rights of the plaintiffs. *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), decided June 21, 2010 ("*Golan I*"). The Court also rejected plaintiff's cross-appeal which asserted that Section 514 was unconstitutional on its face because, in plaintiffs' view, once in the public domain, always in the public domain.

This decision is surprising because the Court's prior remand decision on this question seemed to almost direct the district court to find Section 514 unconstitutional. On remand, the district court did just that. *Golan v. Gonzalez*, 501 F.3d 1179 (10th Cir. 2007) ("*Golan P*"). The Court's prior decision also affirmed the district court's holding that the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, §§ 102(b) and (d), 112 Stat. 2827-28 (1998) (amending 17 U.S.C. §§ 302, 304), violated the "limited Times" portion of the Copyright Clause, U.S. Const. Art. I, § 8, cl. 8, relying upon *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), which rejected similar claims. The Tenth Circuit's decision in *Golan I* was previously reviewed in the MediaLawLetter. See Toby Butterfield and Lisa Digernes, *Tenth Circuit Imposes Constitutional Scrutiny on Copyright Restoration*

Act, MLRC MediaLawLetter Sept. 2007 at 33.

However, in the Tenth Circuit's second decision, it largely adopts the government's analysis of the conflicting interests of the parties and the appropriate application of the governing principles and cases.

Plaintiffs are individuals and entities in various fields whose businesses entail using artistic public domain works, including the performance, distribution, and sale of such works. They claimed that once foreign works entered the public domain, the plaintiffs had First Amendment rights to use these public domain works which were violated by restoration of copyright in the works under Section 514 of the URAA.

Congress enacted Section 514 to implement the United States' obligations under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"). Section 514 restores U.S. copyrights for foreign works which had entered the public domain for specific reasons: (1) non-compliance with U.S. formalities; (2) unprotected subject matter; and (3) ineligible nationality. Copyrights were not restored for works whose terms of protection had expired. Congress also provided some protection for "reliance parties," like plaintiffs, who had exploited foreign works covered by Section 514 prior to restoration of their copyrights. Owners of restored copyrights must file a notice with the Copyright Office within twenty-

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four months of restoration or serve notice on reliance parties of their restored rights.

Reliance parties can continue to use the works and sell or dispose of them for twelve months after such notice without liability, but they cannot make new copies during that time. Reliance parties who have created derivative works based on a restored work can continue to exploit the derivative work if they pay the owner of the restored work “reasonable compensation” and can obtain a court determination of reasonable compensation if the parties cannot agree. The plaintiffs argue that these protections for reliance parties are insufficient to trump their claimed First Amendment rights.

The Tenth Circuit, the lower court, and the parties all agreed that Section 514 was a “content-neutral regulation” of speech because Congress enacted this provision to satisfy international obligations of the United States under the Berne Convention and TRIPs and to protect U.S. authors’ rights abroad.

For a content-neutral provision like Section 514, the Court held it must apply an “intermediate scrutiny” test of constitutionality: the statute “will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”).” *Golan II*, 609 F.3d at 1083.

Applying the intermediate scrutiny test, the Court held that “the government has demonstrated a substantial interest in protecting American copyright holders’ interests abroad, and Section 514 is narrowly tailored to advance that interest ...” *Golan II*, 609 F.3d at 1083-1084. (The Court expressly stated that it was not reaching the government’s other asserted governmental interests, *i.e.*, compliance with the Berne Convention and remedying “historic inequities of foreign authors who lost or never obtained copyrights in the United States.” *Golan II*, 609 F.3d at 1083 n. 6). The Court reversed the lower court’s conclusion that the statute was unconstitutional.

In balancing plaintiffs’ claimed First Amendment rights against the government’s interests, the Tenth Circuit acknowledged the Supreme Court’s statement that “not all First Amendment interests are equal. See *Eldred*, 537 U.S. at 221.” *Golan II*, 609 F.3d at 1083 n. 6. Here, plaintiffs asserted the unlimited right to use other people’s expression, not to protect their own.

In upholding the constitutionality of Section 514, the Court held that: (1) the government’s interest in protecting the rights of American copyright owners abroad is a substantial interest; (2) the political branches’ judgment that Section 514 would remedy a real harm involves a judgment concerning foreign affairs and is entitled to special deference from the courts; (3) substantial evidence supports the government’s conclusion that enactment of Section 514 would remedy the potential harms, even if the Court might have reached a different conclusion; and (4) Section 514 “does not burden substantially more speech than necessary ...,” recognizing that it does not have to be the least-restrictive option in order to pass constitutional muster. *Id.* at 1090.

Plaintiff’s cross-appeal presented a facial attack on the constitutionality of Section 514, asserting that the government could never remove a work from the public domain, regardless of the importance of the government’s interest. *Golan II*, 609 F.3d at 1094. The Court pointed out that it had already rejected this argument in *Golan I*, relying upon the Supreme Court’s decision in *Eldred*. *Id.* at 1095. The Court noted that plaintiffs provided no support for their contention that the First Amendment or any other provision “draws such absolute, bright lines around the public domain, and we are aware of no such authority.” *Id.* at 1095.

* * *

Prediction. The courts have not heard the last of *Golan et al.* They surely cannot resist filing a petition for a writ of certiorari, seeking a final word from the Supreme Court on the fate of Section 514 and a ruling on whether the public domain, once entered, is forever sacrosanct.

Al J. Daniel, Jr. is a partner at Cowan, DeBaets, Abrahams & Sheppard LLP, New York, New York. The Attorney General and the Register of Copyrights were represented by John S. Koppel, Tony West, David M. Gaouette, and William Kanter, Department of Justice, Washington, D.C.; plaintiffs were represented by Anthony T. Falzone and Julie A. Ahrens at the Center for Internet and Society, Stanford Law School, Stanford, California; Hugh Q. Gottschalk and Carolyn J. Fairless of Wheeler Trigg O’Donnell LLP, Denver, Colorado; and Lawrence Lessig, Harvard Law School, Cambridge Massachusetts. A number of amici curiae filed briefs in the case.

NFL Sacked by the Sherman Antitrust Act

Merchandise Licensing Subject to Antitrust Law

By Paul Riehle and Matthew G. Stein

In a ruling that is still sending tremors across professional sports leagues, the U.S. Supreme Court held that the licensing activity (e.g., selling branded merchandise items like jerseys, hats and t-shirts) of the National Football League, its 32 separately owned teams, and the teams' jointly owned affiliate is concerted activity subject to antitrust scrutiny.

The U.S. Supreme Court's unanimous decision in [*American Needle Inc. v. National Football League et al.*](#), No. 08-661, 2010 WL 2025207 (May 24, 2010), may change how professional sports leagues do business with outside vendors. The Supreme Court's ruling struck a significant blow to the long-standing joint venture between the NFL and its 32 member teams to license and market team-owned trademarks through a single entity. The Court's rejection of the NFL's request for a categorical exemption also means that other restrictions by the NFL and other sports leagues are subject to the purview of the antitrust law.

Background

The NFL is an unincorporated association of separately owned professional football teams. Each team owns its own intellectual property and fights for publicity and a wide fan base. In order to develop, license, and market its intellectual property, in 1963 the league formed a distinct legal entity, known as the National Football League Properties (NFLP). For 37 years, the NFLP granted nonexclusive licenses to companies that manufacture and sell team apparel.

In 2000, the 32 NFL teams voted to authorize NFLP to grant exclusive licenses, and NFLP gave Reebok International Ltd., an exclusive 10-year license to produce and sell trademarked headwear for all of the NFL teams. American Needle, which had made and sold headwear under a nonexclusive license for 20 years, sued challenging the agreements under Section 1 of the Sherman Antitrust Act.

Section 1 outlaws contracts, combination or conspiracies which unreasonably restrain trade.

In 2007, the district court granted the NFL entities summary judgment on the basis that the NFL member teams operated as a single entity through the NFLP to market and promote NFL football and so was immune from antitrust liability. In 2008, a unanimous three-judge panel of the 7th U.S. Circuit Court of Appeals, affirmed, ruling that the teams' concerted efforts were required to produce "NFL football," which competes against other forms of entertainment. The panel likened the legal issue to "a Zen riddle," asking, "Who wins when a football team plays itself?"

Petition for Certiorari

American Needle petitioned for Supreme Court review. The NFL defendants, joined by the NBA and the NHL, in hindsight committed a costly turnover by making the unusual request of urging review even though they had prevailed in the lower courts. The NFL defendants hoped to gain across-the-board immunity to antitrust law.

The NFL defendants argued that they were incapable of "conspiring" with respect to the exploitation of intellectual property rights because the NFL, its teams and the NFLP act as a "single entity." They contended that a decision otherwise "would convert every league of separately owned clubs into a walking antitrust conspiracy," and bring a legal challenge to any

decision that the teams make collectively, such as scheduling or marketing.

Supreme Court Decision

Justice John Paul Stevens, who grew up as a sports enthusiast and began his career as an antitrust lawyer, authored the Supreme Court decision rejecting the NFL's

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The Court rejected the argument that NFL teams need each other to play an NFL season, analogizing "a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to" antitrust scrutiny.

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position. Justice Stevens focused on whether the NFL were “independent centers of decision making” for their intellectual property. He concluded that the NFLP is simply an “instrumentality of the teams” because the teams were “separately controlled, potential competitors with economic interests distinct from NFLP’s.”

Justice Stevens explained that NFL teams directly compete against each other on numerous levels. Identifying last year’s Super Bowl competitors, the New Orleans Saints and the Indianapolis Colts, Justice Stevens noted that teams compete against each other “to attract fans, for gate receipts and for contracts with managerial and playing personnel.” The teams compete in the market for intellectual property and, therefore, “[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.”

“Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that ‘deprive the marketplace of independent centers of decision making ... and therefore of actual or potential competition.’” Just because NFL teams may be members of an organization, the NFLP, to jointly market and license its brand and logos, it does not mean the NFL can escape antitrust scrutiny. “If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from” antitrust law, Justice Stevens wrote, “then any cartel could evade the antitrust law simply by creating a “joint venture” to serve as the exclusive seller of their competing products.”

The Court also rejected the argument that NFL teams need each other to play an NFL season, analogizing “a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to” antitrust scrutiny.

In *American Needle*, the Supreme Court ruled that the joint venture was not immune from the antitrust laws. There was no ruling about whether Section 1 had, in fact, been violated. Rather, the Court “punted” the case back to the lower court to consider whether the joint activity violates Section 1 under the “Rule of Reason.” The NFL can still argue that the pro-competitive benefits of joint NFLP licensing outweigh the anti-competitive harms. Moreover, to prevail on remand, *American Needle* will have to prove, among other things, that the NFL has market power in a

relevant market, such as licensing the use of trademarks and other intellectual property.

Impact of Decision

The implications of the Court’s ruling are being widely speculated in the sports world and legal community. Had the NFL prevailed on its request for immunity in *American Needle*, the NFL might have sought to expand the immunity to areas such as ticket pricing and television viewing. As for the intellectual property licensing implications, the ruling may result in the lower court prohibiting the 32 NFL teams’ joint venture to license and market their individually owned teams through a single entity.

The decision appears unlikely to have a significant impact on the NFL’s press credential policies. The Court cited the NFL teams’ shared “interest in making the entire league successful and profitable” as providing “a perfectly sensible justification for making a host of collective decisions.”

The NBA, NHL, MLS, NASCAR and the NCAA publicly supported the NFL, hoping the high court would expand broad antitrust exemption to other sports. However, the Supreme Court’s decision sends the message to these professional sports leagues that their own goals for single entity immunity will not materialize.

Perhaps the answer to “who wins when a football team plays itself?” is “the fans.” In the end, by ruling against the most powerful sports league in the country, the country’s highest court may have been looking out for the fans.

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Supreme Court Upholds Statute Prohibiting “Material Support” to Terrorist Organizations

Content Based Prohibition Upheld

In a 6-3 decision, the Supreme Court upheld the constitutionality of a federal statute that makes it a crime to provide material support to designated foreign terrorist organizations. [*Holder, et al. v. Humanitarian Law Project, et al.*](#), No. 08-1498 (June 21, 2010). In a decision written by Chief Justice Roberts and joined by Justices Stevens, Scalia, Kennedy, Thomas and Alito, the Court held that the statute, as it would be applied to a group that intended to facilitate the lawful, nonviolent purposes of a foreign terrorist group, does not violate the Constitution because served serious national security interests and did not extend to criminalize independent advocacy.

Background

The statute at issue, 18 U.S.C. 2339B, makes it a federal crime to “knowingly provide material support or resources to a foreign terrorist organization.” “Material support or resources” is defined to include “training,” “expert advice or assistance,” “personnel,” and “service” as well as various other activities. An organization is designated to be a “foreign terrorist organization”, as determined by the Secretary of State.

The plaintiffs, U.S. citizens and domestic organizations, sought to provide support for the humanitarian and political activities of two groups that were designated as foreign terrorist organizations, the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).

The plaintiffs wished to provide support in the form of training and teaching members of PKK on “how to use humanitarian and international law to peacefully resolve disputes,” “how to petition various representative bodies such as the United Nation for relief,” and how to engage in political advocacy on behalf of both groups. Plaintiffs challenged the constitutionality of the statute under the Fifth

Amendment Due Process Clause and the First Amendment rights of freedom of speech and association.

The district court granted partial summary judgment to plaintiffs on vagueness grounds and the United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari to determine whether 18 U.S.C. 2339B is unconstitutionally vague under the Fifth Amendment Due Process Clause and whether the criminal prohibitions on the provision of “expert advice or assistance” are unconstitutional with respect to association and speech that furthers only lawful, nonviolent activities of proscribed organizations under the First Amendment.

Knowledge

Plaintiffs argued, as a threshold matter, that the statute was inapplicable to them because plaintiffs did not meet the knowledge requirement of the material-support statute. Plaintiffs contended that to “knowingly provide material support” meant that a defendant must have intended to further a foreign terrorist organization’s illegal activities to be guilty under the statute, as in *Scales v. United States*, 367 U.S. 203, 220-222 (1961).

In *Scales*, the Court held that a person could not be convicted under a statute prohibiting membership in a group advocating the violent overthrow of the government, unless he had knowledge of the group’s illegal advocacy and specific intent to facilitate violent overthrow. Since plaintiffs here never intended to further the group’s illegal activities, they argued that they should not be prosecuted under the statute. The Court dismissed this argument, distinguishing *Scales* by stating that §2339B, prohibits providing “material support” to a terrorist group and not mere membership in a terrorist group.

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Holder is a rare case in which the Court has upheld a content-based restriction on speech. Whether it will have any impact beyond the war on terrorism remains to be seen.

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Therefore, the *Scales* specific intent requirement did not apply to §2339B. The court held that the statutory language was clear that the knowledge requirement of the statute refers to whether the individual supplying the support, knew that the organization was connected to terrorism and not whether he specifically intended to further the organization's illegal aims.

Due Process

Plaintiffs argued that the statute was vague and provided no clear notice of what constituted prohibited conduct and thus violated the Fifth Amendment Due Process Clause. The Court however, found that the challenged statutory terms, "training," "expert advice or assistant," "service," and "personnel," were not open to any real subjective interpretation as applied to plaintiff's proposed conduct. The "dispositive point" was that plaintiff's proposed activities were clearly within the language of the statute and any person of ordinary intelligence would understand that the statute prohibits these activities.

Although the Court left open the possibility that a different fact pattern could lead to a determination that the statute violates due process by inhibiting legal activities, it dismissed the plaintiffs' hypothetical situations and held that the plaintiffs cannot receive relief for a problem that has not been presented in their case.

Freedom of Speech

Since the statute clearly prohibited speech giving "expert advice or assistance" to designated groups, the Court applied a heightened standard of review – and rejected the government's request that it apply intermediate scrutiny. Then Solicitor General Elena Kagan argued that the statute only regulated conduct and could be analyzed under the intermediate scrutiny standard of *US v. O'Brien*, 391 U.S. 367 (1968). Although the majority did not use the phrase "strict scrutiny" it appeared to measure it by whether it was narrowly tailored to serve a compelling government need. The dissenting opinion faulted the Court for not being clear on this point.

The Court reasoned that the statute did not prohibit the plaintiffs from saying anything about terrorist organizations

through independent advocacy. The statute only prohibited speech that provides material support "coordinated with or under the control" of the terrorist group, which was acceptable because "the Government's interest in combating terrorism is an urgent objective of the highest order."

Plaintiffs also argued that application of the statute to their activities was unnecessary because banning their activities would not help fight terrorism and would prohibit legitimate legal activities. The Court disagreed, deferring to Congress' foreign policy judgment that, "All contributions to foreign terrorist organizations -- even those for seemingly benign purposes -- further those groups' terrorist activities."

Thus, the Court found that even material support that was intended to promote lawful conduct could still further terrorism. For example, plaintiff's advice and assistance could further terrorism by freeing up the group's resources, by adding legitimacy to their activities and by teaching them how to raise funds. The Court held that the specific activities that the plaintiffs intended to undertake, qualified as coordinated assistance to the terrorist group.

The Court did stress though, that its holding narrowly applied to the specific activities proposed by these plaintiffs and that it was possible that future applications of the statute could be found to violate the right to free speech.

Freedom of Association

Finally, the plaintiffs argued that the statute violates their First Amendment right of freedom of association because the statute makes it illegal for them to associate with certain organizations. Plaintiffs argued this case was similar to cases where the Court overturned sanctions against people who joined the Communist Party. The Court rejected this claim, stating that "the statute does not penalize mere association with a foreign terrorist organization." The Court emphasized the fact that here, the plaintiffs were not just attempting to associate with the terrorist groups, but were attempting to provide support to the terrorist groups, which was an activity beyond association.

Dissent

In dissent, Justice Breyer, joined by Justices Ginsburg and

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Sotomayor, argued that the statute violated the First Amendment by failing to provide adequate justification for hindering the plaintiffs' rights under the proper level of strict scrutiny. The government, he argued, provided no empirical evidence showing that prohibiting plaintiffs' activities would help achieve the statute's goal of preventing terrorist attacks. The majority had instead, relied solely on some of Congress' concerns when it made their decision, which the dissent found to be an inadequate basis for inhibiting the plaintiff's freedom of speech.

The dissent also criticized the majority's argument that plaintiff's activities could add legitimacy to terrorist organizations stating, "Speech, association and related activities on behalf of a group will often, perhaps always, help to legitimate that group Once one accepts (the majority's) argument, there is no natural stopping place."

The dissent also found the majority's use of the term "coordinated" to distinguish between legal and illegal types of activities, to be weak and unclear, since such a classification is unreliably subjective. The dissent believed that the statute should instead be read to require a defendant's specific knowledge and intent to provide support for terrorist ends, in order to preserve plaintiff's constitutional rights of speech and association.

Holder is a rare case in which the Court has upheld a content-based restriction on speech. Whether it will have any impact beyond the war on terrorism remains to be seen.

The Humanitarian Law Project, et al. was represented by David D. Cole of the Georgetown University Law Center in Washington, D.C. Then Solicitor General Elena Kagan, argued the case on behalf of the Department of Justice.

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Snyder v. Phelps: Supreme Court Considers Plea to Limit Protection for Offensive Opinions

By Robert Corn-Revere, Bruce E.H. Johnson,

Thomas R. Burke, Elizabeth J. Soja and Rory Eastburg

In 1998, the Supreme Court ruled that a caricature of Rev. Jerry Falwell discussing a “drunken incestuous rendezvous with his mother in an outhouse” was immune from tort liability. It did so because the portrayal clearly was fictional, and the justices agreed that public figures should not recover for emotional distress caused by a publication unless it contains a false statement of fact made with actual malice, defined as “knowledge that the statement was false or with reckless disregard as to whether or not it was true.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 48, 56 (1988).

The Court denied Falwell relief despite palpable discomfort with the parody. “There is no doubt that the caricature of [Falwell] and his mother published in *Hustler* is at best a distant cousin of [political cartoons], and a rather poor relation at that,” wrote Chief Justice Rehnquist, an avid collector of political cartoons. “If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm.” *Id.* at 55.

If the justices thought the Falwell ad scraped the bottom of the rhetorical barrel, however, it may be because they never met Fred Phelps and the Westboro Baptist Church. They will do so on October 6, when the Court considers whether the First Amendment allows Phelps and his church to protest near the funeral of a fallen Marine. The protestors obeyed all laws and police instructions, and they were not visible to mourners. But they carried signs with deeply offensive messages such as “Semper fi fags,” “Thank God for dead soldiers,” and “God Hates the USA.”

However, far more is at issue in *Snyder v. Phelps* than the ability of a fringe group to protest near military funerals. The Court is poised to decide whether *Hustler*’s protection for offensive but non-defamatory speech should apply when the plaintiff is a nonpublic figure but the speech involves a matter of public interest. As a coalition of twenty-two media groups told the Court, the answer to this question will affect reporters, editorial boards, commentators, and others in the press who must discuss nonpublic figures in the course of their work. The news media often must go beyond the

bounds of good taste in order to perform its constitutionally protected function, the groups told the Court, and journalists cannot safely breach those bounds [without](#) First Amendment protection for non-defamatory statements on matters of public concern.

“God Hates the USA”

In March 2006, Marine Lance Corporal Matthew A. Snyder of Westminster, Maryland was killed in Iraq. His funeral, held seven days later in his hometown, brought Lance Corporal Snyder’s family face-to-face with another family – the Phelps of Topeka, Kansas.

For more than fifty years, Fred W. Phelps has been the pastor of the tiny [Westboro Baptist Church](#) (“WBC”). The church boasts sixty or seventy members, nearly all related to Phelps. The WBC is best known for its virulent homophobia, with Phelps and his followers preaching the message that God hates homosexuality and punishes America for tolerating it. The military has been a special target lately, with WBC members protesting military funerals in order to spread their message. *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir 2009).

Though they were protesting a Marine’s funeral in Westminster in 2006, their messages were eclectic and often arguably nonsensical. Their signs ranged from “God Hates the USA” to “Pope in hell” to “Thank God for 9/11.” Later, a WBC member also posted an “epic poem” on its website, claiming that Lance Corporal Snyder’s parents “taught Matthew to defy his creator,” “raised him for the devil,” and “taught him that God was a liar.” *Id.* at 212, 222.

While the message was undoubtedly offensive, the WBC was careful to obey all time, place and manner restrictions on their protest. Maryland law mandates a buffer of 100 feet between a funeral and any demonstration. The seven WBC demonstrators complied with all police instructions and stood one thousand feet away from the funeral. Indeed, Albert Snyder did not encounter the offensive messages until after his son’s funeral, when he watched a televised news report. As for the “epic poem” published on the church’s website, Mr. Snyder saw it only because he searched for it on the Web

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several weeks after the funeral. *Id.* at 212, 230

“Essentially ... Religious Opinion”

Albert Snyder sued the WBC and related individuals in 2006 for defamation, publicity given to private life, intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy. The district court threw out the first two claims, finding the defamation claim was improper because Defendants’ speech was “essentially ... religious opinion” rather than a statement of fact. But the other claims went to trial, resulting in a jury verdict for \$2.9 million in compensatory damages and a total of \$8 million in punitive damages.

The district court remitted the punitive award to \$2.1 million, but otherwise did not disturb the jury verdict. *Id.* at 211-13. The Fourth Circuit reversed in 2009, finding that “regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant’s speech.” *Id.* at 218.

The panel conceded that the Supreme Court has required defamation plaintiffs to prove actual malice *only* if they are public figures or public officials. *Id.* at 218. However, the panel found that the trial court erred when it failed to consider “a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain types of speech, and that does not depend upon the public or private status of the speech’s target.” *Id.* at 222 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990); *Hustler*, 485 U.S. at 50).

The trial court should have assessed “whether the pertinent statements could reasonably be interpreted as asserting ‘actual facts’ about an individual, or whether they instead merely contained rhetorical hyperbole.” *Id.* (citing *Milkovich*, 497 U.S. at 20; *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293 (4th Cir. 2008)). If mere hyperbole and opinion, the statements were protected regardless of whether the Snyders were public figures.

Considering the signs, the court found that many – such as “America is Doomed,” “God Hates the USA/Thank God for 9/11,” and “Pope in Hell” – involved matters of public concern, including the status of gays in the military and the Catholic Church abuse scandals. Moreover, the signs did “not assert provable facts about an individual, and they

clearly contain[ed] imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned.” Some signs – such as those declaring “You’re Going to Hell” and “God Hates You” – presented a closer question, but the court concluded that “even if the reasonable reader understood the ‘you’ in these signs to refer to Snyder or his son, no such reader would understand those statements ... to assert provable facts about either of them.” The “epic poem” was the most difficult issue, because the title, “The Burden of Marine Lance Cpl. Matthew A. Snyder,” suggested that the work asserted facts about Snyder specifically. Still, the court concluded that, in context, “the Epic is a recap of the protest and ... would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein.” *Id.* at 222-25.

The court thus concluded that “[n]otwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants’ signs and Epic are constitutionally protected.” *Id.* at 226. Judge Dennis Shedd, concurring in the judgment, would not have reached the constitutional issue on the grounds that “Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims.” Judge Shedd conceded that this ground had not been raised by the WBC on appeal, but urged the court to consider the amicus brief of the Thomas Jefferson Center for the Protection for Free Expression, which argued that “Snyder failed to establish that the Phelps intruded upon his seclusion or that the Phelps’ activities are outrageous under Maryland law.” *Id.* at 227-28 (Shedd, J., concurring in the judgment).

Applying *Hustler* to Private Plaintiffs

To the surprise of many, the Supreme Court accepted certiorari on March 8, 2010. *Snyder v. Phelps*, 130 S.Ct. 1737 (2010). It listed three questions presented, each quite broad: (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?”; and (3) “Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from unwanted communication?”

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Snyder's opening brief argued that the Court "has never granted absolute, categorical protection to speech that cannot 'reasonably be interpreted as stating actual facts'" and that the Fourth Circuit's reliance on *Hustler* was misplaced because *Hustler* dealt with a public figure plaintiff. "Where, as here, a private individual has done nothing to attach himself to a public event or controversy, there is no reason for the Court to extend absolute protection to expressive conduct that intentionally harms that individual." Snyder added that his son's death and funeral did not present legitimate matters of public concern and that any putative matters of public concern had no rational connection to Snyder. "The Phelpses should not be protected from tort liability because they unilaterally associated Mr. Snyder with their selected 'issues,'" his brief argued. See [Brief for Petitioner at 18-19](#).

Snyder also argued that he was entitled to heightened protection against offensive speech because he was a "captive audience" at his son's funeral and "the First Amendment rights of speakers may be curtailed when the listener's constitutional right to privacy justifies protection from the unwanted message." Finally, and perhaps most intriguing, Snyder argued that his First Amendment rights of free exercise were violated when the Fourth Circuit "subordinated Mr. Snyder's First Amendment rights of free exercise and peaceful assembly." Mr. Snyder argued that "[t]he Phelpses' freedom of speech should have ended where it conflicted with Mr. Snyder's freedom to participate in his son's funeral, which was intended to be a solemn religious gathering." *Id.* at 20-21.

In response, the WBC claimed that Mr. Snyder's intentional infliction of emotional distress claim must fail simply because its speech was on a matter of public concern, and had not been proven false. "The Court has historically treated false and not-proven false speech differently, giving more protection to speech not proven false," it said. It added that Snyder "made himself a limited purpose public figure when he spoke with the media extensively immediately after his son's death and when he sought out the media for more coverage immediately after his son's funeral." As to Snyder's invasion of privacy claim, the WBC argued it "must fail because he was not a member of a captive audience. Funerals, generally, are public events (unless specifically designated as private). This is especially true with soldiers' funerals. So the nature of the event does not make Petitioner a

captive audience," particularly because the WBC "did not block, interfere or confront, and they were out of sight and sound." Brief for Respondents at 18-19.

Friendly Advice

Mr. Snyder garnered an impressive list of amici, including 42 Senators, 48 states, and the American Legion. The WBC also has several amicus supporters, including the American Civil Liberties Union, Foundation for Individual Rights in Education, the Rutherford Institute, and a group of First Amendment scholars.

A coalition of twenty-two news organizations also filed a brief asking the High Court to uphold the Fourth Circuit's ruling. See Brief *Amici Curiae* of The Reporters Committee For Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents. The amici are the Reporters Committee for Freedom of the Press, ALM Media, LLC, The American Society of News Editors, The Associated Press, The Association of American Publishers, Inc., Bloomberg L.P., The Citizen Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, The First Amendment Coalition, The First Amendment Project, The Hearst Corporation, The Media Institute, The National Press Club, The National Press Photographers Association, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, NPR, Inc., The Radio Television Digital News Association, The Society of Professional Journalists, and Tribune Company. The brief was filed by Davis Wright Tremaine LLP.

The media groups cautioned that, while the WBC's speech was certainly offensive, the case reached far beyond the rights of Phelps and the WBC. The coalition reminded the Court that its decision will deal with an issue critical to a wide range of speakers, including members of the news media – whether a plaintiff may recover for intrusion and intentional infliction of emotional distress where the harm is based upon the publication of controversial speech about matters of public concern. After all, the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers," meaning that a decision to permit recovery for offensive but non-defamatory publications threatens to expand the risk of liability for news media coverage and commentary. *Id.* at 1-2 (citing *Citizens United v. FEC*, 130

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S.Ct. 876, 905 (2010)).

On the merits, the media groups argued that the emotional debate surrounding the case has obscured four crucial facts. First, though Mr. Snyder and his supporting amici discuss time, place, and manner restrictions at length, the WBC obeyed all time, place and manner restrictions when staging their protest. Second, Mr. Snyder described himself as a “captive audience” while at his son’s funeral, but he encountered the WBC’s offensive statements underlying his claims only *later* through the media. Third, Mr. Snyder claimed that the protest of the WBC violated his First Amendment free exercise rights, but he did not identify the state action necessary to give rise to a First Amendment violation. Finally, the District Court ruled that Respondents’ statements were “essentially ... religious opinion” rather than statements of fact, a judgment which the Petitioner did not appeal. *Id.* at 5.

Once those issues are clarified, the press groups argued, it becomes clear that the district court verdict is based upon the content of the WBC’s “religious opinion” and there was therefore no way Phelps and his followers could have avoided liability short of altering the content of their speech. Such a ruling runs afoul of the principle that the First Amendment “protects the ‘prized American privilege to speak one’s mind, although not always with perfect good taste, on all public (issues).’” *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964)).

While acknowledging the temptation to search for exceptions to this rule when faced with speech as troubling as the WBC’s funeral protest, the groups urged the Court to resist it, as previous courts have done with speech ranging from *Hustler*’s Falwell parody to the spectacle of neo-Nazis marching among Holocaust survivors in Skokie, Illinois. *Id.* at 6.

“A ruling to the contrary in this case would have far-reaching effects on the media and other speakers,” media amici argued, because the WBC protests cannot be meaningfully distinguished from a range of offensive but protected speech. For example, Falwell himself explained the terrorist attacks of 9/11 as God’s punishment for the secularization of America. Anti-war activists sold T-shirts that superimposed “Bush Lied-They Died” over the names of fallen soldiers. And Ann Coulter attacked four widows of victims of the 9/11 terrorist attacks as “The Witches of East

Brunswick,” claiming that they were enjoying their husbands’ deaths. *Id.* at 22, 23. Against this backdrop, “[n]o intelligible standard could be devised based on the notion that the church’s activities are especially ‘outrageous’” and unprotected by the First Amendment. Such a test would be inherently subjective and arbitrary, and as the Court has noted, “[a]ny nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity, or of outrageousness.” *Id.* at 6-7 (quoting *Time Inc. v. Hill*, 385 U.S. 374 (1967))

Finally, a few groups filed *amicus* briefs in support of neither party. For example, the Anti-Defamation League suggested that the court may dismiss the case as improvidently granted, arguing that the case “offer[s] an extremely poor vehicle for rendering the type of expansive ruling the petition for a writ of certiorari and the certified questions appear to invite.” Brief of *Amicus Curiae* the Anti-Defamation League in Support of Neither Party, at 6. Noting that the three questions presented are framed quite broadly, the ADL argued that “the undisputed facts of this case and the decision of the Court of Appeals do not actually raise the certified questions or require this Court to address them.” *Id.*

Conclusion

More than twenty years ago, the Supreme Court held its collective nose and ruled in favor of *Hustler*’s Falwell caricature, even while proclaiming that “public discourse would probably suffer little or no harm” by being deprived of the image of Jerry Falwell having drunken sex with his mother in an outhouse. *Hustler*, 485 U.S. at 55. Free speech advocates are hoping for a repeat performance. If the Court upholds the decision below, it will not be for lack of outrage. Rather, it will be because the High Court, like the Fourth Circuit, recognizes that “judges defending the Constitution must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.

It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.” *Snyder*, 580 F.3d at 226 (quotation omitted).

Robert Corn-Revere, Bruce E.H. Johnson, Thomas R. Burke, Elizabeth J. Soja and Rory Eastburg are lawyers with Davis Wright Tremaine LLP.

Supreme Court to Test Limits of “First Sale Doctrine” in Import Pricing Dispute

Watchmaker's use of copyright law in controlling prices alarms resellers and librarians

By Itai Maytal

The Supreme Court will determine whether manufacturers can use copyright laws to control import prices of their foreign-made goods in a case that could impact U.S. resellers of media products and libraries with imported collections, among others.

This Fall, the Court will hear an appeal from a Ninth Circuit Court of Appeals decision that granted a luxury watchmaker the right to use copyright law as a restraint on the discount sales of its imported watches. See [*Costco Wholesale Corp. v. Omega, S.A.*](#), 541 F.3d 982 (9th Cir. 2008), cert. granted, 77 U.S.L.W. 365 (U.S. April 19, 2010) (No. 08-1423). The issue before the Court is whether copyright owners like Omega – which became a copyright owner by placing a copyrighted globe design on its watches - can assert their distribution and importation rights in the U.S. over their foreign-made goods even after the goods are sold.

If the Court affirms the appellate court’s ruling, it could further narrow the scope of a long-standing principle of U.S. copyright law known as the “first sale doctrine.” This doctrine, as defined in 17 U.S.C. §109, denies a copyright owner the ability to enforce his exclusive distribution rights in copies of a work “lawfully made under this title” after the initial sale or gratuitous transfer of ownership of those copies occurs. Many lower courts, relying in part on the Court’s past dicta, have already interpreted this doctrine to apply only to goods lawfully made in the United States. Thus, in certain jurisdictions, anyone possessing copies of a copyrighted work made abroad may legally have to negotiate with the copyright owner every time they want to dispose of those copies.

Costco Wholesale Corporation (“Costco”), a large warehouse retailer, and a group of amicus petitioners have argued that a Supreme Court adoption of this narrow interpretation of the first sale doctrine would have negative policy consequences. It could prevent the resale by retailers like *eBay* and *Amazon.com* of gray market goods like music, movies, video games, books or other genuine copyrighted material manufactured abroad, by giving “copyright holders

an unfettered right to eliminate these secondary markets.” It could encourage more companies to move their manufacturing overseas to acquire more control over the distribution of their goods. It could lead to price discrimination against U.S. consumers. It might also leave public libraries unable to lend many books, having to first make costly and difficult determinations over whether any of the books in their collections were foreign-made and whether those books should still be circulated.

However, then Solicitor General Elena Kagan, representing the federal government, argued in her certiorari-stage brief that the concerns raised by Costco and its amici, while serious and legitimate, have not materialized and that the Ninth Circuit decision was consistent with prior findings of the Court and other Circuits. Still, the fact that the Court took the case against the recommendation of the Solicitor General could signal a new interpretation of the Copyright Act of 1976.

Factual Events Underlying this Lawsuit

As outlined in Costco’s brief to the Court, Omega manufactures luxury watches in Switzerland and sells them globally through a worldwide network of authorized distributors and retailers. None of these distributors appeared to be restricted by Omega from reselling its watches to anyone else in any geographic region.

For many years, Costco obtained Omega watches from the “gray market” through a series of transactions. Omega first sold its watches to authorized distributors overseas. One or more of these authorized dealers then imported these watches from places like Paraguay into the U.S. and sold them to a stateside importer, who finally sold them to Costco. This stream of commerce enabled Costco to sell “genuine brand name merchandise to its members at prices lower than its competitors,” as it gave the company access to lower priced goods from foreign markets.

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In 2003, in response to complaints from authorized merchants regarding the alleged arbitrage practices of discount retailers like Costco, Omega began to engrave on the back of its watches a small emblem, less than five millimeters across, allegedly to use the Copyright Act to restrict the resale of its products. The copyrighted emblem consisted of three Greek “Omega” symbols inside a circle. Omega knew for many years of the “gray market” and of Costco’s activities, it did not object, presumably because the watches were authentic goods and U.S. trademark and patent laws would not necessarily block their sales. Omega appeared to develop a copyright strategy for controlling when and where its watches were sold.

The following year after Omega added its emblem to its watches and registered them with the Copyright Office, Costco purchased 117 imported Seamaster watches and sold 43 of them for \$1,299, which was more than a third less than what the brand preferred.

Procedural History

Omega sued Costco for copyright infringement under its exclusive rights of importation and distribution under Sections 602(a) and 106(3) of the Copyright Act of 1976 respectively, stating that it did not authorize the sale of those watches, which were also “copies” of its copyrighted globe design. Costco filed a motion for summary judgment, arguing that the first-sale doctrine under Section 109(a) denied Omega the ability to enforce its exclusive distribution right and, by extension, its importation right under Section 602(a). Costco’s motion was granted by a district court, but then reversed on appeal on the grounds that Section 109(a) did not apply to foreign-made goods.

In deciding to reverse, a Ninth Circuit panel first



Omega’s copyrighted Globe design.

determined that a 1998 Supreme Court case, *Quality King Distributors v. L’Anza Research International*, 523 U.S. 135 (1998), was not controlling. There, the Court ruled that U.S. copyright holders could not control the distribution of U.S. copyrighted goods that were imported and resold. However, the Ninth Circuit noted that *Quality King* only concerned goods manufactured in the U.S., not allegedly infringing imports that were manufactured abroad. The appellate court also noted that *Quality King*, in dicta, was consistent with its Circuit’s position that copies of a work copyrighted under Title 17 are not necessarily “lawfully made under [Title 17]”,

the language of Section 109(a), even when made by the owner of a U.S. copyright. The appellate court found that concluding otherwise, and applying the first-sale defense to goods manufactured abroad, would impermissibly extend the Copyright Act extraterritorially.

Briefs Before the Supreme Court

In its appeal to the Supreme Court, Costco argued that the Ninth Circuit’s ruling was inconsistent with the plain text of Section 109(a) of the Copyright Act. It argued the correct meaning of the phrase “lawfully made under this title” is any copy made with the authorization of the copyright owner as required by Title 17. Here, any copies of its watches made or otherwise authorized by Omega were “lawfully made under this title” because Omega had the right to do so under 17 U.S.C. 106(1), as their copyright owner. Costco also argued that applying the first sale doctrine to goods manufactured abroad would not lead to extraterritorial application of the Copyright Act because “Omega seeks to use the Act to prevent or punish another party’s actions, contending that Costco’s distribution of its watches *in the United States* constitutes copyright infringement.”

Costco and supportive amicus briefs from *eBay*, *Amazon.com*, *Google*, and consumer advocate and retail

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industry associations have further asserted that if the Ninth Circuit decision is affirmed, it would encourage U.S. copyright holders to transfer manufacturing operations overseas so as to prevent lawful resale of their goods at discounted prices. This could have a dramatic impact on the U.S. economy, leading to higher national unemployment. In addition, the potential infringement liability arising from this decision for after-markets of any foreign manufactured goods would deter otherwise lawful importation of authentic products, depriving customers of cheaper goods and disrupting e-commerce and trade in general. The American Library Association also submitted a brief in support of Costco, stating that the Ninth Circuit decision “threatens the ability of libraries to continue to lend materials in their collections.”

In its brief opposing the petition, Omega argued that the lower courts and prior Supreme Court rulings were not in conflict over whether goods manufactured abroad benefited from the first sale doctrine and that the plain meaning of the right of importation under Section 602(a) and the first sale doctrine under Section 109(a) support the Ninth Circuit decision. They also questioned their adversaries’ hypothetical claims that the Ninth Circuit’s decision mandated significant, adverse economic hardship and countered that applying Section 109(a) to foreign manufactured goods would disrupt long-standing marketing practices based on market-specific

distribution rights.

Conclusion

Courts in various Circuits appear to have been following the 12-year old dicta in the Supreme Court’s *Quality King* case, which stated that goods manufactured overseas and then imported and sold are not protected by the first sale doctrine. Publishers and other content providers who wish to split foreign rights from U.S. rights so as to prevent arbitraging of the price differentials of their works between different markets may not wish to see the statute read differently. Still, the amicus briefs in the *Costco v. Omega* case from a cross-section of the business world and consumer-based community argue that it is time to reject “the place of manufacturing” distinction made by the Supreme Court in its previous analysis of the first sale doctrine. Ultimately, a new set of justices on the Supreme Court bench since the *Quality King* decision was first handed down may agree with this new collective perspective.

Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP in New York and was the 2009 First Amendment Fellow to the New York Times Company. The petitioner in Costco v. Omega is represented by Englert, Orseck, Untereiner & Sauber LLP. The respondent is represented by Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

SUPREME COURTS BRIEFS AVAILABLE ONLINE

Merit Briefs in Snyder v. Phelps

[Brief for Petitioner Albert Snyder](#)

[Brief for Respondent Fred W. Phelps, Sr., Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, and Westboro Baptist Church, Inc.](#)

[Reply Brief for Petitioner Albert Snyder](#)

Amicus Briefs in Snyder v. Phelps

[Brief for Senators Harry Reid and Mitch McConnell and 40 Other Members of the U.S. Senate in Support of Petitioner](#)

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[Brief for the Veterans of Foreign Wars of the United States in Support of Petitioner](#)

[Brief for the American Legion in Support of Petitioner](#)

[Brief for the John Marshall Law School Veterans Legal Support Center & Clinic and the Chicago School of Professional Psychology in Support of Petitioner](#)

[Brief for State of Kansas and 47 Other States and the District of Columbia in Support of Petitioner](#)

[Brief for Thomas Jefferson Center for the Protection of Free Expression, The Marion B. Brechner First Amendment Project, the National Coalition Against Censorship, and the Pennsylvania Center for the First Amendment in Support of Respondent](#)

[Brief for the Center for Constitutional Jurisprudence in Support of Neither Party Suggesting Reversal](#)

[Brief for the American Center for Law and Justice in Support of Neither Party](#)

[Brief for the Anti-Defamation League in Support of Neither Party](#)

[Brief for Scholars of First Amendment Law in Support of Respondent](#)

[Brief for the Reporters Committee for Freedom of the Press and Twenty-one News Media Organizations in Support of Respondent](#)

[Brief for Liberty Counsel in Support of Respondent](#)

[Brief for American Civil Liberties Union and the American Civil Liberties Union of Maryland in Support of Respondent](#)

[Brief for The Foundation for Individual Rights in Education and Law Professors Ash Bhagwat, David Post, Martin Redish, Nadine Strossen, and Eugene Volokh in Support of Respondent](#)

Merits Briefs in Costco v. Omega

[**Brief for Petitioner Costco Wholesale Corp.**](#)

Amicus Briefs

[Brief for the Retail Industry Leaders Association, the National Association of Chain Drug Stores, Amazon.com, Inc., Gamestop Corp., Quality King Distributors, Inc., Sam's West, Inc., and Target Corporation in Support of Petitioner](#)

[Brief for Public Citizen in Support of Petitioner](#)

[Brief for the Entertainment Merchants Association, and the National Association of Recording Merchandisers in in Support of Petitioner](#)

[Brief for the the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries in Support of Petitioner](#)

[Brief for the Public Knowledge, American Association of Law Libraries, American Free Trade Association, the Electronic Frontier Foundation, Medical Library Association, and the Special Libraries Association in Support of Petitioner](#)

[Brief for Ebay, Inc., Google, Inc., NetCoalition, the Computer and Communications Industry Association, and the Internet Commerce Coalition in Support of Petitioner](#)

[Brief for Intel Corporation in Support of Petitioner](#)

[Brief for the American Intellectual Property Law Association in Support of Neither Party](#)

WikiLeaks Disclosure Affects Federal Shield Law

Supporters of the federal shield law bill announced they would revise the legislation after a website, WikiLeaks, disclosed over 75,000 classified documents related to the war in Afghanistan, which military officials said would jeopardize the safety of Afghan informants and undermine the war effort. Sen. Chuck Schumer (D-NY), one of the sponsors of the bill, said the revisions would make it explicit that “WikiLeaks would never qualify for any protection under the media shield legislation.”

The “Free Flow of Information Act of 2009” ([S. 448](#)), which passed the Senate Judiciary Committee in December 2009, provides a qualified privilege against disclosure of confidential sources and information received in confidence. It provides varying degrees of protection – by virtue of the tests and balances applied – for criminal and civil matters, and for cases involving national security materials.

Even though the bill defines the circumstances under

which the privilege for sources must yield to prevent harm to national security, Sen. Schumer said the revisions were necessary to “remove even a scintilla of doubt” that a website like WikiLeaks could claim the privilege.

The WikiLeaks disclosure delays the bill being put to a floor vote in the Senate. The bill that passed the Senate Judiciary Committee reflected compromise language agreed upon by the sponsors and the Obama Administration in October 2009, which ended years of opposition from the Department of Justice on the scope of the bill.

The House of Representatives passed a version of the bill in March 2009 ([H.R. 985](#)), which differs from the Senate bill in that it covers both confidential sources and unpublished information. Rep. Mike Pence (R-IN), the sponsor of the House bill, also expressed outrage at the WikiLeaks disclosure and said the website should not be able to claim protection under the shield law.

2010-11 UPCOMING EVENTS

MLRC Annual Dinner

November 10, 2010
Grand Hyatt
New York, NY

[For more, click here](#)

MLRC Forum

November 10, 2010
Grand Hyatt
New York, NY

[For more, click here](#)

DCS Annual Meeting

November 11, 2010
Proskauer Rose Conference Center
New York, NY

California Chapter Luncheon Meeting

December 15, 2010
Southwestern Law School
Los Angeles, CA

[For more, click here](#)

MLRC/Southwestern Entertainment Law Conference

January 20, 2011
Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 19-20, 2011
Palo Alto, CA

London Conference

September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England

North Carolina Shield Law Ruling Protects Online Commenters

By John Bussian

On August 16, North Carolina Superior Court Judge Calvin Murphy quashed a state court subpoena in a capital murder case, *State v. Mead*, No 10CRS2160 (Gaston Co. Sup. Ct.), that would have forced Freedom Communications, Inc.'s *Gaston Gazette* and its publisher to disclose user data on their online commenters. The ruling, based on North Carolina's state Shield Law, G. S. Section 8-53.11, in the first of its kind in the Old North State.

The Gazette's Publisher, Julie Moreno, was subpoenaed by the defense to produce all information related to certain Gazette website users, who are said to have posted comments on Gazette news reports concerning the murder case. One of the comments revealed the results of a lie detector test administered to the defendant which had been verbally sealed by the trial judge. The defendant claimed that he needed the subpoenaed information to defend himself against the potential charge that he leaked the lie detector results and to oppose the prosecution's related request to revoke the defendant's bond.

Shield Law Protects Commenters

At June 28 and July 27 hearings in the case, the defense argued strenuously that the Shield Law doesn't apply to protect user data and cited a ruling just weeks earlier to that effect in North Carolina's Vance County Superior Court. The defense theory was essentially that state Shield Law protection is unavailable because:

1. Commenters are not journalists and that, in any event,
2. The requested user data could not be obtained from other sources.

While other Freedom Communications operations have secured favorable rulings protecting online commenter identities from disclosure in Florida and Illinois state court civil cases, this was the first test of the North Carolina Shield Law's strength in a criminal case. And it turned out that the breadth of North Carolina's Shield Law, extending to all "confidential and non-confidential" information acquired by anyone "engaged in the business of gathering ... or compiling information... for distribution via a news medium," proved crucial in the court's decision to quash the subpoena.

In a two-page order, Charlotte-based Superior Court Judge Murphy brought the state Shield Law onto new terrain. He made key findings and conclusions, rejecting the defense argument that online news comments are "social-networking" tools, rather than protected information possessed by a news organization. First, Judge Murphy found the Gazette's Publisher to a "journalist" within the meaning of the Shield Law. And he went on to find that the subpoenaed information met the Shield Law's definition of protected "confidential or non-confidential" information acquired as part of the Gazette's newsgathering operations. The Shield Law applied.

That left one more step under the North Carolina law. Judge Murphy had to consider the defendant's argument that he had overcome the Shield Law's protections with proof that the user data is 1) relevant, 2) unobtainable from other sources, and 3) essential to his claims or defenses. Finding a failure of proof on the defendant's part, Judge Murphy correctly concluded that the defendant had not overcome the privilege against forced disclosure embodied in the Shield Law and granted the Gazette's motion to quash.

As of this writing, the defendant has given no indication of his intention to appeal from the order.

John Bussian of Raleigh, North Carolina argued for The Gazette in the case.

President Obama Signs Federal Libel Tourism Bill

As the 111th Congress Winds Down, Members Consider the Agenda for Next Year

By Kathleen A. Kirby and Shawn A. Bone

While the communications and media agenda in this Congress going forward may be limited, the House and Senate were able to reach agreement on libel tourism legislation just prior to adjournment for the annual August recess. H.R. 2765, the "[Securing the Protection of our Enduring and Established Constitutional Heritage Act](#)" or "SPEECH Act," meant to combat libel tourism, was signed by the President on August 10, just after the two Chambers reached final agreement on a compromise proposal.

"Libel tourism" suits arise when a plaintiff pursues a defamation case in a foreign court based on activity that largely occurred in the U.S. in an attempt to avoid First Amendment hurdles. Once a judgment has been rendered, that plaintiff may return to U.S. federal court to execute the judgment. As signed by the President, H.R. 2765 would prohibit a domestic court (both state and federal) from enforcing a foreign defamation judgment unless the U.S. court determines (1) that the judgment being enforced comports with the First Amendment; or (2) that the defendant in the case would have been found liable for defamation under U.S. constitutional and state law jurisprudence. The SPEECH Act defines "defamation" as "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person.

A domestic court also may refuse to entertain and enforce the judgment if it determines that the exercise of jurisdiction over the defendant by the foreign court does not comport with U.S. due process considerations. Finally, in cases where the defendant in the foreign court was an "interactive service provider" under Section 230 of the Communications Act, the court may not enforce a foreign defamation judgment if such judgment would be barred under Section 230. The plaintiff seeking to enforce the defamation judgment bears the burden of proof both on questions of jurisdiction and substantive validity of the foreign defamation judgment. In addition, a domestic defendant may seek a declaratory judgment rendering a foreign judgment repugnant to U.S. law under any of the foregoing grounds (though in this case the

defendant bears the burden of proof). Nationwide service of process is permitted for the declaratory judgment action.

An appearance by a domestic defendant in a foreign defamation case does not waive any of the foregoing arguments. The domestic defendant also is afforded certain removal powers to move an enforcement case to federal court – namely, removal is permitted where (1) a single plaintiff is from a state different from the defendant; or (2) a plaintiff is a foreign state or a citizen of a foreign state. A foreign defendant may remove an enforcement action to federal court if such defendant is being sued by a domestic plaintiff. A defendant is entitled to seek reasonable attorney's fees and costs from the plaintiff if the defendant prevails in the defamation judgment enforcement action under the grounds established by the SPEECH Act.

Agenda for Next Year

With the 2010 mid-term elections on the horizon, Congressional legislative activity largely has ground to a halt. While a few major proposals may pass in the few remaining legislative days (including one significant media-related bill), most people on and off Capitol Hill have turned their attention to the 112th Congress and the prospective agenda leading into the presidential election in 2012. Several developments signal a move away from large policy initiatives for the Administration and toward smaller, targeted policy changes. A narrowing of the Democratic majorities also could leave Congressional leaders searching for bipartisan proposals supported by broad coalitions of Members in the House and Senate. These shifts on the Hill could mean that media and communications issues could have prominent role in the next Congress.

Twenty-First Century Communications and Video Accessibility Act of 2010

July 26, 2010, marked the twentieth anniversary of the passage of the Americans With Disabilities Act. Several Members of Congress have seized upon the milestone to spur Congressional action on updates to make communications

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and media more accessible to persons suffering from visual, auditory, and other impairments. With that impetus, the House and Senate have taken quick action over the last two months on H.R. 3101 and S. 3304, both entitled the “Twenty-First Century Communications and Video Accessibility Act of 2010.” Both Chambers have passed competing measures that differ significantly. Expectations are that the House will use the current Senate bill as the basis for further action when the Congress returns from August recess. Reports have suggested that the House wants to pass several technical amendments to that Senate text, at which time the Senate will accept the House modifications and present a final bill to the President for his signature.

These bills would update certain provisions in the Communications Act related to communications and video accessibility. Under the legislation, communications equipment manufacturers will have to make their products more accessible under regulations to be issued by the Federal Communications Commission. In particular, manufacturers of television set-top boxes and other equipment meant to display video programming will have to comply with new rules on how persons with disabilities utilize that equipment. They also may have to update their user interfaces and on-screen guides to assist persons with visual or auditory impairments.

Video programmers and distributors also will face new guidelines and requirements for making television programming and emergency information more available to persons with disabilities. First, the FCC will have Congressional authority to reinstate its 2000 video description rules, which were rejected by the D.C. Circuit in 2002. Video descriptions are audio tracks inserted in the dialog for a program that describe key visual elements of a television program that may not be seen by persons suffering from visual impairments. Initially, such video descriptions will be limited to certain television stations and cable networks in the Top 25 designated market areas, though the bills grant the Commission the power to later expand video description requirements to other markets (and eventually to all 210 DMAs nationwide). The FCC also will have the authority to expand the number of hours of video-described programming that stations and networks must

deliver to viewers, though any expansion will be delayed for several years. Waivers from the video description rules on economic hardship grounds will be available.

Second, video programmers for the first time will have to provide closed captions for certain television programming that is delivered to consumers through delivery systems that utilize an Internet protocol backbone. Such a requirement would be imposed no later than six months after an advisory committee report on the technical challenges associated with delivery of closed captions over the Internet. Once the rules (and a concurrent phase-in schedule) are set, however, programmers should be prepared to provide Internet captions for any television programming that (a) appears on television with closed captions (b) after the new rules are in effect. The Commission will have the authority, not unlike with closed captioning on television, to exempt certain programming or video programmers from compliance with the new rules.

Third and finally, the Commission will need to update its rules concerning the delivery of emergency information to consumers. Again, an advisory committee will examine the best approach to make emergency information on television more accessible to persons with visual impairments. Once the committee has completed its work, the FCC will need to update its rules to reflect the advisory committee’s recommendations. This latter proceeding will need to be completed within 1 year of the advisory committee’s report.

While the communications and media agenda in this Congress going forward may be limited, the House and Senate were able to reach agreement on libel tourism legislation just prior to adjournment for the annual August recess.

Update on Other Media Issues in the 111th Congress

Prospects for passage of most of the remaining media agenda items remain dim in this Congress. When the House and Senate return for work in September, their focus likely will be on a narrow set of items geared toward the upcoming election. While plans continue to circulate for a lame duck session after the November 2 mid-term, there is no clear agenda set for that session at this point. While one or more of the following issues could be tacked onto a larger legislative vehicle, one should expect that the 111th Congress will close without resolution and they will remain ripe for work in the 112th Congress.

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Free Flow of Information Act

The Free Flow of Information Act continues to languish on the Senate calendar as final negotiations over the scope of the legislation continue. While proponents of the Act have engaged in heavy lobbying to spur Senate action, the recent furor over Wikileaks's release of sensitive reports on the Afghanistan war has made confidentiality of information a tricky issue on the Hill. The Act's legislative champions have promised that Wikileaks's activities would not be protected by any final legislation, but whether the Act can garner 60 votes to survive a filibuster is unclear.

Performance Rights

Congressional action on performance rights largely has given way to private sector negotiations between the National Association of Broadcasters and the Recording Industry Association of America. The two sides have been talking all summer, at the behest of House and Senate Members, to come to a compromise on the fees terrestrial radio would pay performers for broadcasting their music. In early August, NAB released a proposed framework for a performance royalty compromise that would provide for standard royalty fees based on the net revenues of a radio station (with stations having lower net revenues paying a flat fee, and those with higher net revenues paying a percentage of their revenue to performers). These royalty rates would be set by Congress, and the Copyright Royalty Board could not alter the rates in future royalty proceedings. The compromise also would lower the rates paid for streaming and other Internet-based services.

Indications are that any compromise would be contingent upon resolution of a separate legislative matter – placement of FM-enabled radio receiver chips in cell phones and other devices. The NAB has long sought a bill that would require personal mobile devices to contain FM chips as a way to promote commercial radio and to distribute timely emergency information to consumers. The consumer electronics world, as well as several public interest groups, have opposed government-mandated FM chips as expensive and of limited utility to consumers. Reports suggest that as part of a negotiated settlement on performance royalties, the recording industry would back legislation mandating FM chips (and possibly digital radio tuners). Some reports have gone so far to suggest that the compromise on performance royalties will be contingent on FM-chip legislation.

Any performance royalty compromise will require

legislative action on the part of Congress. As mentioned in a previous legislative update, both the House and Senate have pending performance royalties bills (H.R. 848/S. 379) that are poised for action. Either bill could become a vehicle for passage of the compromise in the current Congress. At the same time, given the strong bipartisan support for the bills in their respective Committees (and their sponsorship by key Democratic Members), the bills could be added to larger legislation in the waning days of the Congress. This latter move would be strongly opposed, particularly by supporters of the "Local Radio Freedom Act" resolutions in both Chambers (H. Con. Res. 49/S. Con. Res. 14).

Spectrum

While work in Congress on mandating a spectrum inventory has languished, several bills have been introduced to implement more sweeping spectrum management reform. In the Senate, S. 3610 (sponsored by Senators Olympia Snowe and Senate Commerce Committee Communications Subcommittee Chairman John Kerry) and S. 3756 (sponsored by Senate Commerce Committee Chairman Jay Rockefeller) would grant the FCC the power to conduct incentive auctions where spectrum holders who voluntarily turn over their licenses would receive a portion of the proceeds from their auction. Similar legislation has been introduced by House Energy and Commerce Communications Subcommittee Chairman Rick Boucher (H.R. 5947). Both S. 3756 and H.R. 5947 contain language indicating that the power to conduct voluntary incentive auctions does not confer upon the Commission the right to involuntarily take broadcast spectrum (or any other spectrum) for such auctions. While S. 3610 does not contain a similar restriction, it would permit the FCC and NTIA to assess yearly license fees on spectrum holders.

At the same time, several bills have been introduced to resolve the debate over what the Commission should do with the 700 MHz "D Block" public safety spectrum. On one side of the debate are those Members and public interest groups that favor licensing the D Block to public safety for creation of a nationwide broadband data network. On the other side of the debate are those that would rather the FCC auction the D Block spectrum to commercial licensees and use those funds to promote construction of a public safety data network in other public safety spectrum bands. Several bills have been introduced to reserve the D Block for public safety (including S. 3756, S. 3625 from Senators Joe Lieberman and John

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McCain, and H.R. 5081 from Representative Peter King). House Energy and Commerce Committee Chairman Henry Waxman and Representative Boucher have released a draft of a bill that would auction the D Block. Further action on these bills likely will wait until the next Congress.

Other Issues

Several other media issues that have been debated in the current Congress appear to have fallen off the legislative agenda in the remaining weeks. While some limited action on these matters might occur, passage of final legislation is unlikely. Any work done in the remaining days of the 111th Congress, however, will set the table for work in next year.

- Sunshine in the Courtroom – Both Senate and House legislation to make federal courtrooms more accessible for live broadcasts have failed to advance so far this year. The current Senate proposals await floor time in the full Senate, and companion bills in the House have not advanced out of Committee so far this Congress. It seems unlikely that the Chambers will reach agreement on legislation to permit live broadcasts of Supreme Court, Courts of Appeals, or Federal District Court proceedings this Congress. Senate Judiciary Committee Members, though, did press Associate Justice Elena Kagan on permitting additional live broadcasts on Supreme Court proceedings during her confirmation, and Justice Kagan expressed support for more live coverage of the Court.

- FOIA Reform – Additional attempts to reform the FOIA process this Congress have not advanced past the Committee stage. Senate Judiciary Committee Chairman Patrick Leahy's attempt to create a commission to study FOIA delays (S. 3111) advanced out of the Senate in May, but has yet to have a hearing in the House Committee on Oversight and Government Reform. Representative Mike Conaway's attempts to strengthen FOIA exceptions for detainee military photographs (H.R.2712, H.R.2875, and H.R. 3015) have received little attention in the House of Representatives, although Senator Joe Lieberman was able to advance a bill out of the Senate on the issue in early June (S. 1285, the "Detainee Photographic Records Protection Act of 2009"). As a reminder, S. 1285 would create FOIA exceptions for certain photographs related to detainees captured by the military between September 11, 2001, and January 22, 2009. The Secretary of Defense would have to certify that disclosure of such photographs would endanger U.S. citizens or members of the Armed Forces or U.S. government

employees deployed outside the United States for an exception to apply. Any certification would be valid for 3 years and could be renewed. A certified photograph could not be obtained through a FOIA request, but could be subject to voluntary disclosure by the Department of Defense. The Senate bill, like the House bills, are waiting for action by the House Committees on Oversight and Government Reform and Armed Services.

- Federal Anti-SLAPP Legislation – The Cohen federal anti-SLAAP legislation (H.R. 4364) has not received much attention in the House Judiciary Committee this Congress, and a Senate companion bill has not been introduced. The bill may be revived next year.

H.R. 4364 would establish absolute civil immunity for any act of petitioning the government made "without knowledge of falsity or reckless disregard of falsity." A defendant may seek dismissal of a SLAPP suit filed in federal court provided that the defendant can make a *prima facie* showing that the activity at issue in the case was an act in furtherance of the constitutional right of petition or free speech. To overcome the presumption of immunity, the plaintiff would have to demonstrate that the underlying claim is both legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment. Defendants subject to SLAPP lawsuits in *state* court would be able to remove the case to *federal* court based upon its characterization as a SLAPP lawsuit and seek dismissal of the case in the same manner.

Looking Forward to the 112th Congress

Any of the foregoing media issues that are left unresolved at the close of the present Congress may be resurrected next year. At the same time, the new Congress could address a number of wide-ranging communications issues that could impact media law and regulation. Of course, it is difficult to predict what Congress may address next week, nonetheless next year. And the outcome of the November mid-term elections could alter dramatically the balance of power in Congress and the legislative priorities for both the Democratic and Republican leadership. It is worthwhile, however, to consider several significant matters "teed up" for Congressional consideration, as follows:

- A Rewrite of the 1996 Telecommunications Act – While it is common for Members in both Chambers to lament the

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shortcomings of the '96 Act and call for its reform, the present Congress actually has begun affirmative steps towards development of a proposal to update the Act. Staff discussions with stakeholders began in June, and are expected to continue into the Fall. A rewrite of the '96 Act could be limited in scope (mainly to questions of the FCC's jurisdiction over broadband networks), but it also could quickly expand to questions of spectrum policy, media regulation, and the future of the Commission itself.

- **Broadband Regulation** – Even if Congress does not begin work on a rewrite of the '96 Act, it likely will turn its attention to what power (if any) the Commission should have over broadband networks. The ongoing discussions at the Commission over re-regulating broadband transmission services as Title II common carrier services has attracted significant Hill attention. And with Chairman Genachowski aiming for a vote on his Title II re-regulation proposal in September, this fall may see Members coalesce around a legislative response to any FCC action. Regardless, debate over broader concepts like net neutrality will continue into the next Congress, and those could implicate media issues, particularly as video delivery systems migrate to online platforms.

- **The Comcast/NBC Universal Merger** – Although review of the proposed merger between Comcast and NBC Universal has been contained in the Executive Branch, FCC and Department of Justice action on the merger (with any concurrent conditions) could prompt Congressional response. Senator Herb Kohl already has called on both agencies to impose very strict conditions on how a merged Comcast/NBCU can negotiate for program carriage and distribute its content online, and Senator Al Franken has called for an outright rejection of the merger on competitive grounds. Any attempt by either the Commission or DOJ to place limits on content carriage or distribution (including limits on how Comcast can negotiate retransmission consent agreements for NBC owned and operated affiliates) could serve as a model for more general reform for all content owners.

Copyright – Passage of the Satellite Television Extension and Localism Act (STELA) earlier this Congress answered several lingering questions about copyright reform for television for the foreseeable future.

At the same time, however, STELA commissions additional studies on whether Congress should maintain

special copyright treatment for broadcast television. Congress has shown some interest in a more general reform of the copyright system to mirror work it has done in the patent realm. Congress also may wish to respond to the recent decision by the Copyright Office to permit device “jailbreaking.” Whether these interests will generate legislation is unclear, but questions about copyright, particularly preservation of copyright on the Internet, will receive attention next year.

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2010-11 UPCOMING EVENTS

MLRC Annual Dinner

November 10, 2010

Grand Hyatt
New York, NY

[For more, click here](#)

MLRC Forum

November 10, 2010

Grand Hyatt
New York, NY

[For more, click here](#)

DCS Annual Meeting

November 11, 2010

Proskauer Rose Conference Center
New York, NY

California Chapter Luncheon Meeting

December 15, 2010

Southwestern Law School
Los Angeles, CA

[For more, click here](#)

MLRC/Southwestern Entertainment Law Conference

January 20, 2011

Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 19-20, 2011

Palo Alto, CA

London Conference

September 19-20, 2011

(In-house counsel breakfast Sep 21st)
London, England

Maryland Federal Court Rejects “Hot News” Misappropriation Claim

A decision from the District of Maryland, provides an interesting take on the “hot news” misappropriation tort. [*Agora Financial LLC v. Samler*](#), No. 09-1200 (D. Md. June 17, 2010). At issue in the case were financial recommendations similar to those at issue in the closely-watched *Barclays v. TheFlyOntheWall* case currently pending before the Second Circuit. In *Agora*, the court denied plaintiffs’ motion for a default judgment and dismissed their “hot news” case because, the magistrate judge found, that plaintiffs’ financial recommendations were likely “original works” within the scope of the Copyright Act, and therefore any misappropriation claim involving them was preempted by Section 301. Magistrate Judge Beth Gesner’s findings were adopted in a summary order on July 15 by Judge William Quarles.

Background

Plaintiffs Agora Financial, LLC, Oxford Club, LLC, Taipan Publishing Group, LLC, Stansberry and Associates Investment Research, LLC, and Sovereign Offshore, LLC publish financial investment newsletters, featuring the recommendations of financial analysts for investment strategies, specific investments, and summary lists. The newsletters are only sent to paid subscribers.

Plaintiffs brought suit on Nov. 23, 2009 against defendant Martin Samler, who operates the website Tipstraders.com (which is also only available to paid subscribers). Samler’s website lists a number of different analysts; each analyst’s name links to a page that summarizes the analyst’s latest recommended investments as well as statistical information about the stocks’ performance. The website had a disclaimer that noted that “the picks above are, unless otherwise stated, entered by registered members of TipsTraders.com,” and noted that any analyst may have

recommended trades not listed, as well as different entry/exit strategies. The disclaimer also disavowed any affiliation with or endorsement by the analysts.

Samler did not respond to the complaint, and on January 22, 2010, Judge Quarles asked the magistrate to consider entry of default judgment. The magistrate accepted the complaint as true, but questioned whether the plaintiffs had pled a legitimate cause of action.

“Hot News” Claim

In *Agora*, the court denied plaintiffs’ motion for a default judgment and dismissed their “hot news” case because, the magistrate judge found, that plaintiffs’ financial recommendations were likely “original works” within the scope of the Copyright Act, and therefore any misappropriation claim involving them was preempted by Section 301.

Magistrate Judge Gesner studied the history, as well as the current status of the “hot news” misappropriation tort, from *International News Service v. Associated Press*, 249 U.S. 215 (1918), to the state of the doctrine after the 1976 revisions to the Copyright Act, which explicitly preempted any state cause of action if the state rights are “equivalent to any of the exclusive rights within the general scope of copyright” and the work falls “within the subject matter of copyright.”

She paid particular attention to the 1991 Supreme Court holding that facts are not copyrightable because they are not original to the author. *Feist Publ’n Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). The *Feist* Court expressly noted that it was not overturning the 1918 *INS* decision. *Feist*, 499 U.S. at 354. She then came to the 1997 Second Circuit decision that held that hot news claims were not preempted by Section 301. *National Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). (She also noted that the Fourth Circuit had never recognized the *NBA* test, and that it had been explicitly rejected by Judge Quarles in *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737 (D. Md. 2003)). The magistrate took particular note of two separate passages

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in *NBA*. First, the *NBA* court defined what it considered to be the essential five elements of an *INS* claim:

(i) the plaintiff generates or collects information at some cost or expense, (ii) the value of the information is highly time-sensitive, (iii), the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it, (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff, and (v) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

NBA, 105 F.3d at 852. The *NBA* court noted that *INS* is not about ethics, but "the protection of property rights in time-sensitive information. The next passage in *NBA* was the one Magistrate Judge Gesner focused on:

We therefore find the extra elements – those in addition to the elements of copyright infringement – that allow a 'hot news' claim to survive preemption are: (i) the time-sensitive value of *factual information*, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff. *NBA*, 105 F.3d at 853 (emphasis added).

Magistrate Judge Gesner noted that in the three-element test, the work at issue must be facts – and noted that the *Agora* plaintiffs had not set forth any proof or pleading that the material at issue was "factual information." "Instead," she wrote, "this material appears to be 'original' works, which are copyrightable, and, therefore, not subject to protection under the *NBA*'s court formulation of the *INS* doctrine.

She noted that "most courts applying the *NBA* test have

only applied it where the material at issue was 'factual,' and therefore not copyrightable, citing *Scranton Times, L.P. v. Wilkes-Barre Publ'g Co.*, No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 17278 (M.D. Pa. Mar. 6, 2009) (facts from plaintiff's obituaries), *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (time-sensitive concert information); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044 (E.D. Mo. 1999) (plaintiff's theaters' movie listings).

Notable exceptions to this reading of *NBA* included the recent *Barclays Capital, Inc. v. TheFlyOnTheWall.com*, No. 06-cv-4908, 2010 U.S. Dist. LEXIS 25728 (S.D.N.Y. Mar. 18, 2010) (stock investment recommendations) and *XI7, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2008) (copyrighted photographs).

The magistrate reviewed the pleadings and found that there was no allegation that the work at issue was "factual," and accordingly recommended the court deny the motion for default judgment. She also considered a Lanham Act claim, but held plaintiffs had failed to state a claim there as well because the disclaimers on the defendant's website made clear that the website was in no way affiliated with plaintiffs or their employees, the analysts.

Judge Quarles accepted the magistrate's recommendations in a summary order on July 15. The recent *Barclays* decision only focused on the five-factor *NBA* test, and did not consider the three-prong test. Although many amicus briefs have been filed in the *Barclays* dispute – some arguing that *Feist* overruled *INS* and obliterated any protection for facts -- not one amicus seems to argue that investment recommendations are within the scope of copyright. (Instead, argues the brief of Google and Twitter: "The state law tort of 'hot news' misappropriation is unenforceable because the Copyright Clause has been construed to ban the removal of facts from the public domain, because application of 'hot news' misappropriation obstructs this constitutional mandate, and because states are precluded from implementing laws that interfere with constitutional guarantees." Brief for Amici Curiae Google Inc. and Twitter, Inc. In Support of Reversal at 17, *Barclays Capital, Inc. v. TheFlyOnTheWall.com, Inc.*, No. 10-1372-CV (2d Cir. June 22, 2010).) Oral argument for the *Barclays* case was held on August 6; a decision is still pending.

Judge Issues Prior Restraint Against Legal Newspaper

POM Wonderful Seeks – And Then Dismisses – Injunction Against Publication Of Information Lawfully Obtained From Public Court Files

By Bruce D. Brown and Laurie A. Babinski

The National Law Journal successfully fought off a prior restraint after a District of Columbia Superior Court judge decided to “throw 80 years of First Amendment jurisprudence out the window” in late July by enjoining the legal newspaper from publishing information lawfully obtained from public court files about a regulatory investigation into pomegranate juice maker POM Wonderful, LLC.

POM filed a complaint against The National Law Journal and its parent company, ALM Media, after it learned that the paper planned to publish the details of a fee dispute between the California-based company and its former counsel that were contained in court files a trial judge had sealed but which were left in the public file due to a clerical error. The details included the identity of the regulatory agency – later revealed to be the Federal Trade Commission – conducting an investigation into POM’s business practices.

The injunction was vacated at POM’s request eight days later after The National Law Journal filed an emergency appeal with the District of Columbia Court of Appeals. That appeal was followed by an amicus brief filed on behalf of nine media companies and organizations decrying the prior restraint as blatantly unconstitutional. The filings drew a firestorm of media attention, including an editorial in The Washington Post, that highlighted the existence of the very investigation that POM had sought to shield from public view.

Background

According to an affidavit filed in Superior Court, National Law Journal reporter Jeff Jeffries went to the clerk’s office on July 15 to review the public court file in a fee dispute case filed by Hogan & Hartson LLP, now Hogan Lovells, against its former client POM over \$666,000 in unpaid legal bills. Jeffries viewed the public docket on a computer terminal in the clerk’s office. He printed several of the pleadings on a printer located behind the clerk’s counter, and the court

official handed him the documents after he paid a \$61.00 fee.

None of the documents Jeffries printed was marked as sealed and no one working in the clerk’s office indicated that they had been placed under seal or were confidential. The documents contained the names of the lawyers involved in the Hogan-POM case and stated that the fee dispute arose from POM’s retention of Hogan to represent the company in an FTC inquiry.

On July 19, Jeffries telephoned Barry Coburn of Coburn & Coffman P.L.L.C. who was listed on the docket as POM’s lawyer. When Coburn returned the call, Jeffries told him that he was working on a story about the fee dispute and wanted to give POM the opportunity to comment. Jeffries also told Coburn that he knew that POM had hired Hogan to handle an FTC inquiry. Coburn indicated that he would contact his client and be back in touch.

On July 22, Coburn again called Jeffries and asked several questions about the article, including whether Jeffries planned to mention that the fee dispute was related to an FTC inquiry. When Jeffries responded in the affirmative, Coburn said he would see if he could respond on the record. At no time did Coburn tell Jeffries that the information was incorrect or inform him that it was subject to a sealing order. Jeffries never heard back from Coburn.

Several hours later, Coburn filed suit against The National Law Journal and ALM along with a motion for a temporary restraining order or preliminary injunction that sought to prohibit the newspaper from publishing the identity of the regulatory agency or any details about the investigation that Jeffries had legally obtained from the public court file.

Superior Court Judge Imposes Prior Restraint

Early the next afternoon, Superior Court Judge Judith Bartnoff – the same judge who had ordered the Hogan-POM

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materials sealed – granted POM’s motion for a preliminary injunction against The National Law Journal.

In a hearing lasting more than two hours, Judge Bartnoff acknowledged over 80 years of prior restraint precedent invalidating injunctions prohibiting the publication of truthful information even where interests such as national security or fair trial rights are at stake. But she rejected the application of that precedent to the facts at hand, holding that an oral sealing order she had entered in open court weeks earlier trumped the newspaper’s First Amendment right to publish information obtained in the documents.

“If I am throwing 80 years of First Amendment jurisprudence on its head, so be it,” Judge Bartnoff said. “None of that First Amendment jurisprudence, to my knowledge, is dealing with this issue – the integrity of the functioning of the court system.”

Judge Bartnoff’s order was entered just as The National Law Journal was coming up on its weekly deadline, forcing the publication to make last-minute edits to strike from the article any reference to the FTC. The newspaper went to press instead with a front-page note to readers informing them that it had been ordered not to publish information it had lawfully obtained from court files.

National Law Journal Files Emergency Appeal

In the early morning hours of July 28, The National Law Journal filed an emergency appeal in the District of Columbia Court of Appeals arguing that the prior restraint was both unprecedented and unconstitutional.

The newspaper’s brief traced the decades of Supreme Court precedent refusing to uphold prior restraints even when the issues at stake were of paramount national importance. The brief stated that the Supreme Court had “*never* upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial,” whereas “the prior restraint in this case was obtained by a privately-held beverage manufacturer to prevent the public

from learning the identity of the regulatory agency that is investigating the company.”

Moreover, The National Law Journal emphasized that any purported commercial interest asserted by POM was insufficient to support a prior restraint. For example, in *Procter & Gamble v. Bankers Trust Co.*, the Sixth Circuit reversed two temporary restraining orders and a permanent injunction against Business Week magazine after it obtained documents sealed pursuant to a protective order from a law firm representing the defendant in a business dispute.

Finally, the brief set forth precedent in the Supreme Court and other federal appellate courts steadfastly refusing to punish the press for the publication of information

inadvertently made available by courts or public officials. For example, in *Cox Broadcasting Corp. v. Cohn*, the Supreme Court refused to punish the publication of a rape victim’s name obtained from indictments inadvertently made available during the trial of her alleged rapist. Similarly, in *Florida Star v. B.J.F.*, the Supreme Court overturned award of damages to a sexual assault victim whose name was accidentally made public by a Florida sheriff’s department.

The holdings of these and other cases made clear that the accidental release of confidential information to the public does not permit a second mistake, one of constitutional magnitude, of imposing liability for publication of the information. It followed that if The National Law Journal could not be held liable for damages for publishing truthful

information, it could not be enjoined from publishing that same information.

Media Amicus Brief

On July 30, nine media companies and organizations across the country led by The Washington Post filed an amicus brief in support of The National Law Journal’s appeal. The amicus brief – also filed on behalf of The New York Times, The Reporters Committee for Freedom of the

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POM filed a complaint against The National Law Journal and its parent company, ALM Media, after it learned that the paper planned to publish the details of a fee dispute between the California-based company and its former counsel that were contained in court files a trial judge had sealed but which were left in the public file due to a clerical error.

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Press, The American Society of News Editors, The Society of Professional Journalists, The Associated Press, Dow Jones, Gannett and NPR – noted that “it is an extraordinary thing for a court to prohibit publication of information obtained from its files, and it is no excuse that the information should have been sealed in the first place.”

The amicus brief drew even more attention to the prior restraint, which had already gained significant traction in the national press. A Washington Post editorial headlined “Muzzling the Press” called the Judge Bartnoff’s decision “extraordinary – and extraordinarily bad.” It also asked court officials to examine why the files were left unsealed and at the same time admonished that “trampling on the First Amendment must never be the solution.”

An online post from The New Yorker titled “The Pomegranate Papers” noted that Judge Bartnoff had “apparently decided that different standards apply to pomegranate juice than to national security.” It also pointed out the “special irony” of the prior restraint because POM’s owner, Lynda Resnick, was an unindicted co-conspirator in the Pentagon Papers case.

POM Requests Withdrawal Of Injunction

Just hours after the amicus brief was filed, POM moved to withdraw the injunction as well as its complaint. Judge

Bartnoff granted the motion just as The National Law Journal was again approaching its weekly deadline, but not before stating that she stood by her decision to impose the preliminary injunction pending resolution of the case on its merits.

The National Law Journal immediately posted the identity of the regulatory investigating POM – the FTC – online. The same information appeared in its next weekly edition and all over the news media.

The fee dispute between Hogan and POM is still pending in the District of Columbia Superior Court. On September 15, POM sued the FTC in the U.S. District Court for the District of Columbia claiming the agency had created a new standard for the evaluation of deceptive advertising that infringed on the pomegranate juice maker’s free speech rights. On September 27, the FTC filed an administrative complaint against POM alleging that the company made numerous false and unsubstantiated health claims in advertisements for its products.

Bruce D. Brown and Laurie A. Babinski of Baker & Hostetler LLP in Washington, D.C. represented The National Law Journal and its parent company, ALM Media, along with ALM Chief Legal Officer Allison Hoffman and deputy general counsel Fabio Bertoni. Kevin Baine and Carl Metz of Williams & Connolly represented the media amicus group. Barry Coburn of Coburn & Coffman P.L.L.C. represented POM Wonderful, LLC.

Tenth Circuit: Colorado’s Criminal Libel Law Cannot Be Applied To Parody Or Satire

By Steven D. Zansberg

The United States Court of Appeals for the Tenth Circuit held that a Colorado district attorney who authorized a search warrant in pursuit of evidence for a criminal libel prosecution was not entitled to qualified immunity because the law was clearly established that satire and parody are not actionable as libel under civil or criminal law. [*Mink v. Knox*](#), No. 08-1250 (10th Cir. July 19, 2010) (Seymour, Gorsuch, O’Brien, JJ.).

The decision in *Mink v. Knox* marked the second time this case was before the Tenth Circuit. Previously, the MLRC and several other organizations had asked the Tenth Circuit to find Colorado’s criminal libel statute unconstitutional, but in

2008 the court affirmed the district court’s finding that Thomas Mink, a student at the University of Northern Colorado who authored “*The Howling Pig*” satirical website, did not have standing to challenge the statute. *See Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1122 (2008).

Student’s Parody Website Offends The Professor

Mink’s website, *The Howling Pig*, was operated out of his home, using a computer that Mink shared with his mother. The website featured a regular column “from the editor,” who

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was a fictional character named “Junius Puke.” The column displayed obviously doctored photos of an actual UNC professor, Junius Peake, wearing dark sunglasses and a Hitler-like mustache. After learning of the parody, Professor Peake contacted the local District Attorney and swore out a complaint alleging that he was a victim of criminal libel. A police detective opened an investigation, reviewed the website, and concluded that Mink was its editor.

Based upon this information, the detective prepared a search warrant affidavit and presented it to Deputy District Attorney Susan Knox, who reviewed and approved the search warrant affidavit. After a magistrate judge approved the search warrant, Greeley, Colorado police searched the home where Mink lived and confiscated his personal computer and additional written materials referencing *The Howling Pig*.

After the search, Mink obtained counsel and demanded return of his computer and papers, arguing that the criminal libel statute could not be applied against him under these circumstances. Having received no response, Mink sought assistance of the ACLU of Colorado, and filed the present civil rights action in federal court, demanding the return of his seized materials, a declaration that Colorado’s criminal libel statute is unconstitutional, and asserting additional civil rights claims for violation of his Fourth Amendment rights by the District Attorney and Assistant District Attorney Knox.

Computer Returned; DA Promises Not to Prosecute

After the civil rights complaint was filed, on January 9, 2004, the U.S. District Court issued a Temporary Restraining Order precluding the D.A. from initiating prosecution of Mr. Mink under Colorado’s criminal libel statute and commanding the forthwith return of Mink’s computer and all contents thereof that were seized from his home. Shortly thereafter, the District Attorney issued a “No File” letter in which he declared he would not file any charges against Mink, and by agreement of the parties the district court vacated the TRO.

In its earlier ruling, the U.S. District Court found that the No File letter from the D.A. mooted Mink’s challenge to the constitutionality of Colorado’s criminal libel statute (or, alternatively, caused him to lack standing). The Tenth Circuit Court of Appeals’ earlier decision reversed the District Court’s finding that Assistant District Attorney Knox was

entitled to absolute immunity for conduct as a judicial officer, and remanded for a determination whether she was entitled, nevertheless, to qualified immunity for her actions in authorizing the search of Mink’s home. See *Mink v. Suthers*, 482 F.3d 1244, 1258- 63 (10th Cir. 2007).

Trial Court: DA Entitled to Qualified Immunity

On remand, the District Court Judge Lewis T. Babcock found that Knox was entitled to qualified immunity because a reasonable prosecutor could have determined that the statements published in *The Howling Pig*, though couched as parody and satire, implied verifiable facts and were therefore actionable. *Mink v. Knox*, 566 F. Supp.2d 1217, 1226-27 (D. Colo. 2008). Judge Babcock ruled that it was also not clearly established law that statements of satire or parody concerning a private figure on a matter of private concern are immune from liability as defamation. *Id.* Judge Babcock also found that although the search warrant violated the Fourth Amendment’s particularity requirement, it was not clearly established that Knox’s authorization of the affidavit lacking particularity violated the Fourth Amendment. *Id.* at 1228-29.

Parody of Private Figures is Immune from Liability or Prosecution

The Tenth Circuit reversed the District Court’s finding that Knox was entitled to qualified immunity. The court first determined that Knox was a “causative factor” in the violation of Mink’s Fourth Amendment rights, by having reviewed and authorized the warrant for the search of his computer and premises.

The Court next determined that Mink’s constitutional rights were violated by the issuance of a search warrant that lacked probable cause. The Court determined that there was no “probable cause to believe that Mr. Mink’s publication of *The Howling Pig* violated the Colorado criminal libel statute.” The court stated that “[i]t goes without saying that a government official may not base her probable cause determination on an ‘unjustifiable standard,’ such as speech protected by the First Amendment.”

The court then turned to the question whether Mink’s speech was protected by the First Amendment. Citing the well-known series of Supreme Court rulings beginning with

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New York Times v. Sullivan, 376 U.S. 254 (1964), and continuing on through *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court recognized that the First Amendment imposes significant limitations upon sanctioning of speech that is alleged to cause harm to the reputation of individuals.

Notably, the court declared (in a footnote) that “[c]ivil and criminal libel cases ‘are subject to the same constitutional limitations,’” citing *Herbert v. Lando*, 441 U.S. 153, 157, n.1 (1979) (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Among those precedents is the doctrine recognizing that “parody, fantasy, rhetorical hyperbole, and imaginative expressions ‘that cannot reasonably [be] interpreted as stating actual facts about an individual,’” are not actionable, citing the *Bresler-Letter Carriers-Falwell* line of cases. Thus, the court declared “[e]ven false statements of fact are protected from a defamation claim [or, as held here, a prosecution for criminal libel] if any reasonable person would recognize the statements as parody.”

Before turning to the text of Mink’s writings to determine whether it constituted “parody,” the Tenth Circuit noted that “[a]lthough the Supreme Court has not yet squarely addressed whether fantasy, parody, rhetorical hyperbole, or imaginative expression is actionable in a case where a plaintiff is neither a public figure nor the speech on the matter of public concern, this Circuit and at least one other Circuit have done so.” The court cited its prior holding in *Pring v. Penthouse Int’l Ltd.*, 695 F.2d 438 (10th Cir. 1982), and the First Circuit’s ruling in *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997).

The court held that “[w]hether a statement could be reasonably understood as a fact is a question of law.” Examining the statements in the context of *The Howling Pig* publication, the court next determined that the publication was “a satirical spoof.” The court noted that *The Howling Pig* humorously altered Mr. Peake’s photograph to create the character of Junius Puke, its “editor,” and that another photo was altered to depict the professor made up as a character in the rock band KISS. Another column allegedly attributed to Mr. Puke stated:

This will be a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all stoners sitting around

watching Scooby Doo. This will be a forum for the pissed off and disenfranchised in northern Colorado, basically everybody. I made it to where I am through hard work, luck, and connections, all without a college degree.

The Court noted that the *Howling Pig* editorials even contained an express disclaimer that Junius Puke was not to be confused with the UNC Monfort Distinguished Professor of Finance, Mr. Junius “Jay” Peake.

Reviewing the statements in their context, the Court concluded that “[n]o reasonable reader would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke, nor would any reasonable person believe they were statements of facts as opposed to hyperbole or parody.” Accordingly, the Court held, “[n]o reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink’s property.” Because the *Pring* (and *Levinsky’s*) rulings were published decisions, the law at the time Ms. Knox approved the search warrant affidavit was clearly established, and she is therefore not entitled to qualified immunity. (The Court also found that Ms. Knox violated Mr. Mink’s rights by authorizing an overly broad search, not bounded by the requisite particularity requirement of the Fourth Amendment.)

Judge Gorsuch Concurs, on More Limited Grounds

Circuit Judge Neil M. Gorsuch filed a separate concurring opinion in which he stated that the District Court’s finding of qualified immunity must be reversed because *Pring v. Penthouse Int’l Ltd.*, 695 F.2d 438 (10th Cir. 1982), clearly established that “[t]he First Amendment precludes defamation actions into parody, even parody causing injury to individuals who are not public figures or involved in a public controversy.” According to Judge Gorsuch, that holding, binding on all officials operating within the Tenth Circuit, “answers the probable cause question at issue, and is thus the beginning and end of my inquiry on that question.” Judge Gorsuch would avoid any discussions whether *Pring* was correctly decided or would be embraced by the Supreme Court.

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**Analysis: Differing Judicial Opinions Serve to
Limit the Scope of Colorado’s Criminal Libel Statute
and Demonstrate Its Unconstitutionality**

An interesting law review article (or articles) will undoubtedly be written addressing what is left of Colorado’s criminal libel statute in the wake of two Tenth Circuit opinions which, at least on their face, declined to reach the constitutional validity of that statute. In its more recent ruling, the Tenth Circuit engrafted an “assertion of provably false fact” element onto the criminal libel statute. In fact, there is nothing textually or historically in the statute that lends itself to that interpretation (or judicial amendment).

To the contrary, Colorado’s statute, enacted in 1883, criminalizes the publication of any “written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of the one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive . . .,” and does not contain any requirement that a statement be false. Indeed, subsection (2) of the statute makes clear that truth “shall be an affirmative defense . . . *except* [in cases of] libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.” (emphasis added).

Thus, Justice Quinn, dissenting in *People v. Ryan*, 806 P.2d 935, 942 (Colo. 1991) (Quinn, J., dissenting), pointed out, correctly, that “[a] person arguably would be subject to criminal prosecution for the knowing publication or dissemination of a defamatory statement even though the statement was true and the person making the statement knew it to be true.” Because Colorado’s criminal libel statute contains no element of falsity (and explicitly rejects truth as an affirmative defense in some cases), arguably, it was not unreasonable for a district attorney to conclude that statements of pure opinion, parody, or satire are actionable under that statute (though not under the First Amendment). Indeed, that (among several other things) is what renders the statute unconstitutional.

It is also curious that this Tenth Circuit panel relied upon the protection for parody in the context of a private figure “victim” on a matter purportedly of purely private concern. (The District Court had determined that the facts pleaded in the Complaint did not establish, as a matter of law, that Professor Peake was a public official or public figure or that

The Howling Pig addressed matters of public concern). The prior Tenth Circuit panel expressly stated that “[t]he parties concede on appeal that Supreme Court precedent makes enforcement of the Colorado criminal libel statute unconstitutional under the facts as alleged here. *The parties have conceded Professor Peake is a public figure. . . .*” See *Mink v. Suthers*, 482 F.3d at 1257 (emphasis added).

Because Colorado’s Supreme Court had previously “partially invalidated” the criminal libel statute –holding it could not be applied against a public official or public figure on a matter of public concern, see *People v. Ryan*, 806 P.2d 935 (Colo. 1991) – no prosecution could be brought for Mink’s publication concerning a professor at a publicly funded university (who had also published several columns in the local newspaper, prior to Mink’s satirical attacks upon him).

Thus, arguably, even unquestionably verifiably false assertions of fact, e.g., that Professor Peake was guilty of actual crimes, would not be subject to prosecution under clearly established Colorado law.

All in all, the more recent Tenth Circuit ruling, like the earlier ruling which dodged the question of the statute’s constitutionality, are helpful published opinions that should prompt any district attorney or police detective to have serious reservations before proceeding in furtherance of *any* criminal libel prosecution.

Unfortunately, however, there remains in place a statute providing for up to two years imprisonment for publishing information on matters of public concern that precludes the assertion of truth as an affirmative defense in certain identified prosecutions (and makes truth an affirmative defense in all other cases).

Moreover, the continuing ambiguity about the reach and scope of this statute, as evidenced by the conflicting, confusing, and internally inconsistent rulings of several federal and state court judges, demonstrates rather forcefully that the statute is hopelessly vague; perhaps someday in the future judges will acknowledge that inevitable truth, and strike this antiquated and speech-chilling statute from the books once and for all.

Steven D. Zansberg is a partner with Levine Sullivan Koch & Schulz, L.L.P. in Denver, CO. Thomas Mink was represented by Marcy G. Glen and A. Bruce Jones of Holland & Hart LLP, Denver, CO; and Mark Silverstein of the American Civil Liberties Union Foundation of Colorado.

Divided Ninth Circuit Panel Rules “Stolen Valor Act” Unconstitutional

False Statements Can Be Remedied By More Speech Instead of Punishment

The Ninth Circuit, in an interesting 2-1 decision, struck down as unconstitutional a federal statute making it crime to falsely claim to be a military service medal winner. [U.S. v. Alvarez](#), No. 08-50345, slip op. 11849, 11850 (9th Cir. Aug. 17, 2010). (Nelson, Smith, Bybee, JJ). The majority reasoned that false statements of fact are not categorically outside the protection of the First Amendment – and the statute was not akin to a law against defamation. Instead, the court reviewed the Stolen Valor Act, 18 U.S.C. § 704 (b), (c)(1) (2006), under a strict scrutiny standard, holding that it was a content-based regulation of speech, albeit false speech, that was not narrowly tailored to the government’s interest in deterring false claims about military service awards. While the majority accepted that the government has a compelling interest to deter such claims, it found that “more speech” rather than criminal punishment could achieve that goal.

In a detailed dissent, Judge Bybee argued that false statements of fact do not enjoy constitutional protection and he accused the majority of rewriting established First Amendment law.

Background

At a July 2007 board meeting of the Three Valley Water District Board of Directors in Pomona, CA., newly seated Director Xavier Alvarez stood to introduce himself, stating “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”

In fact, Alvarez had never been in the Marines and was not awarded a Congressional Medal of Honor. Instead, he had a long history of lying about his background, including claiming he was a helicopter pilot during the Vietnam War, had rescued the U.S. Ambassador in Iran during the Iranian hostage crisis, was a professional hockey player, and was married to a Mexican movie starlet. [Alvarez](#), slip op. at 11851-11852. The district court noted that Alvarez lives in

“a make-believe world where [he] just make[s] up stories all the time.”

After complaints to the FBI, Alvarez was indicted on two counts of violating the Stolen Valor Act for falsely claiming to be a Medal of Honor winner. Alvarez was the first person to be charged and convicted under the current version of the Act.

The Act provides that “Whoever falsely represents himself or herself verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces ... shall be fined under this title, imprisoned not more than six months, or both.” 18 U.S.C. § 704(b) (2006). The prison term is enhanced to one year if the decoration involved the Congressional Medal of Honor, among others. U.S.C. § 704 (c) (2006).

The district court denied Alvarez’s motion to dismiss the indictment on claims that the Act is unconstitutional both on its face and as applied to him. Alvarez pleaded guilty to the first count, reserving his right to appeal the First Amendment question. He was sentenced to pay a \$100 special assessment, a \$5,000 fine, to serve three years of probation and to perform 416 hours of community service. Alvarez appealed to the Ninth Circuit, bringing both facial and as-applied challenges to the validity of the Act under the First Amendment.

False Statements of Fact Protected

The court first addressed the government’s contention that “Congress may prohibit false statements of fact unless immunity has been carved out or should be carved out because the First Amendment requires protection of some falsehood in order to protect speech that matters.” [Alvarez](#), slip op. at 11857.

The court countered this, stating:

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“the right to speak and write whatever one chooses — including, to some degree, worthless, offensive, and demonstrable untruths — without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment ... we presumptively protect all speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie.)” *Id.* at 11860.

The court then found that the Act does not fall within any of the categorical exceptions to the First Amendment, such as defamation or fraud. The government relied heavily on the statement from *Gertz v. Welch*, 418 U.S. 323, 339-340 (1974) that “there is no constitutional value in false statements of fact.” The court pointed out that this exception applies to false and *defamatory* statements of fact.

In the instant case, there was no intent to harm another individual. Rather, the court found that the most obvious reason people lie about receiving military honors is to bring themselves honor and acclaim. *Alvarez*, slip op. at 11867. And while the government claimed the integrity of the awards are harmed by false statements about military honors, the court pointed out that “the right against defamation belongs to natural persons, not government institutions or symbols. *Id.* at 1868.

Moreover, the harm caused by the false speech could be fixed with more speech, such as publicizing the names of false claimants. Similarly, the Act could not be viewed as targeting fraud or impersonation since it lacked elements of materiality, intent to defraud, and injury. “We are aware of no authority,” the court stated, “holding that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false.”

The majority also stressed that there is an affirmative constitutional value in at least some knowingly false statements, such as satirical commentary – citing by name The Onion, The Daily Show, and The Colbert Report as

contributing to the public debate on political and social issues.

Strict Scrutiny Test

Having found that false statements of fact are presumptively protected by the First Amendment, the court applied the strict scrutiny test to determine if the Act was narrowly tailored to meet a compelling government interest. While the court found that Congress has a compelling interest in preserving the integrity of military honors, the Act was not narrowly tailored to serve this interest. “More speech” could repair the harm caused by false claims. *Id.* at 11880. Thus, as presently drafted, “the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more.” *Id.* at 11881.

Dissent

In a detailed dissent, Judge Bybee argued that the court was bound to follow *Gertz* and its broad language on “false statements of fact” as categorically outside of the First Amendment. *Id.* at 11884.

We do not have the authority as a lower court to limit the Court’s statements to what we believe they mean rather than what they actually say. *Gertz* could have used the terms “defamation” or “libel” rather than “false statements of fact” to describe the unprotected category of speech—it presumably knew what these terms mean—but it did not. Because the Court has told us unambiguously that “false statements of fact” are generally unprotected by the First Amendment, this principle should be the starting point for our analysis, not the point for the majority’s departure from the principle.

Defendant-appellant was represented by Jonathan D. Libby, Deputy Federal Public Defender in Los Angeles. Plaintiff-Appellee was represented by Craig H. Missakian, Assistant U.S. Attorney, Cyber and Intellectual Property Section in Los Angeles.

Under Pressure Craigslist Removes “Adult Services” Section

Seemingly acquiescing to the demands of state attorneys general, Craigslist, the online classified ads website, removed the “Adult Services” section of its website in the United States. Initially Craigslist kept the link on its site covered by a black bar reading “censored” – suggesting the removal was a temporary protest. However, Craigslist later removed the link and section entirely, a change it confirmed in recent Congressional testimony.

The move came two weeks after 17 attorneys general sent the site’s founder, CEO, and attorney a letter noting strong concerns that the page provided easy access to prostitution and child sex trafficking. Although the letter was phrased as a request and contained no legal threats, it carried force through its widespread dissemination. The letter was the latest in a two-year effort by state AGs to curtail the website’s alleged facilitation of illicit activities.

Craigslist had already restructured the portion of its page, previously entitled “Erotic Services,” in an effort to reign in the lascivious free-for-all. The site began screening each adult post and requiring an accompanying \$10 payment, credit card information, and a verifiable phone number.

Many saw these steps as a boost to public safety, as the increased transparency and high volume on the page allowed law enforcement to intervene when necessary. But AGs, aided by vocal advocacy groups found the steps inadequate. Even after the Adult Services section was removed in the United States, they continue to press for its elimination worldwide.

Notwithstanding the public pressure, the law surrounding this issue favors Craigslist. Section 230 of the Communications Decency Act, which provides that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁷ U.S.C. § 230(c)(1), has been held to shield Craigslist on a variety of claims over third-party postings.

In a lawsuit brought by an Illinois sheriff against the company for creating a public nuisance by facilitating prostitution, an Illinois federal district court held that none of the site’s actions brought it outside of 230’s protective sphere. *See Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. Oct. 20, 2009). Craigslist has also successfully

invoked Section 230 immunity when sued for discriminatory postings in its housing section, *see Chicago Lawyers’ Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), and for injuries caused by the sale of firearms on the site. *See Gibson v. Craigslist*, 2009 WL 1704355 (S.D.N.Y. June 15, 2009).

In reality, the AGs probably know their legal stance is a weak one; therefore, they have moved their case to the court of public opinion, where outrage can carry more weight than precedent.

UPCOMING EVENTS

MLRC Annual Dinner

November 10, 2010
Grand Hyatt
New York, NY

[For more, click here](#)

MLRC Forum

November 10, 2010
Grand Hyatt
New York, NY

[For more, click here](#)

DCS Annual Meeting

November 11, 2010
Proskauer Rose Conference Center
New York, NY

California Chapter Luncheon Meeting

December 15, 2010
Southwestern Law School
Los Angeles, CA

[For more, click here](#)

MLRC/Southwestern Entertainment Law Conference

January 20, 2011
Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 19-20, 2011
Palo Alto, CA

London Conference

September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England