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INTERNATIONAL LIBEL & PRIVACY

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Press Not Required to Give Pre-Publication Notice To Subjects of News Stories

Notification and Enforcement Would Create Chilling Effect

On May 10, the European Court of Human Rights rejected a controversial request that the press be required to give pre-notification to the subjects of news stories that might be invasive of privacy. [Mosley v. United Kingdom](#), [2011] ECHR 774. Max Mosley claimed that the United Kingdom had violated a positive obligation under Article 8 of the European Convention on Human Rights (respect for private life) by failing to impose a legal duty on the News of the World tabloid to notify him in advance and allow him to sue to enjoin publication.

While expressing a good deal of sympathy for Mosley's particular circumstances, the Court stated it had to consider the broader impact of a pre-notification requirement on political reporting and serious investigative journalism. The Court recognized the serious chilling effect such a requirement would impose and held that Article 8 does not require pre-notification.

Background

Mosley, former president of the F1 racing association, and son of England's notorious World War II-era fascist leader Oswald Mosley, successfully sued the *News of the World* tabloid in 2008 over an article headlined "F1 boss has sick Nazi orgy with 5 hookers." The newspaper's website contained secretly recorded video clips of Mosley's sex sessions. Mosley admitted he engaged in sadomasochistic sessions with prostitutes, where he spoke German and wore a German military uniform, but he denied that the sessions had a Nazi theme. The High Court in London awarded Mosley £60,000 in damages (and later £420,000 in costs), accepting his argument that the sessions were not Nazi-themed, and thus there was no public interest in the disclosure of his conduct.

In his application to the ECHR, Mosley argued that damages were an inadequate remedy for the disclosure of these private and highly embarrassing personal facts. The only effective remedy, he argued, would have been a pre-publication injunction, which he was not able to obtain because the newspaper did not warn him before publication. According to Mosley, the absence of a pre-notification requirement under UK law constituted a violation of the right to respect for private life guaranteed by Article 8. He

conceded that no such rule existed anywhere in Europe, but stressed it would be appropriate for the Court to impose the rule given the aggressive nature of the UK tabloid press.

The UK government, as the respondent in the case, vigorously opposed Mosley's argument, as did several media groups, including MLRC. The UK government noted that the relief requested was unprecedented in Europe, was unworkable as a practical matter, and implied a threatening scheme of criminal punishment by way of enforcement.

If the Court had accepted Mosley's argument the press would have to give several days' notice before publishing any criticism of a public figure, even if the criticism was true, and risk lengthy delays in publishing because of litigation.

Media Amicus Brief

The [amicus brief](#) joined by MLRC, was written by distinguished free-speech advocate Geoffrey Robertson QC. The brief focused on what Robertson called the "root problem" behind the case—the European Court's illegitimate recognition of "honor and reputation" as part of Article 8. This case law has enabled claimants in the UK and elsewhere to circumvent defamation law, where truth is always a defense, and bring privacy claims over truthful information causing "reputational" damage.

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Although “reputation” was specifically excluded as a right under Article 8 when the European Convention was created, over the past decade the Court issued several decisions holding that reputation is a protected part of private life. In [Pfeifer v Austria](#) [2009] 48 EHRR 8, for example, the Court accepted that reputation is part of private life. Moreover, “a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her ‘private life.’” *Id.* at § 35.

This broad and vague definition of “private life” meant that this case had consequences well beyond the sphere of tabloid newspapers. If the Court had accepted Mosley’s argument the press would have to give several days’ notice before publishing any criticism of a public figure, even if the criticism was true, and risk lengthy delays in publishing because of litigation.

ECHR Decision

The European Court rejected Mosley’s argument. Among other things, it noted the total absence in Europe of mandatory pre-notification laws, the existence of voluntary codes of conduct for UK journalists, and the availability of civil damages and interim injunctions under UK law. The key problem, though, was the inherent chilling effect a pre-notification scheme would create. To be effective a pre-notification scheme would require criminal sanctions or significant fines. While these punishments could be effective, in the opinion of the Court, they would inevitably lead to prior restraints and self-censorship of political and investigative reporting – core protected speech under ECHR case law.

While the Court affirmed the protection for speech about political debate, it was sympathetic to Mosley as a victim of the press. It agreed with the English judgment against the News of the World, finding the newspaper perpetrated “a flagrant and unjustified invasion of the applicant’s private life.” It agreed with a UK Parliamentary Committee recommendation that the Editor’s Code in the UK be

amended to require, as a best practice, pre-notification subject to a public interest exception. The Court also reiterated the distinction in ECHR law between stories in the public interest and stories the public might find interesting. “Sensational” or “lurid news” about a person’s private life could be actionable and subject to prior restraint, the Court noted.

The Court did not directly respond to the criticism leveled by Geoffrey Robertson about the Court’s Article 8 privacy jurisprudence. In one paragraph the Court emphasized “the importance of a prudent approach” to protecting private life and the “diversity of possible methods to secure its respect.” Mosley at § 107. The Court cited this proposition to its decision in [Karakó v. Hungary](#), [2009] ECHR 712 – one of the Court’s only decisions to question the recent presumption that Article 8 protects reputation. But the meaning of the

reference is far from clear and provides no clear indication that the Court has shifted its position on Article 8 and reputation.

The press undoubtedly dodged a bullet in the case. The broader questions about privacy law were not answered in Mosley but are on the Court’s docket and may be answered later this year.

Conclusion

On the claimant’s side, one barrister has already declared victory. “The press won the battle but the judgment confirms that it has lost the ‘privacy war,’” Hugh Tomlinson QC wrote in [his analysis](#) of the decision.

The practical consequences doomed Mosley’s application, he concluded, but the Court did nothing to roll back the tide of privacy protection.

The press undoubtedly dodged a bullet in the case. The broader questions about privacy law were not answered in Mosley but are on the Court’s docket and may be answered later this year. In October 2010, the Grand Chamber heard argument in the combined cases of *Von Hannover v. Germany* and *Springer v. Germany* involving privacy claims by 1) a princess photographed on holiday; and 2) an actor arrested on drug charges. Media groups have again asked the Court to roll back its Article 8 /reputation case law. The underlying facts in these cases are more favorable to the press and may provide a better platform for Geoffrey Robertson’s bottom line argument that the Court should not impede the publication of the truth on any matter of public interest.

Other Side of the Pond: Updates on UK and European Media Law

Super Injunctions, Libel and Privacy in the Age of Twitter, CFA's

By David Hooper

The trouble really started with Carter-Ruck's attempt to muzzle what could be raised in Parliament about the Trafigura case. A committee of lawyers practising in this field was set up in April 2010 under Lord Neuberger, the Master of the Rolls, the senior judge in the Court of Appeal. That produced a 76 page report on 20 May 2011, which is the latest word on the law in this field and is entitled "[Super injunctions, anonymised injunctions and open justice](#)."

The terms of reference were (1) to examine the practice and procedure relating to interim injunctions, super injunctions and anonymised proceedings and their impact on open justice (2) to produce a clear definition of a super injunction and (3) to make recommendations about practice and procedures in such cases.

A super injunction, the Committee decided, was an interim injunction which prohibited a person from (a) publishing information which concerns the applicant and is said to be private or confidential and (b) publicising or informing others of the existence of the order and the proceedings. An anonymised injunction prohibited a person from publishing information which concerns the applicant and is said to be private or confidential but not from publicising or informing others of the existence of the order and the proceedings but which did ensure that the names of either or both parties were not stated. The procedure to be followed in such cases is set out in [JIH v Newsgroup](#) 2011 EWCA Civ 42.

The Committee said that there had been only two super injunctions to protect private or confidential information, namely [Ntuli v Donald](#) 2010 EWCA Civ 1276, which was in fact set aside by the Court of Appeal and [DFT v TTD](#) 2010 EWHC 2335 where the super injunction only lasted seven days to prevent the defendant being tipped off about the

proceedings. Depending on matters of definition, there may have been a few more super injunctions but the species if not extinct is very endangered. The media has confused super injunctions with anonymised proceedings.

Super injunctions will now be very rare. The onus is on the applicant to establish by very clear and cogent evidence that a super injunction is strictly necessary. That evidence will be subjected to intense scrutiny by the Court. The Court must ensure that any derogation from open justice is kept to an absolute minimum. Such a derogation from open justice

cannot simply be agreed between the two parties for their own convenience. It must be approved by the Court and must be for a limited period with a return date specified ([Goldsmith v BCD](#)) 2011 EWHC 674. Super injunctions will only very rarely be granted and will be kept under close review by the Court.

The Committee has also laid down suggested directions for the procedure to be followed in what will now be termed Interim Non-Disclosure Orders. As regards anonymised injunctions, reliable statistics are hard to come by, but they do seem to be on

the increase. One of the things the Committee has recommended is that the Ministry of Justice keeps detailed statistics of such cases. The Independent newspaper has published details of sixty nine privacy injunctions obtained for the most part anonymously. These include twenty eight cases involving extra-marital affairs which appear to involve nine footballers, nine actors, four pop stars, six wealthy businessmen, one senior civil servant and an MP – individually rather than as an act of group sex. What one does not know, of course, is whether the allegations are true; they can be damaging whether true or false.

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The Courts follow the procedure in the JIH and DFT cases, where they tend to anonymise the person seeking the privacy injunction, but give such details of the nature of the information as does not identify the applicant. A number of companies have also acquired anonymised injunctions but these attract adverse publicity and sooner or later they suffer from what is now known as the Barbara Streisand effect, namely that litigating such cases can attract far wider publicity than the offending article and so such cases should only be brought in the most extreme circumstances, as to which see below.

The Committee has also suggested that Parliament reviews its procedures when MPs deliberately flout a Court Order by naming people who have obtained such orders anonymously in Parliament.

Sir Fred Goodwin aka MNB

Sir Fred Goodwin was a smug banker who nearly brought down the long established Royal Bank of Scotland. He sacked so many of the employees that he became known as Fred the Shed. However his antics in bringing a privacy action under cover of the anonymised letters MNB to prevent News Group publishing details of his affair with his mistress, who also worked at RBS and who rather than being sacked was promoted twice, earned him a variation to his nickname of Fred the Bed.

He obtained a wide-ranging injunction – [2011 EWHC 528](#). However, his identity was revealed in Parliament first by John Hemming MP and subsequently in the House of Lords by a former journalist Lord Stoneham, who revealed that Sir Fred was carrying on with one of his employees in a way which might have triggered corporate governance issues. The Daily Mail published a pixillated photograph of a person said to be the mistress. Goodwin's lawyers attempted to get Tugendhat J to refer the matter to the Attorney General for contempt, but he declined to do so [2011 EWHC1341](#), saying it was up to Goodwin to do so.

The Court had lifted the ban on naming Goodwin after it had been raised in Parliament and became public knowledge.

While such matters are undoubtedly covered by the law of privacy, it is highly questionable whether it is always sensible for people such as Goodwin to bring such cases.

Ryan Giggs (aka CTB) and the Busty Big Brother Babe

Ryan Giggs is a well known Manchester United footballer and in *CTB v News Group Newspapers* [2011 EWHC 1232](#) the injunction that he had previously been granted concerning an attempt by a former Miss Wales, one Imogen Thomas, to provide chapter and verse of her nights of passion with Ryan Giggs – material which Mr Justice Eady discussed as tittle tattle and tawdry allegations – was upheld despite repeated attempts to discharge it. The judge found it particularly distasteful that she wanted a sum north of £50,000 if she was not to spill the beans.

The judge applying the principle of *Cream Holdings v Banerjee* UKHL 204 considered that Giggs would get a permanent injunction and that his playing away was clearly a matter of protectable private information for this otherwise happily married man.

However, once the injunction had been given all hell broke loose, with football crowds chanting ribaldly about his relationship with the girl and it was said there were some 75,000 tweets naming Giggs. Finally John Hemming MP named Giggs in Parliament. It was a spectacular own goal which was said to have cost Giggs somewhere in the region of £250,000, albeit only several weeks salary. It was litigation brought to us courtesy of Schillings, a fact which led the Daily Mail to do a feature article in distinctly uncomplimentary terms on [Keith Schilling: The injunction king, a cabal of grasping lawyers and a £2,000 an hour assault on free speech](#). The Ferrari owning Keith was however said only to be responsible for £650 of the legal hour's charge.

Questions have certainly arisen as to whether in the twitter/internet age it is sensible to pursue litigation so aggressively, even though Schillings had correctly advised Giggs as to his remedies. One sequel to the case is that Giggs is seeking a Norwich Pharmacal order for disclosure of

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Twitter now face the same problems as ISPs who receive complaints about third party material and face disclosure orders as to the identity of posters.

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the identity of the persons who were tweeting Giggs' identity in breach of the Court Orders. That case is *CTB v Twitter Inc* and persons unknown HQ2011X01814.

Libel and Privacy in the Age of Tweeting

As mentioned above, disclosure orders have been sought against persons who have disclosed protectable material on Twitter, without the knowledge or responsibility of Twitter. On 30 May an Order was reportedly obtained in California by Newcastle County Council against a person who had as Mr Monkey posted disobliging material about the Council Leader.

Twitter now face the same problems as ISPs who receive complaints about third party material and face disclosure orders as to the identity of posters. Persons seeking such disclosure orders have to satisfy the English court that they have grounds for such an order and to pay the costs of the body from whom they seek disclosure. Twitter does seem to have come on the radar of the English Courts in that the businessman and television presenter Lord Sugar found himself reprimanded by a judge when he commented on Twitter about an ongoing trial that he thought it possible that a Conservative peer being tried for fiddling his expenses might be cleared whereas Labour MPs had all been convicted, something which was thought to involve a potential contempt of court.

In a case called [Bacon v Automatic Inc, Wikimedia Foundation and Denver Post LLC](#) 2011 EWHC1072 Tugendhat J allowed the service of a Norwich Pharmacal order to be served by email provided that it was permissible under local law. In a case in the Court of Protection which was protecting the interests of a mentally impaired woman called M the order on publishing material about the brain damaged woman made by Baker J was specifically extended to social networks and media including Twitter and Facebook.

Honest Comment

In [Cook v Telegraph Media Group Ltd](#) 2011 EWHC1134,

Tugendhat J applied the principles recently laid down by the Supreme Court in *Spiller* and held that critical comments made by the Telegraph about an MP who reclaimed as expenses a charitable donation of £5 at a memorial service were a matter of comment and not an allegation of fact and though they were defamatory, they were defensible as comment. He rejected the more fanciful arguments on meaning and contentions that these were allegations of fact which had to be justified.

Equally, in the case of [Bowker v Royal Society for Protection of Birds](#) 2011 EWHC737, Sharp J held that criticisms made by RSPB of research by the Bowkers into black grouse were capable of defamatory meaning but were defensible on the grounds of qualified privilege. The best part of the case perhaps was that the Royal Society for the Protection of Birds were defended by the well known firm of Bird & Bird.

The obscene sums claimed under CFAs are likely to become a thing of the past- a matter of no small importance for defendants as costs far outstrip damages and are all too often determinative of decisions to settle cases.

CFAs the Government's Response

Kenneth Clarke, the Justice Secretary, in a statement to the House of Commons, has broadly speaking adopted the Jackson recommendations. The obscene sums claimed under CFAs are likely to become a thing of the past- a matter of no small importance for defendants as costs far outstrip damages and are all too often determinative of decisions to settle cases. CFAs will be deducted from

damages and therefore paid by claimants rather than defendants. The claimants' damages are likely to be raised by 10% to cover this.

Legislation will be required to implement these changes, which really take CFAs back to the original regime. No longer will defendants have to pay for CFAs or After The Event insurance with their grotesque unilateral premiums. Defendants who fail to accept reasonable (as it turns out) offers made by claimants to settle litigation are likely to face not only penal costs orders, but also an additional sanction of up to 10% of the value of the claim.

Defendants must therefore be prepared to make realistic offers to settle cases. However, Clarke wants to introduce a

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new test of proportionality so that only reasonable and proportionate costs may be recovered from the losing party. The idea is to curb disproportionate activity much loved by some claimant lawyers which has no real regard to the value complexity or importance of the claim.

Mosley Gets a Spanking

As reported elsewhere in this issue of the MediaLawLetter, the Fourth Section of the European Court of Human Rights rejected the attempt by Max Mosley to impose on the media a requirement of pre-notification if private information was to be published about a person. The moving spirit in this decision seems to have been the English judge on the court, Mr Justice Bratza.

They certainly did not like the way that the News of the World had behaved but they thought that pre-notification would be unworkable in practice and that the present law fell within the margin of appreciation allowed to individual legal systems. It was also noted that pre-notification was not required elsewhere in Europe.

French Criminal Libel and Libel Tourism

The case brought in France by Dr Calvo Goller concerning a review by Professor Weigand in the European Journal of International Law for criminal libel was dismissed by the Tribunal de Grande Instance de Paris. The review did not, they ruled, damage her honour or reputation or go beyond the limits of academic freedom and freedom of expression. Calvo Goller was criticised for libel tourism and ordered to pay Euros 8,000 damages to Professor Weiler, the New York based publisher.

Schadenfreude Corner

The consultant cardiologist Peter Wilmshirst, who was sued by the Boston based UMT Medical and who had obtained an order that UMT pay £200,000 by way of security for costs when they sued them for comments he had made at a medical conference about the shortcomings of their device for treating holes in hearts has had the satisfaction of seeing them go bust.

MLRC UPCOMING EVENTS

MLRC London Conference: International Developments in Media Libel, Privacy, Newsgathering and New Media IP Law

September 19-20, 2011 | Stationers' Hall, Ave Maria Lane, EC4 London

MLRC Annual Dinner

November 9, 2011 | Marriott Marquis, New York, NY

MLRC Forum

November 9, 2011 | Marriott Marquis, New York, NY

DCS Annual Meeting

November 10, 2011 | Proskauer Rose, New York, NY

Artistic Freedom Prevails Over Intellectual Property Rights in Dutch Case

By Reindert van der Zaal

A Dutch District Court gave an interesting judgment in a case in which the IP-rights of fashion giant Louis Vuitton clashed with the free speech of Danish artist Nadia Plesner. In its ruling, the Court seems to extend the ECHR-rule that the limits of acceptable criticism are wider for public figures and large public companies -since high winds blow on high hills- to 'famous IP', such as famous logo's and trademarks, including the iconic LV designs. Even when this IP is used as an 'eye catcher.' [Nadia Plesner Joensen v. Louis Vuitton Malletier SA](#), No. 389526 (Court of the Hague May 4, 2011).

Background

Danish artist Nadia Plesner studies at the Rietveld Academie, an art academy in Amsterdam, The Netherlands. One of Plesner's artworks, *Darfurnica* (the illustration right), is modeled after Picasso's 'Guernica' and expresses the artist's surprise at the attention that is paid to nondescript celebrities like Paris Hilton, while humanitarian disasters like those in Darfur remain rather unnoticed. In the middle of the painting an African boy is depicted, holding a look-a-like Louis Vuitton bag.

This boy was also depicted in an earlier work by Plesner as a standalone image called 'Simple Living':

Louis Vuitton took offense at this work, and obtained an *ex parte* order against Plesner in France in 2008. Plesner did not take action against this order, because it looked like Louis Vuitton would leave it at that.

Ex Parte Order and Motion to Quash

But it did not; when Louis Vuitton discovered the *Darfurnica* painting at an exhibition in Copenhagen,

Denmark, it claimed before a Dutch Court (because Plesner lives in The Netherlands) that the use of the pattern of the look-a-like bag infringes upon its design rights, and obtained an *ex parte* order against Plesner from the Court of The Hague in preliminary relief proceedings. The Court prohibited Plesner, inter alia, from showing or exhibiting her painting and the Simple Living image in the European Union. She was also prohibited from showing the painting on her website.

Plesner however, relying on her fundamental right to freedom of speech, more specifically her right to artistic freedom, brought preliminary relief proceedings against Louis Vuitton, in order to quash the *ex parte* order. After Plesner successfully challenged a judge of the Court in the preliminary relief proceedings, another judge of the Court in these preliminary relief proceedings ruled in favor of Plesner (an English translation of the judgment can be found [here](#)).

From the moment the case got a lot of international media attention, Louis Vuitton claimed that the case had nothing to do with 'Darfurnica', and that therefore the *ex parte* order did not extend to this painting. The Court disagreed with Louis Vuitton and rules that "*also the exhibition and the offering for sale of the painting fall under the prohibited acts since they are described in number 14 of the application and the Court in preliminary relief proceedings has referred to the operative part of the judgment.*" However, since Louis Vuitton stated during the hearing that it had no problems with the painting, the judgment focuses on the Simple Living drawing.

The Court balanced Plesner's right to free speech (Article 10 ECHR) with Louis Vuitton's right to peaceful enjoyment of property (Article 1 of the first Protocol to the ECHR). The Court ruled that "*the interest of Plesner to (continue to) be able to express her (artistic) opinion through the work*

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The Court prohibited Plesner, inter alia, from showing or exhibiting her painting and the Simple Living image in the European Union. She was also prohibited from showing the painting on her website.



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“Simple Living” should outweigh the interest of Louis Vuitton in the peaceful enjoyment of its possession.”

In that respect, the Court ruled that artists enjoy a considerable protection with regard to their artistic freedom, in which art may “offend, shock or disturb”. Plesner uses Louis Vuitton’s reputation to pass on her society-critical message (the situation in Darfur) and besides the bag she also depicts another luxury/show business picture in the form of a Chihuahua dressed in pink.

The Court goes on: *“Apart from the question of whether it could be taken into consideration in this design right case that after seeing “Simple Living” a part from the public could possibly think that Louis Vuitton (or, as the Court has added: a Chihuahua dressed in pink) is in any sense involved in the problems in Darfur, the Court in preliminary relief proceedings does not deem that this has become plausible (...).”* Furthermore, the circumstance that Louis Vuitton is a very well-known company, of which the products enjoy a considerable reputation, which it also stimulates through advertisings with famous people, moreover implies that Louis Vuitton must accept criticism as the present one to a stronger degree than other right holders. The Court cited to *Steel vs. Morris*, ECHR Feb. 15 2005, 68416/01, in which the ECHR ruled that *“the limits of acceptable criticism are wider”* for large well-known public companies.

The Plesner judgment seems to stretch the *Steel vs.*

Morris judgment, in the sense that the limits of acceptable criticism also seem to be wider in respect of ‘famous intellectual property’, such as well-known logo’s, designs and trademarks.

The Court continued by stating that the Simple Living drawing has to be regarded as a lawful statement of the artistic opinion of Plesner. Plesner does not infringe upon Louis Vuitton’s design rights. The Court adds: *“This is not different if the illustration is somewhat used as an eye-catcher, all the more because Plesner has argued, insufficiently refuted, that the work occupies a central position in her oeuvre (concerning Darfur) and that to that extent establishing extra attention (for the exhibition with the problems in Darfur as a theme) is justified.”* Therefore Plesner can also use the drawing as an eye-catcher, something Louis Vuitton heavily opposed.

Plesner also pleaded that the *ex parte* proceedings are not appropriate for conflicts such as this, in which a large company demands a far-reaching limitation on the freedom of speech of an artist. However, since the Court already ruled in favor of Plesner, and quashed the *ex parte* order, the Court did not rule on this point.

Jens van den Brink, Christien Wildeman and Reindert van der Zaal of Kennedy Van der Laan in Amsterdam represented Nadia Plesner in this case. Louis Vuitton was represented by B.J. van den Broek, Amsterdam.

French Court Dismisses Criminal Libel Case Against *The Observer*

By Jean-Frédéric Gaultier & Emmanuelle Levy

Following an article entitled "*America's New Vogue for Black Fashion is all due to Michelle Obama*" published in the British weekly newspaper *The Observer* and on the website www.guardian.co.uk, Yves Saint Laurent and its creative director, Stefano Pilati, initiated legal action for defamation before the Paris District Court against the author of the article, who resides in the United States, the Editor of *The Observer* and the Managing Director of Guardian News and Media Limited, editor of the website www.guardian.co.uk.

The Paris Court of Appeal held the claims of the plaintiffs to be unfounded, the rules cited in the claims not being applicable to foreign publications.

Rules on Service of a Writ of Summons Abroad

The Court of Appeal, upholding the ruling of the judges at first instance, declared null and void the writ of summons served on the Editor and on the Managing Director of *The Observer*, the writs having been delivered to their business addresses and not to their home addresses.

The plaintiffs alleged that, for a writ of summons to be valid, the fact that it was duly and properly delivered to the Public Prosecutor's office of the Court enjoying jurisdiction was sufficient. They alleged that, in any case, the Editor, comparable to the "Publication Director" within the meaning of French law, and the Managing Director, the legal representative of the company, could be duly and properly served with a valid writ of summons at the head office of the newspaper pursuant to the Law of 29 July 1881 on the Press. (The "Publication Director" title is purely formal and does not correspond to particular functions in a journal. The journal has only to designate, in accordance with this law, the person who will be legally liable for potential press-related offences.)

The Court pointed out that publications published or printed abroad are not subject to this law with regard to the organization of the newspaper and, in particular, with regard to the requirement to designate a Publication Director. Under these conditions, the Editor and the Managing Director of a foreign publication, who are not "Publication Directors" within the meaning of French law, have to be served with a writ of summons at their home addresses.

Failing such, in the event of service at the address of the newspaper, the plaintiff has to establish that the defendants have been personally made aware of the writ of summons, for

example when the writ of summons has been served on the addressee in person and not on an assistant or on the legal department of the newspaper.

The essential purpose of this requirement for personal service resides in Article 55 of the Law of 29 July 1881, which requires the defendant to provide evidence of the truthfulness of the defamatory facts within ten days of service of the writ. Should proof fail to be tendered in this way within the time allowed, the defendant will be barred from producing such evidence (the defendant can still avail himself of other defences, such as "good faith").

Considering the severity of this rule and the brevity of the time allowed, it is very important to duly and properly serve the defendant with a writ of summons or, failing such, it is important that the defendant should have been personally made aware of the writ of summons.

As these conditions were not met in the present case, the Court held that the writ of summons served on the defendants was null and void and threw out the case.

Criminal Liability and Foreign Journalists

The Anglo-American journalist residing in the United States had been served with a writ of summons in his capacity as author of the article at issue pursuant to Article 42 of the Law of 29 July 1881, which raises a presumption of liability notably against the author of the article at issue.

The Court pointed out, in accordance with an unbroken line of precedents that Article 42 is not applicable to cases concerning newspapers printed or published abroad. Under such conditions, the rules of general criminal law apply. The plaintiffs must therefore establish actual and personal participation by the defendants in introducing the comments at issue into France.

As the plaintiffs failed to produce any evidence that the journalist had personally and deliberately taken part in the distribution of his article in France, the Court dismissed their claims. In this way, even if the French criminal courts most often claim jurisdiction to repair loss suffered on French soil that arises from defamatory comments published abroad, judges are particularly vigilant with regard to the application of French rules to foreign publications. Transferring to France a dispute whose links with this country are not significant is thus not as simple as that.

Jean-Frédéric Gaultier and Emmanuelle Levy are lawyers with Clifford Chance in Paris.

UK Government Releases Libel Reform Bill

What the Draft Bill Would Mean in Practice

By Niri Shan and Lorna Caddy

In March, the UK Ministry of Justice released a much awaited [Draft Defamation Bill](#) to reform English libel law. This article analyzes some of the key changes that would ensue if the Bill is enacted and what those changes would mean in practice for claimants and defendants. We also analyze what is missing from the Bill, in light of current issues and when compared to Lord Lester's Private Member's Defamation Bill published last year.

Clause 1 of the Draft Bill

Substantial Harm - All claimants must show that the publication has caused or is likely to cause substantial harm to the claimant's reputation. Libel is currently actionable without proof of actual damage. Recent case law has introduced a "threshold of seriousness" in what is defamatory. Following *Jameel v Dow Jones & Co* [2005] EWCA Civ 75, there is also the possibility of striking out actions where there has been no real and substantial wrong.

Comment

Given the recent case law developments, the introduction of a requirement for claimants to show substantial harm will not come as a surprise to most media lawyers. What is still to emerge is how a company goes about showing substantial harm. Does it have to do this by demonstrating a drop in profits/loss of a contract or a likelihood that profits are likely to drop or a contract is likely to be lost? Some more guidance on this would assist.

Clause 2 of the Draft Bill

Responsible publication on a matter of public interest - It is a defense to show that the statement complained of is, or forms part of, a statement on a matter of public interest; and the defendant acted responsibly in publishing the statement complained of.

Comment: Clause 2 of the Bill codifies some of the existing law on Reynolds Qualified Privilege deriving from the House of Lords' cases of *Reynolds v Times Newspapers*

Limited [1999] 3 WLR 1010 and *Jameel v Wall Street Journal (Europe)* Sprl [2007] 1 AC 359, including some of Lord Nicholl's 10 factors. As per Lord Lester's Bill, it is intended that the defense will be available regardless of whether the statement complained of is a statement of fact, an inference or an opinion. Historically, this defense has arguably related to statements of fact only.

It follows that defendants may choose to run both a responsible publication defense as well as an honest opinion defense when the statement is one of opinion. However, given the lack of a requirement to show responsible journalism for honest opinion, this would seem the more attractive route for a defendant.

Clause 2(2) lists 8 factors which the court may have regard to in deciding whether the defendant has acted responsibly. In practice, publishers have found this defense very complicated and expensive to run. The Consultation Paper stresses that the factors should not be interpreted as a checklist or set of hurdles for defendants to overcome. They should be interpreted in an illustrative and non-exhaustive way. Historically, they have been interpreted as hurdles so the inclusion of the word "may" is welcome.

In the Consultation Paper, the Government asks for views on whether "the nature of the publication and its context is more important than the other factors" and whether it should be given greater weight. We submit that it should be. Courts need to bear in mind the circumstances in which the publisher is operating. As the Consultation Paper points out, the context of a national newspaper is likely to be different from the context of a non-governmental organization or scientific journal.

Clause 2(3) helpfully clarifies the law in relation to the reportage doctrine - i.e. neutral reporting of attributed allegations - for example, the unfolding of a dispute. In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication. It gives a statutory basis to the case of *Al-Fagih* [2001] All ER (D) 48. Currently, this defense is relied on infrequently. Hopefully, a statutory basis will give defendants more confidence to use it.

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Clause 3 of the Draft Bill

Clause 3 renames the common law justification defense with a statutory defense of truth. "It is a defense to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true." The burden of proving truth remains on the defendant.

Clause 4 of the Draft Bill

Honest Opinion - a defendant will be able to rely on this defense where: The statement is one of opinion On a matter of public interest That an honest person could have held on the basis of: a) a fact which existed at the time the statement complained of was published; b) a privileged statement which was published before the statement complained of.

Comment: This is hopefully a big liberalization of the defense formally known as fair comment. It has been notoriously hard to rely on and there has been confusion about what a defendant must demonstrate in terms of fact supporting the comment. Here, provided a statement is opinion on public interest, it will be sufficient if a fact existed at the time the statement complained of which support the opinion in question. It seems to follow from this that the author would not have to include details of the fact(s) within the comment.

It also appears that an author can also rely on facts which existed at the time of publication but of which he was not necessarily aware. However, the Consultation Paper muddies the waters here stating "It is envisaged that a fact may be expressed in or implied by the statement and the courts will be able to apply this in a flexible way taking account of the particular context in which the opinion was formed."

While this would be a hugely welcome development, some commentators would like to see the introduction of a single meaning rule for honest opinion whereby the meaning of the allegedly defamatory words to be defended is held to be the meaning ascribed to those words by the author.

Clause 5 of the Draft Bill

Privilege - amends the provisions contained in the Defamation Act 1996 relating to the defenses of statutory

absolute and qualified privilege to extend the circumstances in which these defenses can be used.

Comment: Key changes which will affect journalists' ability to report proceedings and meetings are:

Section 14(3) of the Defamation Act 1996 currently provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK. This defense would be extended to cover proceedings in any court in a country or territory outside the UK.

Clause 5(3) of the Bill extends the defense of statutory qualified privilege to summaries of notices or other matter issued for the information of the public by a number of governmental bodies, and to summaries of documents made available by the courts. Summaries of material are different from copies or extracts in so far as they may involve an element of paraphrasing of the original material.

Currently, qualified privilege under Part 1 of Schedule 1 of the 1996 Act extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. Clause 5 of the Bill would extend the scope to cover the different types of publication to which the defense extends anywhere in the world.

Clause 5(5) would also extend qualified privilege to fair and accurate reports of proceedings at general meetings and documents circulated by public companies elsewhere in the world. Currently, the privilege only extends to UK public companies.

Clause 5(7) extends qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences.

Clause 5's extension of privilege to include a greater international dimension is welcome. The press have indicated that many instances arise where they are threatened with legal action for quoting or citing public documents, for example relating to corrupt activities in other countries.

Clause 6 of the Draft Bill

Single Publication rule - where a person publishes a statement to the public and subsequently publishes that

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statement or a statement which is substantially the same, the limitation period for any cause of action is to be treated as accrued on the date of the first publication. The limitation would not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication. The first occasion on which a publication is made available to the public generally (or to any section of the public) is to be regarded for all purposes as the date of publication of each subsequent publication.

Comment: If enacted, Clause 6 would overturn the ruling in the case of *Loutchansky v Times Newspapers* [2001] 3 WLR 404 CA where it was held that each time an article that appeared in the Times archive was accessed, there was a fresh publication giving rise to liability and the limitation period would be open-ended. This date of first publication will be the relevant one for calculating the one year limitation period, rather than the current system whereby words are deemed as published as at the date on which they are accessed, irrespective of when they were first published.

While this would be a welcome development, Clause 6(5) may lead to some confusion. It reads:

“In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters): a) The level of prominence that a statement is given; b) The extent of the subsequent publication.”

The Consultation Paper explains the provision by giving the following example: “A possible example of this could be where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.”

This subclause has the makings of trouble and uncertainty. What happens if a story is not in a prominent place but it suddenly gets huge profile because someone other than the defendant draws attention to it, e.g. via Twitter? Who is responsible for this new “level of prominence”?

Clause 7 of the Draft Bill

Libel Tourism - A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

Comment: The aim of this clause to address the issue of “libel tourism”. It is carefully worded to avoid conflict with our European obligations, particularly under the Brussels Regulation on jurisdictional matters. In summary, Clause 7 focuses on cases where action is brought against a person who is not domiciled in the UK or an EU Member State (or a party which is party to the Lugano Convention).

In practice, this is often going to rule out bringing a claim against a publisher based in the US. This complements the US’s SPEECH Act introduced in 2010 to prevent foreign libel judgments being enforced there.

The clause is intended to ensure that, in cases where a statement has been published in this jurisdiction and also abroad, the court is required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. The example given in the Consultation Paper is where a statement is published 100,000 times in Australia and 5,000 times in England, that would be a good basis on which to conclude that the most appropriate jurisdiction would be Australia.

Clause 8 of the Draft Bill

Presumption of trial without jury

Comment: This would be a welcome reversal of presumption. It would mean that issues which could otherwise have been decided by a judge at an early stage (such as meaning) could be resolved before trial. For many reasons, the reversal of the presumption is very likely to reduce costs for all parties in a defamation action.

What’s Not in the Bill

Whether companies must show the publication has caused or is likely to cause substantial financial loss.

In his Private Member’s Bill, Lord Lester included a clause which stated that a body corporate which seeks to

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pursue an action for defamation must show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the body corporate.

This has been abandoned by the Government. This is likely to cause some upset among publishers. However, if the Government's Bill is adopted in its current form, companies are going to have to demonstrate substantial harm. How they will demonstrate this in practice without having to point to a drop in profits/loss of contracts, will be interesting to see.

Safe Harbor Provisions

While the issue of responsibility for publication on the internet is not dealt with in the current draft of the Bill, the Government is consulting on the issue and may incorporate a provision to deal with it in due course. Lord Lester's Private Member Bill set out safe harbor provisions in line with those specified in the Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations 2002. Clause 9 of the Bill specifies that for those involved in publication/broadcast (besides primary publishers who include authors, editors or a person acting as an author or editor), on receiving written notice of a complaint about defamatory material, the defendant will have a defense where within 14 days (or such other period as the court may specify), the words or matters have been removed from publication.

The Government is basing its consultation around clause 9 of Lord Lester's Bill. Clause 9 includes a provision which reads that "Any defendant in an action for defamation has a defense if the defendant shows that the defendant's only involvement in the publication of the words or matters complained of is as a facilitator." Facilitator is defined as a "person who is concerned only with the transmission or storage of the content of the publication and has no other influence or control over it."

These days, hosting is not a straight forward matter. Many publishers host their own content and then user generated content, such as message boards. Many of those publishers would hope to successfully argue under the current law that they were a facilitator in the latter situation. It would be helpful if this were clarified. What exactly is a facilitator / ISP? The Consultation Paper states "in most circumstances a blog owner or discussion board owner may be viewed in the same way as an ISP, as he or she would have editorial control

over the content of the postings and hence the opportunity to remove any material considered to be potentially defamatory."

What if the blog owner purposefully did not exercise editorial control over UGC posted to its site? In these circumstances, we would hope he would be able to rely on a safe harbor provision.

Procedure

A proposal to create a new High Court procedure for defamation cases to be channelled through a process whereby key issues such as the following can be determined as early as possible:

- ◆ Whether the claim satisfies the new substantial harm test where this is disputed
- ◆ What the actual meaning of the words complained of is and whether the meaning is defamatory
- ◆ Whether the words complained of are a statement of fact or an opinion
- ◆ Whether the publication is on a matter of public interest
- ◆ Whether the publication falls within the categories of publication in Schedule 1 of the Defamation Act 1996 for which the defense of qualified privilege is available
- ◆ Consideration of costs budgeting in appropriate cases.

Currently, there are no proposals included in the Bill for a change of procedure in defamation cases. However, the Government is consulting on this and has put forward some core elements of a new procedure for discussion (shown above).

These would all be very welcome. Consideration of these issues should narrow the issues in dispute and lead to earlier settlement / cheaper litigation. It is currently envisaged that costs should be costs in the case if the claim proceeds. However, this needs to be thought through. What if the parties have tried to agree these matters themselves without success and then the judge gives a ruling which is the same or similar to one or other party's submissions? Should costs be in the case in those situations?

Privacy

While the Defamation Bill will help promote freedom of
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speech in relation to defamation actions, it is disappointing that the Government is not actively looking at privacy reform in the same way. The current privacy law is in many ways a bigger threat to free speech especially because it is quite common for the court to grant pre-publication injunctions in privacy claims. This happens very rarely in defamation cases. There is a distinct possibility that, because of the additional hurdles to bringing a defamation claim introduced by the Bill, and the availability of pre-publication injunctions in privacy claims, claimants will increasingly try to shoe horn what are essentially defamation claims into privacy actions.

Costs

Recent lobbying by media organizations has concerned

the current costs regime whereby the conditional fee agreement system (with success fees of up to 100% and costly after the event insurance premiums) makes it too risky for many defendants to defend claims, resulting in a chilling effect on freedom of expression. Any reform of the substantive law of defamation needs to be accompanied by a change in the costs regime. Lord Justice Jackson's consultation on civil litigation funding and costs ended last month.

The Ministry of Justice has indicated that it will introduce any necessary primary legislation in the Spring. Primary legislation is going to be necessary, following the European Court of Human Rights' ruling in the case of MGN Limited v UK.

Niri Shan is a partner and Lorna Caddy a senior associate at Taylor Wessing in London.

Phone-Hacking in the UK and Damages

Distinguishing the Truth from the Hyperbole

By Keith Mathieson

Last September the New York Times ran a long article about illegal phone-hacking by the best-selling UK tabloid the News of the World. News International, the publisher of the newspaper, responded in characteristically combative fashion by dismissing the allegations as baseless and untrue and even accusing the New York Times of breaching its own ethical guidelines by indulging in a gratuitous attack on a commercial rival.

Eight months on, how things have changed. The trickle of litigation last September has turned into a flow of such proportions that a judge at the High Court in London has been specially assigned to manage the cases. In the last couple of weeks the News of the World has admitted liability in eight cases and appears to have made substantial offers of settlement from a multi-million pound compensation fund it has established for the purpose. Perhaps most worryingly for NI, the Metropolitan Police has reopened its criminal investigation into the affair. So far, it has arrested three senior journalists and the big question is whether certain senior NI executives might also receive the summons to attend at Scotland Yard.

The affair has gradually begun to occupy more and more space in the UK media, though it's fair to say that the bulk of

the coverage has been by the Guardian, Independent and BBC, all considered unfriendly towards Rupert Murdoch and his business empire. It is now clear that we have a significant media scandal on our hands. What was once thought to be an isolated case of a rogue reporter going off the rails now appears in fact to have been a systematic and possibly criminal enterprise that involved inexcusable invasions of personal privacy over several years.

Having said that, there is no evidence that the admitted wrongdoing at the News of the World between 2004 and 2006 has continued or has spread to other newspapers. None of the victims appears to have suffered lasting damage and the information derived from the interception of voicemails appears to have been for the most part celebrity tittle-tattle of a fairly uninteresting kind.

These considerations have not, however, put a brake on the relentless coverage of the affair or its accusatory nature. In February 2011 the coverage prompted one former editor to speak out against what he saw as a disproportionate attack on the News of the World. Donald Trelford, the respected former editor of the Observer, wrote in the Independent that the phone-hacking saga was a case of "dog eats dog gone

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barking-mad." In his view, the agenda was driven by a combination of MPs and celebrities bent on revenge against the tabloid press, greedy lawyers and the "anti-Rupert Murdoch faction." The fuss about phone-hacking was "obsessive, hysterical and opportunistic."

Since Trelford's article, NI's admission of certain instances of voicemail interception may be thought to leave Trelford with a spot of egg on his face. But Trelford's observations retain some force: much of the recent discussion has been characterised by exaggeration, vindictiveness and self-interest. Yes, intercepting voicemails is a crime and it's an invasion of personal privacy, but it's not the most serious crime and nor in most cases is it even at the more serious end of the scale of possible privacy infringements.

One of the more extreme contributions has been by the Labour MP Tom Watson, a member of the House of Commons Culture, Media and Sport Committee. On the Labour Uncut blog he lays into the Murdoch empire - and indeed the Murdoch family - with unrestrained abandon. The phone-hacking affair has "pulverised careers, relationships and lives"; Murdoch's operation is about to "sink in shame" and "judgment day is round the corner"; News International's approach to "a saga of mass criminality is one of dumb insolence"; people have "had their lives turned inside out", suffering "depression, sleepless nights and fear"; they've "lost friends and loved ones" and contemplated suicide. Watson expresses the hope that "those bullies are getting a flavour of the misery they have casually meted out to people over many years."

Henry Porter has said the phone-hacking affair is "one of the most serious post-second world war scandals to affect British public life" and expressed the view that it is "hard to imagine a more dangerous breach of trust by a public corporation." A prominent London media lawyer has said that phone-hacking was "endemic on Fleet Street" with "just about every news organisation" being involved "at one level or another". Charlotte Harris, a lawyer representing a number of claimants, has said that up to 7,000 people may have had their phones hacked by the News of the World.

Lawyers are "outraged" on behalf of their clients. One lawyer's outrage has sent him spinning into a vortex of mixed metaphors. Rod Dadak, a solicitor said to be representing "potential claimants", is quoted by Reuters saying:

Every case is different, but is it really likely that any of the victims of phone-hacking will be able to say their lives were ruined?

This is Murdoch's Watergate because the cat is out of the bag. Two or three people have taken the rap but the powers that be must have known or turned a blind eye to what was going on. ... It's a black hole.

The lawyer who represented Max Mosley, Dominic Crossley, has called for phone-hacking claimants to be awarded exemplary damages (i.e damages of a punitive and non-compensatory nature) to reflect NI's "shocking" behaviour and to deter them from doing it again. He notes that NI's parent company, News Corporation, has a turnover of US\$33 billion. Against that figure, he suggests only eye-watering awards of damages will have any impact on the News Corp "beast." Mark Lewis, the lawyer who claims to have "devised" phone-hacking claims, is indeed seeking "huge" damages for his client Mary Ellen Field, a former confidante of the model Elle McPherson who says she lost her job, reputation and health in consequence of phone-hacking by the News of the World.

Much of this is indeed posturing and exaggeration. No-one would deny that phone-hacking is a reprehensible practice, but there's a lot of worse stuff going on. Can it really be right for claimants to expect damages of hundreds of thousands of pounds for the indignity of a tabloid hack listening to their voicemail messages?

As Dominic Crossley concedes, damages in privacy cases in the UK have been nowhere near six figures. Until Eady J awarded Max Mosley £60,000, they hadn't even reached five figures, though a few cases had been reported in which settlements involved the payment of sums in the region of £30,000 to £40,000. In Max Mosley's case (*Mosley v News Group* [2008] EWHC 1777) Eady J said:

It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate and avoid the appearance of arbitrariness. I have come to

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the conclusion that the right award, taking all these considerations into account, is £60,000.

Every case is different, but is it really likely that any of the victims of phone-hacking will be able to say their lives were ruined? To take three not particularly random examples, neither Lord Prescott (the UK's ebullient former deputy prime minister), Sienna Miller (a glamorous actress) nor Steve Coogan (a less glamorous actor), might be thought to lack those features that would normally define those whose lives had been ruined. Max Clifford, the doyen of celebrity PR advisers, who settled his claim against the News of the World some time ago, displays cheerful resilience in the face of his ordeal.

Before the current scandal emerged, NI had settled with two claimants: Mr Clifford and that of Gordon Taylor, head of the Professional Footballers' Association. Those settlements have been reported as involving payments of between £700,000 and £1 million.

We do not know the reasons why NI decided to pay these apparently lavish sums and it seems not unreasonable to suppose that the confidentiality clauses apparently contained in the settlement agreements may have been an important factor.

Moreover, NI's own statement of admission and apology, in referring to a compensation fund, will have done little to dampen claimants' expectations of a big pay day. But it nonetheless seems unlikely that if the courts have to decide what compensation should be paid to victims of phone hacking, they will award anything like the sums the News of the World seems to have agreed to pay Clifford and Taylor (this may not, of course, be a concern for some of the claimants, who apparently just want an apology).

Instead, the courts will take a close look at all the circumstances of each case and make a reasonable and proportionate award. It is quite possible that some claimants who are able to demonstrate real harm and distress will receive payouts even greater than Max Mosley, but it is equally possible that other claimants won't get anywhere close to that sort of figure. It may be worth remembering that if you sue for personal injury in the UK, £60,000 is roughly the figure you get for the loss of an arm. Six figure damages are reserved for brain damage and quadriplegia. Do we really think phone hacking is on the same scale?

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Let's Do the Time Warp Again: New York Court of Appeal Rules Long Arm Jurisdiction Exists Over Some Non-domiciliary Copyright Infringers

By Toby Butterfield and Zehra Abdi

On April 21, 2009, the Second Circuit vacated and remanded a decision by the Southern District of New York (Lynch, J.) to dismiss book publisher Penguin's complaint against online library American Buddha for lack of personal jurisdiction. *Penguin Group (USA) Inc. v. American Buddha*, No. 09-528. The Second Circuit's decision was based on the New York Court of Appeals' determination that the location of the copyright holder is the "situs of injury" for the purpose of determining long arm jurisdiction under NY CPLR 302(a)(3)(ii). This ruling confirms that media entities based in New York may bring actions there against alleged infringers, wherever in the United States the infringer may be located. However as the ruling is limited to literary works, it underscores how long courts have taken to determine relatively basic issues concerning the application of copyright law to the Internet.

Background

Penguin, the well-known book publisher based in New York, sued American Buddha, an Oregon not-for-profit corporation with its principal place of business in Arizona ("Buddha"), in the Southern District of New York for copyright infringement. Penguin alleged that Buddha infringed on Penguin's copyrights to four books (Oil!" by Upton Sinclair; "It Can't Happen Here" by Sinclair Lewis; "The Golden Ass" by Apuleius, as translated by E.J. Kenney; and "On the Nature of the Universe" by Lucretius, as translated by R.E. Latham) by uploading the text of those books to its website

www.naderlibrary.com. The actual electronic copying and uploading of the works took place in Oregon or Arizona. Penguin did not allege that infringing conduct occurred in New York and pled only that "[u]pon information and belief, defendant American Buddha has engaged in infringing activities that injure plaintiff in this district, and is otherwise subject to personal jurisdiction in this district." Complaint, ¶ 5.


Buddha moved to dismiss the complaint for lack of personal jurisdiction, arguing that its ties to New York were too insubstantial. In response, Penguin asserted that it had secured long-arm jurisdiction over Buddha under CPLR 302 (a)(3) (ii), which provides jurisdiction over non-domiciliaries who commit tortious acts outside the state that result in injuries within New York. Penguin argued that because it and therefore its intellectual property were located in New York, it suffered injury in New York. Buddha countered that CPLR 302 (a) (3)(ii) was inapplicable because Penguin had not shown injury within the state.

The District Court dismissed Penguin's complaint holding that Penguin was injured in Oregon or Arizona, where the copying and uploading took place. The Court determined that Penguin's "purely

derivative economic injury" in New York based on its domicile here was insufficient to trigger CPLR 302 (a)(3)(ii). The Court recognized previous cases that endorsed plaintiff's position that the situs of injury is where the plaintiff is located and/or copyright is owned, but found that those decisions

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AMERICAN BUDDHA ONLINE LIBRARY COPYRIGHT NOTICE



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The American Buddha Online Library ("ABOL") is a project of American Buddha, an Oregon nonprofit corporation that makes available selected artistic and literary works under a system of voluntary, free online lending, under the fair use exclusion from copyright liability accorded to libraries and archives pursuant to 17 U.S.C. Section 108. American Buddha educates members as to the meaning of lawful fair use of copyrighted materials, and imposes contractual and technical limitations on access to the archive. The American Buddha Online Library contains materials that are protected by copyright, and by accessing this content, library users are agreeing not to violate those copyrights by piratical behavior, i.e., using the materials for anything other than private study, scholarship or research.

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(37 C.F.R. 201.14)

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[Legal Representation by Online Media Law, PLLC](#)

To send DMCA Notices to The American Buddha Online Library's Legal Representative, [Click here](#)

Penguin alleged that Buddha infringed on its copyrights to four books by uploading the text of those books to its website.

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were “at odds with the well-established principle requiring a direct injury in New York to support jurisdiction.” *Penguin v. American Buddha*, 2009 WL 1069158, at *3-4. While acknowledging the Internet as a “complicating factor” for personal jurisdiction analysis, the court ultimately concluded that the Internet played “no role in determining the situs of [Penguin’s] alleged injury” since the claimed infringement occurred in Oregon or Arizona. *Id.* Finding the jurisdictional issue to be dispositive, the decision did not address whether Penguin satisfied the remaining 302(a)(3)(ii) elements, or whether the exercise of jurisdiction would comport with due process requirements.

(Jurisdiction under CPLR 302(a)(3)(11) rests on five elements: First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce. The Court’s decision and Penguin’s subsequent appeal addressed only the third element.)

New York Court of Appeals Ruling

On Penguin’s appeal, the sole issue was whether there was a basis for personal jurisdiction over Buddha in New York. Recognizing a split of authority on CPLR 302 (a)(3)(ii)’s application to copyright infringement cases against out-of-state defendants, the Second Circuit certified the following question to the New York Court of Appeals:

“In copyright infringement cases, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302 (a)(3)(ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?”

The Court of Appeals responded by narrowing and reformulating the certified question to read: “In copyright

infringement cases involving the uploading of a copyrighted printed literary work onto the Internet, is the situs of injury for purposes of determining long-arm jurisdiction under 302 N.Y. C.P.L.R. § 302 (a)(3)(ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?” (Emphasis added.) The answer, the Court said, is the location of the copyright holder. [*Penguin Group \(USA\) Inc. v. Am. Buddha*](#), 16 N.Y.3d 295, 302, 946 N.E.2d 159 (2011).

The Court of Appeals distinguished cases involving uploading copyrighted content onto the Internet from traditional commercial tort cases in which courts generally link the injury to the place where the sales or customers are lost, finding it “illogical to extend” the traditional tort approach that “equates a plaintiff’s injury with the place where its business is lost or threatened” to the context of “online copyright infringement cases where the place of uploading is inconsequential and it is difficult, if not impossible, to correlate lost sales to a particular geographic area.” *Id.* at 305. The Court’s analysis went well beyond traditional situs of injury inquiry, and took into consideration factors such as the broad reach and purpose of the Internet, the diverse ownership rights of copyright holder and the impact of non-economic harm stemming from infringement, such as loss of creative

The Court’s analysis went well beyond traditional situs of injury inquiry, and took into consideration factors such as the broad reach and purpose of the Internet, the diverse ownership rights of copyright holder and the impact of non-economic harm stemming from infringement, such as loss of creative incentive to publish works.

incentive to publish works. *Id.*

The Court of Appeals also rejected Buddha’s assertion that allowing Penguin to prevail would open a Pandora’s box, allowing any non-domiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copyright owner of a printed literary work. The Court pointed out that CPLR 302 (a)(3)(ii) incorporates built-in safeguards against such exposure by requiring a plaintiff to show that the non-domiciliary both “expects or should reasonably expect the act to have consequences in the state” and, importantly, “derives substantial revenue from interstate or international

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commerce.” The Court further referred to the Federal Due Process requirements requiring proof that the out-of-state defendant has the requisite “minimum contacts” with the forum state and that the prospect of defending a suit here comports with “traditional notions of fair play and substantial justice.” Based on this response, the Second Circuit vacated and remanded the district court’s previous decision, leaving it to the district court to grapple with those remaining issues.

Remaining Long-Arm Issues

While at first glance this appears to be a victory for Penguin, as well as for all copyright owners, how much of a win this is remains to be seen, as the decision did not address whether Penguin had met its burden of proof with respect to the remaining long-arm requirements, such as whether Penguin proved that Buddha derived substantial revenue from interstate commerce, or whether this exercise of jurisdiction would comport with federal due process. Given that Buddha alleges that it does not transact business with, maintain offices in or derive any economic benefit from New York, Penguin still must carry that burden. Those viewing this decision as a green light to commencing an action against an out of state infringer in a New York court would be wise to consider whether the action would withstand due process scrutiny, notwithstanding a successful allegation of in state injury.

The Court of Appeals and the district court had contrasting attitudes towards the impact of the Internet in shaping their respective conclusions. While the Internet seemed to have very little influence over the district court’s decision, which stated it “no doubt added layers of depth to personal jurisdiction jurisprudence but played no role in determining the situs of injury,” the Court of Appeals factored the impact of the Internet quite heavily in its jurisdictional analysis, pointing out that because of the Internet, identifying the situs of injury is not as simple as turning to “the place where plaintiff lost business” because there is no singular location that fits that description.

Given that the Internet has been operational for over 20 years, and in its early days was the subject of numerous cases concerning jurisdiction, the Court’s narrow reformulation of the question to apply only to literary works is troubling. Developers can create, move and dismantle websites in minutes, but over more than two years of litigation, this case has not yet determined the threshold issue of jurisdiction, and

the Court of Appeals was not willing to answer the question generally. This creates the distinct possibility that some other jurisdictional analysis may apply for other forms of IP such as photographs, videos or software. Unlucky future litigants suing for infringement of each form of IP may have to litigate, appeal and certify further questions to the Court of Appeals. Non-lawyers would be forgiven for assuming these questions had been answered 20 years ago, when copyright law started to be applied the Internet.

Toby Butterfield and Zehra Abdi are lawyers with Cowan DeBaets Abrahams & Sheppard, LLP. Plaintiff was represented by Richard Dannay, Cowan, Liebowitz & Latman, P.C. New York. Defendant was represented by Charles Hernan Carreon, Online Media Law, PLLC, Tucson, AZ.

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A Bridge Too Far—The Google Books Settlement

By Devereux Chatillon

At the time that the proposed settlement of the Google Books litigation was revealed in October of 2008, it was hailed as a visionary break through. Richard Sarnoff, then President of the Association of American Publishers and an architect of the settlement [described](#) the proposed settlement's benefits:

“From our perspective, the agreement creates an innovative framework for the use of copyrighted material in a rapidly digitizing world, serves readers by enabling broader access to a huge trove of hard-to-find books, and benefits the publishing community by establishing an attractive commercial model that offers both control and choice to the rightsholder.”

In the years following the announcement, however, over 6800 potential participants rejected it and the settlement was the target of an extraordinary number of formal objections filed with the court—over 500 submissions, most of them critical. A full day Fairness Hearing in February 2010 was filled mainly with objections to the settlement

So, it was not a huge surprise when on March 22, 2011, Judge Denny Chin, sitting as a United States District Court Judge for the Southern District of New York, rejected the proposed settlement in the Google Books case. [The Authors Guild v. Google Inc.](#), No. 05-8136 (March 22, 2011) (“Opinion”).

The only surprise was that it took the judge over a year to reach that decision. The rejected settlement itself while a brilliant legal construct had stretched both copyright and class action law well beyond the breaking point. And it was that conclusion that the judge reached.

Background

The Google Books case was the result of Google's Library Project. In 2004, Google announced that it had decided to digitize the entire collections of major university libraries, including books in copyright, without asking permission or paying the rights holders. (Opinion at 2-3) The digitized volumes would then be available as snippets in

Google's search results. Although Google initially said that it would not gain any revenue from the Library Project, as it was called, search results including those of digitized books are now included in regular Google search results and ads are shown against those search results.

And so five major publishers and the AAP, as well as the Authors Guild on behalf of a class of authors, sued Google in federal court in New York claiming copyright infringement in 2005. Less predictable perhaps was the 2008 announcement of a settlement, one that included publishers, authors, and the libraries whose collections were the source of the digitized volumes.

The actions were structured as class actions against Google, with one class including book publishers and one including book authors. Briefly, the settlement allowed Google to include all books that had been digitized in search results and other non-display uses. It also allowed Google to sell certain products based upon the digitized books, including ebooks to consumers, digital library subscriptions, etc.

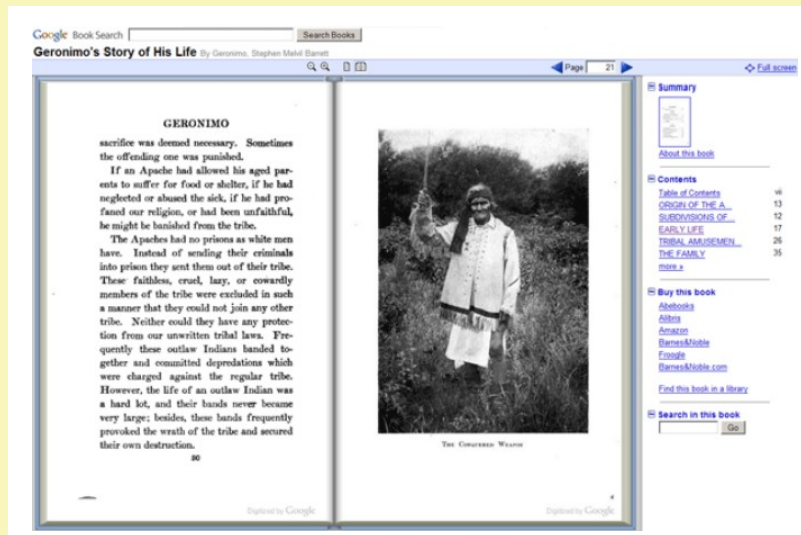
Authors, publishers, and other rights holders could opt out of all or some of these uses. But significantly, if the opt out mechanism was not invoked, Google could make all these expansive uses of the digitized works without ever having received the author's or publisher's permission. (Opinion at 2-5)

Needless to say, this was as controversial as it was brilliant and for the same reasons. The proposed settlement neatly solved some fairly knotty problems. There are several major obstacles to creating a universal or near universal digital library – the biggest are getting agreement between interested parties on who can grant permission (whether the publisher or author has ebook rights under old contracts, for example) and finding all the parties who might be rights holders.

The solution to the first problem is what doomed the settlement. It was also probably the only easily administered solution to the problem of getting rights when thousands of parties dispute which person or company has them. Under the rejected settlement, all authors and publishers were members of either an authors class or a publishers class. Both the author class and the publisher class granted Google (and only Google) the right to use the digitized books in the various ways described above.

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“The question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.”



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The legal fiction of a class action is that absent opting out – filing something with the court saying I’m not agreeing and I’m taking my rights and going home – the class member has legally consented to whatever is in the settlement. As a result, both the author and publisher granted ebook rights to Google unless they took action to withdraw. (One of the unanswered questions under the now rejected settlement was what would happen if an author opted out of the settlement altogether, but the publisher did not and the contract between them wasn’t crystal clear about whether the publisher could exercise ebook rights without further consent from the author.)

Because both publishers and authors would be deemed to legally consent to the settlement provisions and because the legal settlement would override any private contracts between them, it didn’t matter that publishers and authors in many instances are disputing who has the digital book rights under the contracts in place. Both are deemed to consent.

In addition, and this has been written about extensively, Google would have obtained the rights to use the digital editions of books it had created unless someone stepped forward to object. Thus under the proposed settlement, Google and Google alone would have been able to make use of the “orphaned works,” that is works that are still in copyright but whose rights holder can’t be located or don’t respond to permission requests. Under normal copyright rules, if permission isn’t granted, the user is at legal peril in proceeding even if extensive efforts have been made to try to locate the rights holder. Had the settlement been approved,

this provision of copyright law would have been altered for Google, but only for Google. That was also at the heart of the Court’s rejection of the settlement.

The Court’s Decision

The several hundred objections that were filed to the settlement with the court came from a dazzling array of interested parties – authors from all over the world, agents, the Republics of France and Germany, Microsoft, Amazon, and many others (but no US publishers). The United States filed comments that among other issues identified significant problems under Rule 23 of the Federal Rules of Civil Procedure that governs class actions, as well as the antitrust laws. In his decision, Judge Chin considered and relied on many of the objections as the basis for his rejection of the settlement.

The court’s opinion reveals that the overriding reason for the settlement’s rejection was the forward-looking nature of the settlement. That led the court to conclude, correctly in my view, that approval of it would exceed the court’s power under Rule 23, that it usurped congressional authority to make new copyright law, that it was contrary to existing copyright law, and that it raised antitrust concerns.

The court commented that “The question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more

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appropriately decided by Congress than through an agreement among private, self-interested parties.” (Opinion at 23). The Court went to the heart of the copyright concerns about the settlement – that by requiring copyright owners to come forward and take affirmative action to protect their rights, and not requiring the user, Google, to seek permission first, copyright law’s most fundamental precepts are upended: “[I]t is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.” (*Id.* at 35).

The unclaimed or orphan work issue was also at the heart of the court’s antitrust concerns. Because of the settlement’s clever use of the class action device coupled with the normal copyright law’s requirement to seek permission first, only Google would have been able to use works whose owners can’t be found to grant permission, a number that in the United States alone is estimated to be around 5 million books. (Fairness Hearing Transcript 2/18/10 at 57). That, according to the court, “would arguably give Google control over the search market.... Google’s ability to deny competitors the ability to search orphan books would further entrench Google’s market power in the online search market.” (*Id.* at 37). The Court also echoed concerns raised by libraries (other than those involved in the original scanning project) and the United States that Google’s subscription product for libraries would have been an effective monopoly because only Google could include the orphan works. (*Id.* at 36).

At the end of his opinion, Judge Chin said that if the settlement were changed to opt-in for the forward-looking arrangements, as opposed to opt-out, that would go a long way towards alleviating his concerns.

What it Means and What’s Next

In the aftermath of the court’s decision, the most pressing question is whether Google will continue along the settlement path and go along with the opt-in rather than opt-out option suggested by the court. At the fairness hearing in February 2010, the possibility of changing the settlement from an opt-out settlement to one requiring opt-in was raised repeatedly,

both by the objectors and by the court. (E.g., Fairness Hearing Transcript 2/18/10 at 93, 125, 138).

Google’s counsel rejected the possibility outright and argued that the transaction costs of making out-of-print books available if rights had to be cleared were prohibitive. (*Id.* at 146). If all participants in all parts of the settlement were required to opt-in, one of the major advantages to Google of the settlement – the exclusive ability to include these millions of work in Google’s search engine and to serve up brief portions of them as search results would be lost. In a search market that is beginning to look competitive for the first time since it began, an advantage like this could be significant for Google. (A recent [report](#) concluded that Microsoft’s search engine, Bing, had 30% of the US search market with Google at 66%.)

What hasn’t been explicitly discussed is the possibility that a revised settlement could be a combination of opt-out and opt-in. Such a settlement could require any class member to opt out or otherwise release any claim for all books digitized by Google for use as part of Google’s search engine – exactly the conduct that was the basis for the original lawsuit – with any more extensive use on an opt-in basis. What this would mean is that any unclaimed works could be included in Google’s

search results.

Such a solution would avoid many of the issues that the court saw with the rejected settlement proposal, including avoiding the question of the court’s power to approve such a settlement because it would focus on the specific conduct at the heart of the original lawsuit.

Presumably some kind of fund would still need to be set up to look for absent rights holders and authors. What would be missing is the forward looking and elaborate business arrangements allowing for database subscriptions to all the books for libraries and ebook sales to consumers. Whether the authors, publishers, and libraries would agree to such an arrangement is unclear. Equally unclear is whether Google would agree to this. And there would still be major objections given the anti-competitive impact such an arrangement might have on the search market, a factor that worried the Court as well as the Anti-Trust Division of the Justice Department. But given the legal fees racked up by the publishers and

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authors that were to be paid by the settlement fund, the pressure to reach some kind of agreement is huge.

If a revised settlement can't be negotiated, then presumably the parties must go back to litigation, a litigation that seems even less relevant now than it did six years ago when all this started. Since the original settlement was announced three years ago, ebooks have exploded, reaching 9% percent of the overall book market for 2010, up from 3% in 2009 and increasing 115% in the early months of this year according to [recent estimates](#). Regular print publishers, ebook houses such as Open Road and Rosetta Books, and even Google have advanced arrangements that cover much of the same territory as the now rejected settlement.

If the parties do end up litigating, the core issue will be whether Google's act of digitizing millions and millions of books is fair use under the US Copyright law. Google will argue that it is fair use because while the entire work is copied (customarily a no-no under the fair use caselaw), only small portions of the works are shown to the public as the results of searches – the so called snippets, usually about 3 to 10 words in length.

How, Google will argue, can the use of a few words from a full-length book be copyright infringement. (Testimony of David Drummond, General Counsel of Google at a Hearing Before The Committee On The Judiciary, House of Representatives September 10, 2009, at 5.) Google can cite to other cases, many of them won not surprisingly by Google, to support its position. *E.g.*, *Perfect 10, Inc. v Google Inc.*, 487 F3D 701 (9th Cir 2007).

The publishers and authors have a number of arguments on their side as well. First, Google has copied the entirety of millions of books without anyone's permission. That sure feels like copyright infringement. It has converted these books, many of them for the first time, to another medium entirely, again without the author's or publisher's permission. It seeks to use these works to make its search engine more valuable to its users, and therefore to its advertisers and therefore to Google.

Google, after all, derives 66% percent of its revenue, some \$29 billion in 2010, from the advertising it sells on its websites, including its search engine. Others would be willing, the argument goes, to license works for this purpose. In one of the key tests under fair use caselaw, if Google is

allowed to continue this behavior, it will destroy that potential market.

The rejected settlement injected many interesting and visionary concepts into core public discourse. One of the many wonderful aspects of the proposed settlement was the Book Rights Registry that would have been given life by the settlement. Google would have paid for the establishment of a separate entity, a not for profit company, with publishers and authors on its board. The Registry would have been the repository of the rights information for all of the books digitized by Google. It was to have used funds from licensing to search for unreachable rights holders and it was authorized to license entities other than Google to use books for which it had received explicit permission from the author or publisher.

Various alternative projects to create such a rights registry have been discussed since the settlement got bogged down in court proceedings. Not for profit entities such as the Internet

Archives and the Book Industry Study Group are likely candidates that are well situated. Given the need that all who are part of digital publishing recognize to have a central rights clearance or at least information depository, the public interest in having such an entity seems clear. Perhaps ironically, this was one of the original purposes of the US Copyright Office – to maintain public records

relating to the ownership of copyright. (Copyright Office, Circular 1a)

Which brings us to a core problem of modern copyright law that isn't discussed very much, but should be. When the United States rewrote its copyright statute in the late 1970's and when it joined the major international copyright treaties in the late 1980s, it changed a key aspect of the law that avoided a lot of the mess that we're now dealing with. Under the "old" copyright law, the 1909 Act, federal copyright existed only for published works and only if they were registered properly for federal copyright. Under the old copyright statute, the copyright lasted for 28 years unless it was formally renewed, i.e., the proper renewal papers were filed with the Copyright Office.

While this resulted in certain injustices (and many seasons of an omnipresent "It's a Wonderful Life," because someone forgot to renew the copyright), it did avoid at least some of the orphan work problem. If no one came forward to renew

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The rejected settlement itself while a brilliant legal construct had stretched both copyright and class action law well beyond the breaking point.

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the copyright, the work lost its copyright and became entirely publicly available – it became public domain material.

While formalities are forbidden by the Berne Convention, which is one of the major international copyright treaties, it should be possible to fix this problem at least in part. Congress has considered several approaches over the past few years to address the orphan works issues. Most of those approaches provide for limited damages and safe harbors for any uses of copyrighted material that follow rigorous and unsuccessful efforts to locate rights holders. As perhaps an additional safeguard, it might be possible to add a provision that after a set period of years, parties holding rights to copyrighted material need to sign up somehow with the Copyright Office or risk expanded fair use in their work and/or a presumption that searches for them under the orphan works safe harbor will not succeed. In other words, put some common sense mechanism back into the law to make it worth people's time to make sure that they can be found.

Another possibility that has been discussed is digital deposit of new works so that the Copyright Office and the Library of Congress can begin to compile the true universal digital library. Or perhaps Congress could allow Google or Microsoft or some consortium of public and private entities to collaborate with the Copyright Office to digitize the current collection, which could then be used for some research and other not for profit purposes. Other interesting proposals for possible legislative solutions can be found in the [very recent article](#) by Professor Pamela Samuelson, who also filed objections to the settlement on behalf of academic authors that were cited in the Court's opinion.

The balancing of public and private concerns that are necessary for an undertaking of this scope clearly requires government involvement – that is what we have a government for. But that doesn't necessarily mean that there is no proper role for private entities as well. The Google Books Settlement was indeed a bridge too far, as the court said. But that doesn't mean that many of the great ideas contained in it should go down with the ship.

Devereux Chatillon is a Digital Content and IP attorney in private practice in New York and is part time Counsel for Callaway Digital Arts. She teaches in the NYU Publishing graduate program and has written frequently about, among other things, the Google Book settlement.



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Appropriation Artist's Million Dollar Works Deemed Copyright Infringements

Federal Judge Denies Fair Use Defense to Controversial Art Form

By Itai Maytal

Is it permissible under copyright law for an artist to appropriate a protected image of another and then alter it for commercial sale? Or is appropriation art by definition misappropriation?

These questions surfaced, but were ultimately left unresolved, in the settled lawsuit between the Associated Press and Shepard Fairey – the street artist responsible for turning an AP photo into the iconic red-white-and-blue Obama “HOPE” poster. Now, one Manhattan federal judge has offered some clarity to this hot button issue, holding in a recent decision that the legality of appropriation art depends in large part on whether the artist’s work specifically “comments” on the original image appropriated.

In a decision handed down on March 18, 2011, U.S. District Court Judge Deborah A. Batts ruled that the well-known appropriation artist Richard Prince (“Prince”) had infringed the copyright of French photographer Patrick Cariou (“Cariou”) when Prince incorporated 41 photographs shot by Cariou into his art gallery exhibition in New York. [*Patrick Cariou v. Richard Prince, et. al.*](#), No. 08 Civ. 11327, 2011 WL 1044915 (S.D.N.Y. March 18, 2011).

More importantly, the judge rejected Prince’s claim that his use of Cariou’s photographs in his art was fair, mainly

because Prince admitted that he did not comment on the photographs in any manner. The judge also held that the Gagosian Gallery and its owner, which exhibited and sold Prince’s art for more than \$10 million, were directly, vicariously and contributorily liable for copyright infringement. According to the decision, they had failed to meet their burden to inquire with Prince as to whether he had acquired a license from Cariou to use his photographs in the artwork that they sold.

Judge Batts made her ruling after the parties filed cross-motions for summary judgment. According to court filings, the decision is now the subject of an appeal by Prince to the Second Circuit, who is seeking to avoid having to surrender all of his exhibition works that include Cariou’s photographs and to pay Cariou any potential monetary damages.

Background

The plaintiff in this case, Patrick Cariou, is a professional photographer who has authored several books on photography and sold commercial photographs to various fashion and travel magazines. For six years, Cariou took photographs of Rastafarians in the tropical jungles of Jamaica and then published them in the book, “Yes, Rasta” (PowerHouse Books, 2000). According to his filed deposition excerpts, Cariou generated these images after

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The judge rejected Prince’s claim that his use of Cariou’s photographs in his art was fair, mainly because Prince admitted that he did not comment on the photographs in any manner.

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scouting locations, gaining the trust of his subjects, and then posing the vast majority of his subjects for periods ranging from fifteen minutes to hours. He also made creative decisions in taking and developing the 100 black-and-white photographs featured in his book, which included selecting cameras, lenses, film, depth of field, background, lighting, time of day, exposures and waiting for meteorological events such as an approaching tropical storm to unfold. Cariou asserted in his moving papers that his purpose for his photographs, which included portraits and landscapes, was to capture the Rastafarians in their tropical habitat in an aesthetic way.

The lead defendant in this case is Richard Prince, a prominent appropriation artist. While artists generally draw on the works of other artists, appropriation artists take this practice further by leaving what they take largely intact, absent some minor alterations. The art involves, as defined by Prince and other appropriation artists like Jeff Koons, the “taking of an original work for the purpose of transforming [it] into a new expressive meaning and purpose.” *See also Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992) (defining appropriation art, as follows: “when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place.”) Prince has exhibited his work at numerous museums and other institutions, including a solo show at the Guggenheim Museum in New York, created an album cover for Sonic Youth and sold paintings for millions. He is most famous for having taken pictures of Marlboro Man magazine advertisements and then re-photographing and enlarging them without their logos and texts.

According to Cariou’s complaint, on or about November 8 through December 20, 2008, Prince displayed a series of artworks called “Canal Zone” that incorporated 41 images from Cariou’s book, “Yes, Rasta.” The artwork was featured in a location belonging to the Gagosian Gallery. Prince’s mural-sized works incorporated Rastafarians from Cariou’s photographs, which were altered through tinting, additions of paint, the placement of oval shapes over their eyes and mouths, and the inclusion of guitars. Several photographs were added into collages of appropriated pornographic female nudes not taken by Cariou. According to the decision, 28 of Prince’s 29 paintings in his exhibition included images appropriated from Cariou.

On December 11, 2008, Cariou sent the Defendants a cease and desist letter. However, it had no impact on the show, which continued to run without interruption. Cariou then filed his copyright infringement lawsuit against Prince, the Gagosian Gallery, Lawrence Gagosian, the owner of the gallery, and Rizzoli International Publications, the publisher of Prince’s exhibition’s catalogue.

Legal Analysis

As a preliminary matter, the Defendants asserted that Cariou’s photographs were not protected by copyright law because they were “mere compilations of fact,” and “arranged with minimum creativity in a manner typical of their genre.” Judge Batts rejected this argument, pointing out that “it has been a matter of settled law for well over one hundred years that creative photographs are worthy of copyright protection even when they depict real people and natural environments.” After rejecting the Defendants’ claim that the photographs were not copyright protectable, the judge examined plaintiff’s fair use argument and found that all four fair use factors enumerated in 17 U.S.C. 107 weighed against a finding of fair use.

Purpose and Character of Use

Judge Batts found that the first factor weighed in favor of Cariou because Prince’s use was only “minimally transformative” of Cariou’s photos, because the use was “substantially though not exclusively commercial”, and because the Defendants acted in bad faith.

Transformativeness

In their moving papers, the Defendants’ invited the judge to find that appropriation art is per se fair use, regardless of whether or not the new artwork in any way comments on the original works appropriated. The judge declined the invitation. Relying on the *Rogers v. Koons* decision – involving fellow appropriation artist Jeff Koons and his *String of Puppies* sculpture copied from a postcard photo – the judge noted that there would be “no practicable boundary to the fair use defense” if a defendant’s infringement could be excused by pointing to “a higher or different artistic use.” In other words, it is not enough for a work to transform a prior work to be transformative. Instead, all the precedents Judge Batts could identify imposed a requirement that a new work

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must in some way “comment on, relate to the historical context of, or critically refer back to the original work.”

After examining the record, Judge Batts concluded that Prince’s own testimony showed “his intent was not transformative within the meaning of Section 107.” According to the decision, Prince testified that he had no interest in the original meaning of the photographs he uses and did not intend to comment on any aspect of the original works (a.k.a. his “raw ingredients”) from his Paintings, or on the broader culture associated with Cariou or his photos. Instead, Prince indicated he was intending to pay homage or tribute to other painters, including Picasso, Cezanne, Warhol and de Kooning and to create beautiful artworks with related music themes and for a post-apocalyptic screenplay he was writing featuring a reggae band. Moreover, Prince testified that his purpose for using Cariou’s portraits was to be as truthful to the Rastafarians and their culture as possible.

Commerciality

Judge Batts concluded the Defendants’ use of Cariou’s photographs was substantially commercial, based on the fact that the Gagosian Gallery sold eight of defendant’s collages for over \$10 million, with 60 percent going to Prince and 40 percent going to the gallery. Another seven “Canal Zone” paintings were exchanged by the gallery for art that was valued as much as \$8 million. As such, the judge found that the commerciality prong of the first §107 factor weighed against a finding of fair use.

Bad faith

Turning to the bad faith prong, Judge Batts found that Prince’s bad faith was “evident.” The fact that neither Prince nor his employee sought permission to use Cariou’s photographs, but did contact the publisher of “Yes, Rasta” to purchase additional copies of the book, weighed against a finding of fair use. The judge also found that the Gagosian Gallery acted in bad faith because it neither inquired with Prince as to whether he had a license to use Cariou’s photos, nor ceased to commercially exploit Prince’s paintings after receiving Cariou’s cease-and-desist letter.

Nature of the Copyrighted Work

The judge held this factor weighed against a finding of fair use because Cariou’s photographs are “highly original and creative artistic works and ... fall within the core of the copyright’s protective purposes.”

Amount and Substantiality of the Portion Used

As to the third factor, the judge noted that this too weighed against a finding of fair use because the amount of Prince’s taking was “substantially greater than necessary” to further the purpose and character of his use. Judge Batts observed that Prince appropriated entire photographs from Cariou in several of his collages. Moreover, the majority of them appropriated the central figures depicted in Cariou’s photographs.

Effect on the Market

Finally, Judge Batts found the Gagosian show’s effect upon Cariou’s market weighed in Cariou’s favor and against fair use. According to the decision, the photographer had planned to show his “Yes, Rasta” pictures at a New York gallery of Christiane Celle. But, as the gallery owner testified, she cancelled the show because it had been “done already” by the Gagosian Gallery and because she didn’t want to be seen as capitalizing on Prince’s reputation.

After concluding her aggregate fair use analysis in favor of Cariou, the judge turned to the Gagosian Gallery defendants. Judge Batts found they were directly, vicariously, and contributorily liable for copyright infringement because they exhibited and sold Prince’s unauthorized works in violation of Cariou’s exclusive rights as a copyright owner; they supervised Prince’s work, “or at the very least [had] the right and ability (and perhaps even responsibility) to ensure that Prince obtained” licenses from Cariou; and they were “well aware of (and capitalized on) Prince’s reputation as an appropriate artist who rejects the constricts of copyright law”, but did nothing to evaluate the legality of his use of Cariou’s photographs.

Judge Batts issued a permanent injunction requiring that all works and materials relating to Prince’s “Canal Zone” be “delivered up for impounding, destruction, or other disposition, as Plaintiff determines,” and that the Defendants “notify in writing any current or future owners of the Paintings of whom they are or become aware that the Paintings infringe the copyright in the Photographs, that the Paintings were not lawfully made under the Copyright Act of 1976, and that the Paintings cannot lawfully be displayed.” The judge also scheduled a status conference regarding damages between the parties for May 6, denying a request by the Defendants for a stay of the proceedings pending appeal.

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Considerations for Appeal

Judge Batts' decision has prompted heated commentary within the media, photography and artistic communities, and may lead to *amici curiae* participation on both sides of the case when it reaches the Second Circuit. It also may also be questioned on several procedural and substantive grounds.

For example, Judge Batts failed to analyze separately each of the 28 paintings at issue by Prince under the four statutory fair use factors. The Copyright Act instructs that such analysis take place before a use can be considered or denied as fair: "In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include . . . [four factors]." 17 U.S.C. §107. Instead, the judge made global assessments about the paintings, noting, for example, a transformative spectrum among the paintings that appeared "minimal at best" and "not consistent."

In addition, Judge Batts did not apply the *eBay v. MercExchange* four-part test before granting a permanent injunction to the plaintiff upon finding copyright infringement. See e.g., *Pearson Educ., Inc. v. Vergara*, 09 Civ. 6832, 2010 WL 3744033 (S.D.N.Y. Sept. 27, 2010) (applying eBay test to grant permanent injunction in copyright infringement action); *Warner Bros. Entm't Inc. v. RDR Books*, 575 F.Supp.2d 513, 551 (S.D.N.Y.2008) (same). Specifically, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay v. MercExchange*, 547 U.S. 338, 391 (2006).

Finally, Judge Batts' decision raises the substantive question as to whether the commenting requirement for fair use must be met by the artist himself or can be articulated by others, such as art historians or scholars. It seems debatable to

expect all artists to articulate the purpose of their art when they very often do not consider its narrative thread when they create it. Moreover, they may not be the best judges of their own works.

Just as a psychoanalyst may be in a better position to understand the motivations of a patient, so too may an art scholar or historian better understand the creative impetus of an artist. In this case, Prince may have understood, but intentionally did not want to meet, the commenting requirement for fair use because he was defending the essence of appropriation art, which is its transgressiveness. As such, it seems that no expert would have aided the judge in her determination. Other cases, however, may merit a different approach to addressing the first factor of fair use.

Conclusion

The late President Richard Nixon once said, "When the President does it, that means that it is not illegal." It seems like Richard Prince would want the same special rationale to apply under copyright law to appropriation artists when they exploit without permission the works of others. It appears he would have their art be deemed transformative even when they denied the relevance of the original

works appropriated to their art's meaning. Perhaps Prince will have better luck than his contemporary Jeff Koons in making this "high art exception to fair use" argument to the Second Circuit.

But for now, it appears that appropriation art cannot exist legally under our copyright law regime unless its creator can articulate how the art comments on the so-called "raw ingredients" it appropriates.

Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP. The plaintiff in Cariou v. Prince et. al. is represented by Daniel J. Brooks and Eric A. Boden of Schnader Harrison Segal & Lewis LLP. The defendant was represented by Steven M. Hayes of Hanley, Conroy Bierstein Sheridan Fisher & Hayes LLP. On appeal, the defendant will be represented by George Carpinello and Eric Maurer of Boies, Schiller & Flexner LLP.

Richard Nixon once said, "When the President does it, that means that it is not illegal." It seems like Richard Prince would want the same special rationale to apply under copyright law to appropriation artists.

U.S. District Court Denies Preliminary Injunction Against Photo-Sharing Website

DMCA Safe Harbor Protections Apply

By Michael A. Norwick

A New York federal district court denied a motion for a preliminary injunction in a copyright infringement suit brought by a *pro se* visual artist, Sheila Wolk, against the photo-sharing website, Photobucket. [*Wolk v. Kodak Imaging Network, Inc. et al.*](#), 2011 U.S. Dist. LEXIS 27541 (S.D.N.Y. March 17, 2011) (Sweet, J.).

Background

Photobucket allows users to upload and edit images, add special effects, and share photos on social networking sites. The site also allows users to order hard copies (and other products) containing any image on the site from Photobucket's business partner, Kodak Imaging Network. Photobucket's users have uploaded more than eight billion photos to the website.

The plaintiff claimed that copies of her copyrighted images had been uploaded to Photobucket without her permission and that she provided notices to Photobucket requesting that these images be taken down. Photobucket removed all images that were identified by the plaintiff in notices complying with the Digital Millennium Copyright Act ("DMCA"), which provides sites like Photobucket – which display content uploaded by users – "safe harbor" from financial copyright liability if they promptly remove allegedly infringing material pursuant to compliant notices.

DMCA Analysis

Notwithstanding the removal of these allegedly infringing images, the plaintiff complained that more infringing images remained on the site. Plaintiff's motion for a preliminary injunction argued "that her past notices also serve as DMCA-compliant notice of other present and future alleged

infringements of the same copyrighted works posted at different times and at different locations." *Id.* at *11. The court explained: "[i]n essence, Plaintiff contends that Photobucket is now aware that her copyrights are being infringed on its site, and it must now police its [site] to uncover current infringements and prevent future infringements, without her providing DMCA-compliant notice in each instance." *Id.*

Photobucket argued that its operation of the website was protected under the DMCA's § 512(c) safe harbor and that it had no duty to police its site for other materials that might infringe the plaintiff's copyrights.

The court agreed with Photobucket, holding that the plaintiff sought to place a burden on the site beyond what is required by the DMCA. Relying in part upon the decision in *Viacom International, Inc. v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Stanton, J.), Judge Sweet held that DMCA-compliant notices "must identify and reasonably locate the infringing activity in *each instance*" (*Id.* at *11; emphasis added)

and cited to the *Viacom* court's example of sufficient location information: "a copy or description of the allegedly infringing material and the so-called 'uniform resource locator' (URL) (i.e., the web site address) which allegedly contains the material." *Id.* at *11-12 (citing 718 F. Supp. 2d at 529). As the court explained:

The requirement that DMCA-compliant notices identify and locate specific acts of infringement undermines Plaintiff's position, as her past notices do not identify and locate other, and future, infringing activity. The Court does not accept her invitation to shift the burden from her to Photobucket, as the underlying purpose

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Judge Sweet's opinion in *Wolk* is the first known decision to interpret the parameters of the limited injunctive relief available under § 512(j).

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of the notice requirements is to place the burden of policing copyright infringement - identifying the potentially infringing material and adequately documenting infringement - squarely on the owners of the copyright. *Id.* at *12-13 (citations omitted).

Finding that Photobucket met all of the criteria necessary to enjoy the protection of the § 512(c) safe harbor, the court addressed the limited injunctive relief available under Section 512(j), which is available to plaintiffs even where a site qualifies for a safe harbor under Sections 512 (b), (c) or (d) of the DMCA. While the plaintiff essentially sought a court order requiring Photobucket to search for all infringing activity on its site, the court held that none of the relief available under § 512 (j) provides such a burdensome remedy. The court held that Section 512(j)(i), which provides for an “order restraining the service provider from providing access to infringing material or activity” does no more than require the defendant to block access to infringing material when given proper notice, something Photobucket was already doing. *See id.* at *20. The court also analyzed § 512(j)(iii), a catch-all provision permitting the court to fashion other injunctive relief, but only when “such relief is the least burdensome to the service provider.” The court found that the plaintiff had not satisfied this criteria. Significantly, Judge Sweet’s opinion in *Wolk* is the first known decision to interpret the parameters of the limited injunctive relief available under § 512(j).

In denying the plaintiff’s motion for a preliminary injunction, the court also cited to 1) her failure to demonstrate irreparable harm (which, under the Second Circuit’s recent decision in *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), is no longer to be presumed even if infringement is found), 2) her delay in bringing the motion, and 3) the burden that would be placed on website operators if required to police their websites for copyright infringements. As the court stated, “[p]lacing such a debilitating burden on ISPs would defy the purpose of the DMCA, which was to facilitate the growth of electronic commerce, not squelch it.” *Id.* at *25 (citations omitted).

Michael A. Norwick, is an MLRC Staff Attorney. Prior to joining MLRC he represented Photobucket.com, Inc. in this case with Kenneth P. Norwick, Norwick, Schad & Goering; and Mark Lerner and Meghan H. Sullivan, Satterlee Stephens Burke & Burke LLP. The plaintiff, Sheila Wolk, appeared pro se.

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Ninth Circuit Debates the Contours of Protected Speech in Overturning the Stolen Valor Act

Are Lies Worth Saving?

By Tom Clyde

In an exchange of sharply worded opinions, a divided Ninth Circuit Court of Appeals refused to rehear en banc the panel decision that struck down the Stolen Valor Act. [*United States v. Alvarez*, Case No. 08-50345 \(9th Cir. March 21, 2011\)](#).

Relying on distinctly different interpretations of seminal defamation cases such as *Sullivan*, *Gertz* and *Hepps*, the divided Court debated the constitutional value that is afforded to false speech under First Amendment jurisprudence.

Alvarez is considered by many commentators as strong candidates for a grant of certiorari by the U.S. Supreme Court. If cert. is ultimately granted, the resolution of the constitutional challenge will likely turn on how much protection, if any, our system should afford to admittedly false speech.

Case Prompted by Lies Shout Congressional Medal of Honor

Alvarez presents a “clean” challenge to the Stolen Valor Act, 18 U.S.C. § 704(b). In 2007, Xavier Alvarez was an official on his regional water district board of directors who had a “hobby” of telling outrageous – and untrue – tales about himself. At a meeting with a neighboring district water board, Alvarez introduced himself by stating that he was “retired marine of 25 years” and that “back in 1987 I was awarded the Congressional Medal of Honor.”

In fact, these statements were, in the words of the Court, “a series of bizarre lies.” Alvarez had never been in the military and the accolade he awarded himself was hardly an obscure one. The Congressional Medal of Honor is the nation’s most prestigious military decoration.

Alvarez was indicted and thereafter pled guilty to a violation of the Stolen Valor Act, which makes it a crime for a person to “falsely represent[] himself or herself” as having “been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . .” In entering his plea, Alvarez reserved his right to appeal on First

Amendment grounds.

On appeal, a divided panel reversed Alvarez’s conviction and struck down the Act. Judges Thomas G. Nelson and Milan D. Smith, Jr., found that the speech criminalized by the Act was not “sufficiently proscribed to fit among the narrow categories of false speech previously held to be beyond the First Amendment’s protect sweep.” Applying strict scrutiny, the majority found that the Act was not narrowly tailored.

Judge Jay S. Bybee, however, dissented, arguing that a litany of Supreme Court decisions had stated in various linguistic formulations that false statements of fact have “no constitutional value,” so are unworthy of strict scrutiny. Under a less demanding scrutiny, Judge Bybee asserted that the Stolen Valor Act was not unconstitutionally overbroad.

Petition for Rehearing En Banc Draws Sharply Divergent Views

Not surprisingly, the government petitioned for rehearing en banc. In denying the petition, the Ninth Circuit judges brought an even sharper focus to the debate that had taken place in the panel decision.

Judge Smith, concurring in the denial of rehearing en banc, emphasized that ever since *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court had emphasized that speech does not forfeit its constitutionally protected status merely because it is determined to be false. Judge Smith emphasized, for example, the statement in *Sullivan* that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” *Id.* at 279 n.19 (quoting J.S. Mill, *On Liberty* 15 (Oxford: Blackwell, 1947)).

Chief Judge Alex Kozinski, concurring in the denial of rehearing en banc and writing separately, dramatically illustrated the sweeping array of speech that could be subject to penalty if falsity were deemed to preclude constitutional protection.

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So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. . . . [T]he white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis."

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost \$10 at poker") to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

Notwithstanding Judge Kozinski's concerns about a "terrifying" world, seven judges dissented from the denial of rehearing, joining an opinion written by Judge Diarmuid O'Scannlain. The dissenters emphasized that in case after case, the Supreme Court has indicated that false speech is outside of constitutional protections, characterizing it as "particularly valueless," "not immunized by the First Amendment," and "carry[ing] no First Amendment credentials." The dissenters focused on the statements in *Gertz* that "the erroneous statement of fact is not worthy of constitutional protection." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

In the dissenters' view, the proper analysis is to consider false speech as unprotected, but then determine whether some other interest – such as "the presence of robust and functional news media" – nonetheless requires protection against liability for publishing erroneous facts. In this way, false speech, like that at issue in the Stolen Valor Act, should only

warrant protection if necessary to create a "breathing space" for other "speech that matters."

Petition for Certiorari Likely

Given the sharply divergent approaches, *Alvarez* is considered by many as a good candidate for certiorari. The chances of this issue reaching the Supreme Court will improve further if the Tenth Circuit reaches a contrary decision on the constitutional validity of the Stolen Valor Act in an appeal now pending before it. *U.S. v. Strandlof*, Case No. 10-01358 (10th Cir. August 13, 2010).

If either or both of these cases go up, it is likely that the Court will be closely scrutinizing *Sullivan* and its progeny, but in a very different – and potentially less sympathetic – context than a defamation claim.

Tom Clyde is a partner with Dow Lohnes PLLC in Atlanta

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Welcome to Hawaii, the Aloha State

By Jeffrey Portnoy

Publishers and authors statutorily liable for injuries sustained by hikers who trespass on private property? Not in this country. Well – maybe.

In the just recently concluded Hawaii Legislative session, [H.B. 548](#) and its companion [Senate Bill 1207](#), as initially introduced, would have held publishers and authors of visitors guides and websites that “invite attract or encourage” readers to trespass on private property liable if those readers suffered injury or death while “trespassing”. The original draft of the Bill would also have imposed a duty on authors or publishers of a guidebook to warn readers of dangerous conditions.

As the Bill made its way through the Legislature, it was amended several times. The final edition of the Bill eliminated the tort liability, but would have established a task force, attached to the State Department of Business, Economic Development and Tourism, to “identify problem areas on the various islands related to trespass over privately held or public lands as the result of information published on visitor guide websites and in visitor guide publications”.

If there is any good news in all of this, however, it is that both bills died in Committee, but since Hawaii has a two year Legislative session, the bill will likely be reintroduced next January.

The introductory language in the initial draft of was quite troublesome. The legislation stated that various guide websites and visitor guide publications “inadvertently” invited visitors to trespass on remote private property to experience an attraction or activity. The preamble continued that these representations put visitors at potential risk by describing attractions or activities without “adequately explaining” the inherent dangers associated with them. The initial version of the bill would have held publishers and authors personally liable for any injury sustained by someone who was “directed” to private property and sustained a serious injury as a result of that activity.

The proposed task force in the final draft was to “develop findings and recommendations to reduce the incidence of trespass over privately held public lands to areas remote or scenic designations as the result of information published on visitor guide websites and in visitor guide publications”.

This legislation, at least as initially proposed, was clearly

unconstitutional as it conveniently ignored the fact that the information published in the guidebooks is clearly protected by the First Amendment and that publishers and authors cannot be held financially liable for the unlawful acts (trespass) of third parties absent actual incitement.

The Bill was strongly supported by members of Hawaii’s tourism community and several major private landowners. They claimed that the Bill was necessary as a result of several significant injuries and/or deaths sustained by tourists who trespassed on private land to get to hiking trails, waterfalls, and other natural attractions promoted in several guidebooks. For example, in the book “*The Ultimate Kauai Guidebook: Kauai Revealed*”, the author publicized several remote attractions such as a natural tide pool called Queen’s Bath and a swimming hole called “Kipu Falls” on the island of Kauai. Kauai officials say that accidents at those two locations “used to be rare”, but since the guidebook was initially published in 1994, Kauai officials claimed that at least ten people drowned at Queen’s Bath and Kipu Falls.

One of the sponsors of the legislation was quoted as saying “I do believe we are endangering our visitors and it is our responsibility to keep them safe”. He went on to state that “Authors or publishers of visitor guide publications describing attractions have a duty to warn the public of dangerous conditions”. Private land owners chimed in arguing that they are exposed to liability because of guidebooks that “encourage” tourists to trespass on private property. Another member of the legislature was quoted as saying this has never been about First Amendment rights, it has always been about safety.

It isn’t as if there was sufficient judicial precedent which should have educated Hawaii legislators that the initial bill was unconstitutional. For example in 1989, a California couple sued G. P. Putnam Sons, the US publisher of the “*Encyclopedia of Mushrooms*” after they fell ill after picking and eating wild mushrooms. The plaintiffs claimed that the authors advised readers which mushrooms were “good to eat”. The Courts dismissed that case primarily on First Amendment grounds.

It should have been clear to the Legislature that the State cannot attempt to statutorily hold a publisher of generally circulated books liable because of an injury that may occur to

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In the just recently concluded Hawaii Legislative session, H.B. 548 and its companion Senate Bill 1207, as initially introduced, would have held publishers and authors of visitors guides and websites that “invite attract or encourage” readers to trespass on private property liable if those readers suffered injury or death while “trespassing”.



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a reader. But this is not the first time the Hawaii legislature has proposed clearly unconstitutional First Amendment legislation. Remember it was an earlier Hawaii Legislature that debated a bill that would have forced journalists to reveal their assets. (Fortunately, it too failed).

The present version of the bill, asking for a task force to review and study the matter, may well pass next session absent a full court press by media and

publishing groups. Although one could argue that it simply initiates a task force, the ultimate goal may well be legislation that would attempt to impose unconstitutional burdens on journalists that would clearly have a chilling effect on those who write, publish and distribute guide books about Hawaii. For a state so dependent upon tourists, it is not only unconstitutional, but economically foolish.

Jeffrey Portnoy is a partner in the Honolulu office of Cades Schutte LLP.

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Court Rejects Murder Defendant's Subpoena for Outtakes

North Carolina Shield Statute Protects TV Documentary Show

By Jonathan Buchan and Linda Steinman

Relying upon the state's journalist's shield statute, a North Carolina state trial court rejected a murder defendant's subpoena for the production of twenty hours of outtakes shot by the producers of *The First 48* television show in connection with its coverage of the investigation of a drug-related killing.

The court expressly rejected the defendant's contention that *The First 48*, and the A&E Television Network on which it is broadcast, did not qualify as "journalists" or "news media" under the North Carolina shield law. The court also denied the defendant's motion for voluntary discovery of that raw film footage directly from the Charlotte-Mecklenburg Police Department or from *The First 48* pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and North Carolina's criminal discovery statute, rejecting the defendant's contention that *The First 48* was acting on the government's behalf or as a prosecutorial agency.

Background

ITV Studios, Inc. is the producer of *The First 48*, a documentary series on police homicide investigations that has aired on the A&E television network since 2004. *The First 48* depicts various police detective units throughout the country as they investigate homicides. The series focuses primarily on the first forty-eight hours of an investigation – believed to be the most critical time period for solving a violent crime – and aims to provide a realistic portrayal of the investigative process. *The First 48*'s field producers accompany and film the police officers as they pursue their investigation.

The First 48 in early 2010 entered into a written agreement with the Charlotte-Mecklenburg Police Department ("CMPD") permitting *The First 48* to accompany

and film the CMPD for the purpose of creating episodes for the television series. The agreement provided that *The First 48* was the sole owner of its raw footage and related materials.

On August 22, 2010, *The First 48*'s field producers began covering the CMPD's investigation of the murder of Oscar Chavez, who had been stabbed that day in his car in what appeared to be a drug deal and robbery gone wrong. Detectives interviewed the 911 caller (an eyewitness who noted the license plate number of the vehicle allegedly transporting the perpetrators) and the car's owner, who implicated a young man named Jonathan Fitzgerald and his girlfriend. In police interviews videotaped by CMPD, Fitzgerald confessed to stabbing Chavez and was charged with first degree murder.

ITV filmed over 20 hours of footage related to the Chavez investigation. That raw footage was not provided to the CMPD, but was instead shipped to ITV's office in New York to be edited into a 22-minute episode. In accordance with its agreement with CMPD, *The First 48* permitted CMPD to review the "rough cut" of the planned episode of the Chavez investigation to "ensure factual accuracy." *The First 48* retained "absolute discretion" to determine the editorial content of each episode, subject to one restriction: the episodes could not contain any confidential investigatory, procedural, and/or operational information concerning CMPD which would not be available to the general public.

In October 2010, Fitzgerald's attorney filed a motion for voluntary discovery seeking to have CMPD and *The First 48* turn over all video footage and other notes and information related to the filming of the Chavez investigation, citing *Brady* and N.C.G.S. § 15A-90, the North Carolina statute

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Defendant failed to demonstrate that the substance of the information contained in the raw, unedited footage was not obtainable from other sources, including the police officers and detectives who were present during the events and from other witnesses to the crime and the crime scene.

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governing mandatory disclosure of law enforcement files to criminal defendants.

Defendant Fitzgerald alleged that CMPD and *The First 48* were required under *Brady* to turn over to him the raw footage because the producers had been “acting on the government’s behalf” in filming the investigation. In addition, Fitzgerald asserted that *The First 48* was a “prosecutorial agency” under the state statute because it had allegedly obtained information on behalf of CMPD in connection with the investigation of a crime. Fitzgerald also served a subpoena *duces tecum* on *The First 48* seeking all raw footage and notes related to the investigation.

The First 48 moved to intervene in the criminal proceeding for the limited purpose of opposing the motion for voluntary discovery and filed its objection to that motion. *The First 48* also filed its objection to the subpoena on several grounds, including the protection provided by the North Carolina journalist’s privilege statute, N.C.G.S. § 8-53.11. The District Attorney and CMPD both ultimately opposed the compelled disclosure of the material.

On January 28, 2011, the court held an evidentiary hearing and heard testimony from witnesses called by the defendant, including CMPD’s police chief, the lead homicide detective in the Chavez investigation, and several other police detectives and personnel who were involved in the Chavez investigation.

They were questioned at length regarding the substance of the agreement between *The First 48* and CMPD and the role of *The First 48*’s field producers in filming homicide investigations generally and specifically in the Chavez case. *The First 48*’s co-executive producer, Mike Sheridan, also testified.

The Court’s Ruling

The trial court ultimately rejected Fitzgerald’s contention that *The First 48* was required to produce its raw footage under *Brady* or under the North Carolina criminal discovery statute. The court found that *Brady* did not apply because the information sought was not in the possession of CMPD and because *The First 48* had not acted “on the government’s behalf” in its filming of the investigation. The court also found that the North Carolina statute did not apply because *The First 48* was not acting on the government’s behalf and was not a “prosecutorial agency” involved in the investigation of the crime. The court noted that the

agreement with CMPD permitted police to limit *The First 48*’s filming in order to protect the public safety or the security of the investigation, but found that these restrictions did not result in the field producers being under the CMPD’s supervision or control. The court also noted that the CMPD and the district attorney at no time had possession, custody, or control of the raw, unedited footage and that the CMPD had no legal right or authority to obtain *The First 48*’s raw, unedited footage.

The court also rejected defendant’s contention that *The First 48* and the A&E Television Network did not qualify as “journalists,” or as “news media” under the North Carolina privilege statute. Defendant argued that A&E’s focus was on entertainment, not news, pointing to shows such as “Dog the Bounty Hunter,” “Billy the Exterminator,” and “The Sopranos.”

The trial court held that *The First 48* did qualify for protection under the North Carolina shield statute. (*The First 48* presented evidence that A&E in fact broadcasts a wide variety of programming, including documentary films and drama series, as well as documentary programs such as *The First 48*.) The court also concluded that defendant had failed to demonstrate by the greater weight of the evidence that the information sought was essential to Fitzgerald’s defense.

The court’s April 15, 2011 Order noted specifically that the evidence presented revealed no specific information that would be contained in *The First 48*’s raw footage which would be essential to his defense: “There was nothing at the crime scene that was not thoroughly documented by CMPD’s own photos, sketches, and descriptions, and there was nothing which suggested that *First 48* had any greater access to evidence at the crime scene or at any other location than did the police.”

The court also concluded that the defendant failed to demonstrate that the substance of the information contained in the raw, unedited footage was not obtainable from other sources, including the police officers and detectives who were present during the events and from other witnesses to the crime and the crime scene. For those reasons, the court found that the shield statute protected *The First 48* from compelled production of the raw footage.

The First 48 and its parent company *ITV Studios, Inc.* were represented by *Linda Steinman and Elisa Miller of Davis Wright Tremaine LLP* and by *Jonathan Buchan and Curtis Griner of McGuireWoods LLP*. *Jonathan Fitzgerald* is represented by *Jeremy B. Smith of Smith and Roberts Law Firm, PLLC*.

Maryland Court Quashes Subpoena to TV Journalist for Testimony Concerning Broadcast on Locksmith's Business Practices

By Cheryl A. Feeley and Charles D. Tobin

A Maryland trial court last month quashed a subpoena issued by the state Attorney General's Consumer Protection Division to a television journalist seeking testimony about his station's investigation of a locksmith's practices.

WMAR-TV, a Scripps Broadcasting station in Baltimore, has been following the state's consumer protection proceedings against Joseph M. Horton, who runs his business under the name "Around the Clock Locksmith." In August 2010, in a civil proceeding, the Attorney General's Office secured a preliminary injunction that required Horton to immediately cease and desist from:

- ◆ Engaging in any unfair or deceptive trade practices in violation of the Maryland Consumer Protection Act;
- ◆ Selling or offering to sell locksmith services unless he provided estimates quoting the total cost of their services before performing services, and to specify the particular services they will perform at that cost; and
- ◆ Selling or offering to sell locksmith services unless he completed the installation, repair, opening or modification of the lock or locks, any other services

that he said they would perform, for the price that he quoted to the consumer.

WMAR-TV aired a story in November 2010 as part of its continuing coverage of Horton and the court proceedings.

As part of the story, Jeff Herman, a WMAR-TV producer,

locked his keys in the trunk of his car. Herman then made a call on his cellphone. The station's reporter's voiceover reported that Herman was calling Horton's business. Herman's side of the conversation was broadcast in the story, including his repetition of the locksmith's telephone estimate of \$150 for the service. The story then showed Horton arriving at the parking lot where Herman's car was parked. Herman provided his credit card and



WMAR-TV, a station in Baltimore, has been following the state's consumer protection proceedings against Joseph M. Horton, who runs his business under the name "Around the Clock Locksmith."

identification to Horton, who remained in his van. WMAR-TV's reporter explained that Horton was attempting to charge Herman \$825 for the services. The reporter then emerged and questioned Horton about the charges. Horton denied providing a different price over the phone, and he drove off.

Following the broadcast, dozens of people contacted the Attorney General's Office to report allegedly similar encounters with Horton. On the basis of those complaints, the Attorney General's Office brought a motion seeking to

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hold Horton in contempt. The Attorney General's Office asked for full restitution to Horton's customers and to have him jailed.

In the contempt proceedings, the Attorney General's Office subpoenaed WMAR-TV's producer Herman, and in opposing the motion to quash, represented that the journalist would be asked: 1) what day he made the telephone call captured in the November 2010 video recording; 2) what telephone number he called; 3) whether the person who answered the telephone was a man or a woman and whether the person identified himself or herself; 4) what the other person on the telephone said; and 5) to authenticate the video recording.

In moving to quash the subpoena, WMAR-TV asserted its rights under Maryland's Shield Law (Md. Code, Courts and Judicial Proceedings, § 9-112), Article 40 of the Maryland Declaration of Rights, and the First Amendment to the U.S. Constitution. The hearing was held on April 26, 2011, after the court had heard the Attorney General's Office put on testimony against Horton from five witnesses who had called his business for service.

At the hearing on the Motion to Quash, counsel for WMAR-TV argued that the requested testimony would require Herman to reveal source information, in contravention of the Maryland Shield Law. WMAR-TV also argued that the Division could not demonstrate by clear and convincing evidence (1) a high degree of relevance, (2) the lack of any alternative means to obtain the information it sought from Herman, and (3) the compulsory disclosure will serve an overriding public interest.

Notably, WMAR-TV argued that any potential testimony from Herman was irrelevant, as the journalist was not a "consumer" within the meaning of the statutes at issue, and thus his experience with Horton and Around the Clock Locksmith could not be used as evidence at the contempt hearing. Indeed, the Attorney General's Office did not even mention Herman in its petition for contempt. WMAR-TV also pointed out the fact that the Petition stated that the Division has received at least 26 complaints about Horton's business practices from consumers, and that the court already had heard for itself the testimony of five of these consumers at the hearing before the Motion to Quash was argued.

Finally, WMAR-TV explained that the public interest favors protecting WMAR-TV and Herman from compelled testimony, as the reporting on Horton actually prompted

additional consumers to come forward to the Attorney General's Office to report their experiences with him.

The Attorney General's Office argued that under Maryland case law, Herman was the source of the information and thus § 9-112(c)(1) did not apply. The state also argued that there was no alternative source for the conversation Herman allegedly had with someone at Around the Clock Locksmith, and that the testimony would support the petition for contempt and was therefore in the public interest. Finally, the Attorney General's Office also argued that by broadcasting the information about what Horton said on the phone, the journalist and the station waived its protection under the Maryland Shield Law.

In a ruling from the bench, Judge Alison L. Asti quashed the subpoena. She said that she has followed the legislative history of the Maryland Shield Law and understands the importance of protecting the news media privilege. Judge Asti concluded that the case law in Maryland must be read more narrowly than the Attorney General's Office suggested and made clear that this was not one of the limited instances in which a journalist could be compelled to testify. The court also remained un-convinced that such information could not be obtained by alternative means, especially in light of the testimony from consumers at the hearing.

Cheryl A. Feeley and Charles D. Tobin, of Holland & Knight LLP in Washington, D.C., represented WMAR-TV and its producer Jeff Herman in this matter. Lucy A. Cardwell and Philip D. Ziperman represented the Consumer Protection Division of the Office of the Attorney General of Maryland.

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Court Quashes Libel Plaintiff's Subpoena to Non-Party Reporter

Discovery About Accurate Report Sought to Show Fault of Broadcaster

By Robert C. Clothier

A federal judge in the Eastern District of Pennsylvania upheld the First Amendment reporter's privilege and quashed a subpoena seeking testimony from a Philadelphia television station's executive producer. A libel plaintiff sought the producer's testimony about the station's own reporting of an FBI raid that was allegedly inaccurately reported by the competitor Philadelphia radio station sued by the plaintiff. The court held that such evidence showing how the television station "got it right" was not "crucial" to showing that the defendant radio station "got it wrong."

The Libel Lawsuit and Plaintiff's Subpoena

The subpoena arose in the context of a defamation lawsuit that was brought by plaintiff Edward J. McBride, a local union official, against CBS Radio East, which owns KYW Newsradio, a radio station in Philadelphia ("KYW").

Plaintiff alleged that KYW defamed him by reporting that his home was one of several locations raided by the FBI. Subsequent to that reporting, a communications consultant for the union where plaintiff worked sent an email blast to the news media saying that plaintiff's home was not raided. An executive producer at WPVI-TV/6ABC ("WPVI"), a television station in Philadelphia owned by ABC, Inc., responded that WPVI had not reported that plaintiff's home was among those raided by the FBI. WPVI, he explained, was unable to get independent confirmation.

During discovery, the plaintiff subpoenaed the executive producer seeking his testimony, but not any documents. Plaintiff's counsel said that he wanted the testimony to show that WPVI had followed the standard of care by declining to publish information from a confidential source that could not be independently confirmed.

Such an argument praising WPVI's reporting was a bit unusual coming from plaintiff's law firm, which regularly

represents libel plaintiffs against the media and whose name partner, Richard Sprague, remains the winner of what is considered the largest defamation verdict (\$34 million, later reduced to \$24 million) against a media company (The Philadelphia Inquirer) upheld on appeal.

These efforts to resolve the matter were unsuccessful, and the executive producer and ABC, Inc. filed a motion to quash.

The Motion to Quash

In the papers, the plaintiff argued the motion was premature and that the witness should appear for his deposition and respond on a question by question basis. He also tried to weaken the legal test under the First Amendment, arguing that he need show only that the subpoenaed testimony was "relevant and important," not that it was "crucial" as held in numerous Pennsylvania and Third Circuit court decisions. He maintained that the executive producer's testimony was "relevant and important" for two reasons. First, he claimed the executive producer's emails suggested that he knew that defendant KYW was incorrect in reporting that plaintiff's home was raided.

Second, he claimed the emails suggested that he knew that KYW had failed to corroborate a confidential source's information and would have determined that plaintiff's home had not been raided if it had tried to do so. Lastly, he argued that the executive producer was the only source of information showing what he "meant and implied" in his emails.

In response, ABC and the executive producer argued that there was no reason for the witness to appear when virtually every question likely to be asked would implicate the First Amendment reporter's privilege. They also argued that the First Amendment test required that plaintiff establish the information was "crucial," not simply relevant and important,

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The court held that such evidence showing how the television station "got it right" was not "crucial" to showing that the defendant radio station "got it wrong."

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and that plaintiff failed to satisfy his burden under the First Amendment. They asserted that there was no basis for the plaintiff to believe that the executive producer had any personal knowledge about how KYW reported the story, and that testimony about how WPVI reported the story was irrelevant to plaintiff's claims, especially if plaintiff were deemed a public figure. They also asserted that the executive producer was hardly the only source of information going to the falsity of defendant KYW's reporting (indeed, plaintiff revealed in his sur-reply brief that the Department of Justice stated that his home was not raided) nor of information going to defendant KYW's negligence (the plaintiff could depose defendant's reporters and editors and retain an expert). Lastly, they asserted that merely saying that only the executive producer knows what he "meant and implied" misunderstands the First Amendment test. By that standard, virtually every witness would be the "only source" of subpoenaed information.

The Court's Decision

The court held that the plaintiff bore the burden of showing that (1) he "attempted to obtain the information from other sources, (2) the information can only be acquired through the journalist or the journalist's sources, and (3) the information is 'crucial' to the party's claim." It found that one factor was "whether the case is civil or criminal, because 'the privilege assumes greater importance in civil than in criminal cases.'" For these principles, the court relied on *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003) as well as two Third Circuit decisions (*United States v. Criden*, 633 F.2d 346 (3d Cir. 1980) and *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979)).

Applying the test, the court first found that the plaintiff's argument – that only the executive producer can explain what his emails meant – "frames the dispute too narrowly." The court said that the plaintiff "can prove [defendant KYW] was negligent in numerous ways without producing evidence of the investigations and editorial decisions of other news organizations." Given these alternative sources, the court found that the subpoenaed testimony was not "crucial" to plaintiff's claims and thereby rejected the plaintiff's contention that he need show only that the subpoenaed information was "relevant and necessary."

The court found it significant that the plaintiff was seeking testimony about "6ABC's newsgathering practices and policies." Among the information plaintiff sought was "(1) whether 6ABC received an anonymous tip which was also given to [KYW], (2) what research 6ABC engaged in after receiving this tip, and (3) why 6ABC elected not to broadcast [the plaintiff's] name as part of its story about the FBI raids." The court stressed that the plaintiff was seeking "editorial decisions and newsgathering activities that are at the core of what the reporter's privilege protects." Noting that the privilege is "especially important in this type of civil case, where the media entity from whom information is sought is not a party to the litigation," the court concluded that the privilege was "properly invoked" and quashed the subpoena.

Lastly, the court rejected the plaintiff's contention that the motion to quash was premature, holding that "[w]hen, as here, the information sought is wholly protected by the First Amendment reporter's privilege, a non-party media entity need not be subjected to the burden of appearing at a deposition."

It is significant the plaintiff did not argue that there is no First Amendment reporter's privilege in Pennsylvania. Because the case was a diversity case, Pennsylvania, not federal law, applied, though Pennsylvania courts heavily rely on Third Circuit cases when applying the privilege. While intermediate Pennsylvania appellate courts have uniformly adopted the privilege, the Pennsylvania Supreme Court in *Bowden* pointedly assumed without deciding that there was such a privilege. The court's decision is important for several reasons. It provides a strong re-affirmation and robust articulation of the First Amendment reporter's privilege in Pennsylvania at a time when courts around the nation have shown less support for the privilege generally. And it holds that the reporter's privilege fully protects newsgathering activities and editorial decisions and precludes a libel plaintiff from obtaining testimony from other media organizations merely because they reported on the same story at issue. A contrary ruling would have opened the door to more subpoenas on journalists.

Robert C. Clothier of Fox Rothschild LLP and Indira Satyendra, Senior Counsel at ABC, Inc. represented Movants Richard Williams and ABC, Inc. Gayle C. Sproul of Levine Sullivan Koch & Schulz, L.L.P. represents defendant KYW. Plaintiff is represented by Joseph R. Podraza, Jr. of Sprague & Sprague, Philadelphia, PA.

S.D.N.Y. Quashes Subpoena to Reporter in Fraud Suit Against Goldman Sachs

Investors Sought Reporters Testimony to Prove Negligence

By Amanda M. Leith

The Southern District of New York has quashed a subpoena served on Jesse Eisinger, a former *Wall Street Journal* reporter, seeking his testimony in a case brought by plaintiffs Janet and James Baker against Goldman Sachs & Co. (“Goldman”), arising from services Goldman provided in connection with the merger of the Bakers’ voice recognition software company, Dragon Systems, with the Belgian speech technology company Lernout & Hauspie (“L&H”) in 2000. *In re Subpoena to Jesse Eisinger*, No. 11-mc-00060 (S.D.N.Y. Apr. 12, 2011) (Jones, J.).

The Court found that Eisinger’s testimony was protected by the New York Shield Law, and determined that plaintiffs had failed to make the showing necessary to overcome the privilege

Background

In the underlying suit pending in federal court in Massachusetts, plaintiffs brought claims against Goldman for breach of fiduciary duty, breach of contract, negligence, negligent misrepresentation and unfair trade practices. Plaintiffs had hired Goldman to be Dragon’s “exclusive financial advisor” in connection with the sale of the company, then valued at over \$600 million.

In March 2000, Plaintiffs agreed, allegedly with Goldman’s “endorsement,” to merge Dragon with L&H. The merger deal, under which plaintiffs exchanged 51% of their interest in Dragon for approximately \$300 million in L&H stock, closed in June 2000. The L&H stock became worthless shortly thereafter upon the discovery of various financial frauds perpetrated by L&H, which declared bankruptcy in November 2000.

Plaintiffs claim that Goldman breached its professional, fiduciary and contractual duties by failing to fully investigate L&H and failing to uncover, among other things, L&H’s

overstated reporting of revenue, particularly with respect to customers in Asia.

Among plaintiffs’ theories is that Goldman was negligent because it did not do what the *Journal* did to uncover L&H’s fraud. Eisinger, then a *Journal* reporter, authored and co-authored several articles about L&H, which quoted analysts who were skeptical of L&H’s claimed sales successes in Asia. One article of particular interest to the Bakers, published on August 8, 2000 and entitled “Lernout & Hauspie Surges in Korea, Raising Questions,” described the results of an inquiry by the *Journal* into L&H’s purported Korean client list, which revealed that some of the listed clients did not even do business with L&H and that others had made far less significant contributions to L&H’s revenues than the company claimed.

The publication of the August 8 article was followed by a significant drop in L&H’s stock price, an SEC investigation and ultimately L&H’s declaration of bankruptcy.

Plaintiffs contended that they needed to depose Eisinger as “the individual who did exactly what Goldman should have done” and subpoenaed Eisinger, who filed a motion to quash. Eisinger argued that under the New York Shield Law, New York Civil Rights Law § 79-h, applicable in this diversity case, he could not be compelled to testify because plaintiffs could not meet the stringent test for discovery of non-confidential information and that confidential information, also implicated here, was absolutely protected.

Plaintiffs opposed the motion, arguing that the Shield Law protected only unpublished information and that they sought only testimony concerning published information. However, their brief made clear that they hoped to inquire into “what Eisinger did” and “what he did and what he found as he reported.” Plaintiffs also argued that they were able to satisfy

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Among plaintiffs’ theories is that Goldman was negligent because it did not do what the *Journal* did to uncover L&H’s fraud.

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the demanding test imposed by the Shield Law. Goldman submitted a statement objecting to plaintiffs' characterization of the underlying case and supporting the motion to quash.

Decision

The Court first addressed whether or not the Shield Law was applicable to the subpoenaed testimony. Plaintiffs argued that the Shield Law did not apply because they sought Eisinger's testimony only to "confirm the details published" in the *Journal* articles, which by definition was published information not covered by the statutory privilege. Eisinger contended, however, that, in seeking testimony concerning "what he did," plaintiffs inevitably would ask questions concerning unpublished information. In addition, Eisinger argued on this point that plaintiffs had failed to take into account Goldman's right to cross examination.

The Court agreed. First, it found that plaintiffs' written submissions and statements at oral argument suggested that the scope of testimony would not be confined to published information. The Court noted that, despite its repeated questions to plaintiffs' counsel during oral argument, plaintiffs "could not assure the Court that they would only ask Eisinger to confirm the [published] details" and, indeed, "could not define the exact questions [they] would ask" if permitted to depose him.

The Court observed that, to make their point that a non-accountant such as Eisinger was able to learn information that Goldman did not find, "plaintiffs inevitably would have to ask questions regarding Eisinger's techniques for conducting his investigation, the backgrounds of Eisinger's co-authors, and the [*Journal's*] editorial staff, and whether he consulted with any experts or other sources in the course of the investigation." The Court held that "these topics are key parts of the newsgathering process, and as such are protected by the New York Shield Law."

Second, the Court noted that the inquiry would logically delve into unpublished details given that (1) the August 8 article was co-authored by three journalists and the article did not identify precisely who had taken which steps in the *Journal's* investigation and (2) if deposed, Eisinger would be subject to cross-examination by counsel for Goldman, who represented to the Court that he would need to conduct an in-depth examination into the circumstances of Eisinger's investigation. The Court noted that this situation was distinct

from those in cases relied upon by plaintiffs, in which all sides had agreed to restrict themselves to questions regarding published information.

The Court next considered whether plaintiffs had made the requisite showing to overcome the privilege imposed by the Shield Law. It held that the language of the statute that requires the testimony be "critical or necessary to the maintenance of the claim" in turn required that plaintiffs demonstrate that their claims "virtually rise or fall with the admission or exclusion of the evidence" sought.

Observing that it was "even doubtful Mr. Eisinger's testimony would be relevant," the Court found that plaintiffs had "not demonstrated how testimony about a journalist's investigative techniques and process of reporting are a relevant comparison to Goldman Sachs' duty of care in this situation. The fact the Wall Street Journal conducted an investigation into L&H sheds no light on the scope of Goldman's obligations to Dragon and the Plaintiffs."

The Court therefore granted the motion to quash. Plaintiffs have filed a notice of appeal to the Second Circuit.

Mr. Eisinger was represented by Jason Conti of Dow Jones & Company and Gayle C. Sproul of the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. and Amanda M. Leith of the firm's New York office. Plaintiffs Janet and James Baker were represented by Alan K. Cotler, Joan A. Yue and Andrew J. Soven of Reed Smith, LLP. Defendant Goldman Sachs & Co. was represented by Paul Vizcarrondo of Wachtell, Lipton, Rosen & Katz.

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California Appellate Court Shines Light on Public Employee Pensions as Fiscal Tsunami Heads for Coast

By Karl Olson

Public employee pensions are a fiscal tsunami which threaten to swamp many state and local governments. Nowhere is that more true than in California, where a \$425 billion funding shortfall for three state pension systems, and a \$200 billion shortfall for local government pension systems is tarnishing the Golden State's luster.

It's against that background that a Sacramento-based appellate court recently issued a pro-transparency decision, holding that the names, pension amounts and employment history of county employees are matters of public record.

The Court of Appeal's May 11 decision in [*Sacramento County Employees' Retirement Association v. Superior Court \(Sacramento Bee\)*](#), 2011 Cal. App. LEXIS 569 was in many ways a pension version of the California Supreme Court's 2007 decision in *International Federation of Professional and Technical Engineers Local 21 v. Superior Court (Contra Costa Newspapers)* (2007) 42 Cal. 4th 319, which held that public employee salaries are matters of public record.

Just as the Supreme Court in the *Contra Costa Newspapers* case held that a statute exempting peace officer "personal data" from disclosure did not provide an exemption for peace officer names and salaries, the Court of Appeal in the *Sacramento Bee* case held that a law exempting "individual records" from disclosure did not exempt county employees' names, pension amounts and employment history from disclosure.

The "individual records" exemption "protects information provided by a member or on the member's behalf...not all information held by [the agency] that pertains to or relates to the member. The confidential record does not include the name, date of retirement, department retired from, last position held, years of service, base allowance, cost of living adjustment, total health allowance and monthly pension benefit of each retiree. Therefore, the trial court correctly concluded that this information, as requested by the *Bee*, was not protected from disclosure," the Court of Appeal ruled.

The Court of Appeal also brushed aside the pension agency's assertion – backed by a welter of *amicus* briefs from other pension associations and retiree associations – that disclosing named employees' pensions would subject them to identity theft, hostility or danger. The Sacramento pension agency had argued that most of the retirees were elderly and could be preyed upon by scam artists – a questionable assertion since the average retirement age for police officers and firefighters in Los Angeles is 51.

One of the primary drivers of California's pension crisis is a "3 percent at 50" pension formula for safety officers, which gives them 3 percent of their final salary for every year of service. Another problem for the state is the prevalence of "pension spiking," under which employees "spike" the last year salary upon which their pension is based with overtime, vacation cashouts, "uniform allowance," and other one-time enhancements to pay.

The Court of Appeal succinctly rejected the Sacramento pension agency's argument that "publication of individual pensions will harm retirees by exposing them to public hostility, particularly during their 'golden years.'" The Court remarked: "In [the agency's] laudable zeal to protect its members, [it] edges in the direction of 'unsupportable age-based stereotyping.' Simply because many retirees are elderly does not mean they are too frail

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to weather disclosure of their individual pensions.”

As the California Supreme Court had done in rejecting the claim that publication of salaries would expose employees to identity theft, the Court of Appeal turned aside similar claims about disclosure of pensions: “[The agency] has not demonstrated that releasing individual pension information will pose serious danger to its members.”

The Court of Appeal’s opinion may well have impact beyond California’s borders. While there is ample case law holding that public employee salaries are public records, the authority in the area of public employee pensions is less plentiful (although there is an obvious rationale for equating the two). The leading case from other jurisdictions, *Pulitzer Publishing v. Missouri Employee Retirement Systems*, 927 S.W.2d 477, was cited approvingly by the Court in the *Sacramento Bee* case.

It is not entirely clear that the Court of Appeal’s ruling in *Sacramento Bee* will be the last word. Similar cases are now before Courts of Appeal in San Diego and San Francisco: the media have filed an *amicus* brief in the San Diego case (which is scheduled for argument June 13), and the *Santa Rosa Press-Democrat* is a party in the fully-briefed San Francisco case. But the Sacramento-based Court of Appeal’s exhaustive, well-reasoned 48-page opinion will hopefully prove persuasive to the other courts, and it is very much in harmony with, and faithful to, the California Supreme Court’s *Contra Costa Newspapers* decision.

The Supreme Court said it well in the *Contra Costa Newspapers* salary decision: “Openness in government is essential to the functioning of a democracy.” That is especially true now in the area of public employee pensions, as Californians are watching libraries, schools and state parks close or cut back services at the same time as pension costs soar. Nationally, there are as much as \$3 trillion in unfunded pension promises made by the states, and in Los Angeles nearly a third of the city’s general fund could be consumed by retirement costs by 2015, according to the *Los Angeles Times*. The public has the right, and the need, to know where all that money is going.

Karl Olson is a partner at Ram, Olson, Cereghino & Kopczynski in San Francisco. He was counsel in the Contra Costa Newspapers and Sacramento Bee cases, and he represented the media amici in the pending San Diego case.

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Mobile Technology Headlines

MLRC Digital Media Conference

Fourth Annual Legal Frontiers in Digital Media Conference at Stanford University

MLRC held its fourth annual Legal Frontier's in Digital Media conference at Stanford University on May 19 & 20, 2011. This year's conference, organized -- as always -- in cooperation with Stanford Law School Center for Internet and Society, kicked off with two panels focused on mobile technology, "The Wireless Ecosystem," moderated by Dan Waggoner, Davis Wright Tremaine, and "The App World," a discussion led by video game consultant and entrepreneur, Shawn Foust.

With the introduction of the iPhone just four years ago, and the recent explosion of the smartphone and app markets, the panels discussed the enormous change and legal challenges posed by what speaker and venture capitalist and partner in Founders Co-op, Chris DeVore, referred to as "business disruption" technology. DeVore noted that in three and a half years, Apple grew to control half of the profit pie, but that Android, based upon a free platform, was surging and would likely run away with the market worldwide -- "free is compelling."

Rajeev Chand of Rutberg & Company, took off from the premise that mobile, local and social will shape the future. Linda Norman of Microsoft noted that the emerging mobile device may well substitute for the PC in the future. Security and data privacy will be key legal issues going forward, while intellectual property will be front and center in the business models.

The uncertainty of the privacy and international law implications of mobile devices were major points of

discussion. When asked how to comply with divergent international privacy laws, Shawn Foust responded bluntly: "It's a trainwreck," and suggested that companies "comply where [they] have assets." Panelists noted the evolving nature of the definition of personal identifying information, as well as the difference on that score in Europe versus the United States. Notwithstanding the uncertainty of the law

within the international arena, Bart Volkmer, Wilson Sonsini, noted that U.S. courts would apply the DMCA and Section 230 immunities to mobile apps the same way they have to web-based content.

Kate Spelman of Cobalt LLP led a panel on the "Good and Bad Side of Content Regulation." During that panel, a lively debate ensued between Professor Eric Goldman of Santa Clara University School of Law and Dean Marks of Warner Brothers, Entertainment, on the proper role of regulation of the Internet in the context

of intellectual property protection, and what balance should be struck to protect free speech while encouraging creativity. Nicklas Lunblad of Google referred to a United Nations study of content regulation on the Internet from the perspective of democracies versus dictatorships.

Sophie Cohen of Cobalt LLP moderated a panel on search engine technology, which featured a tutorial from Google's Daniel Russell on the tricks and tips of search, and insights into the future of search from ProQuest's Timothy Babbitt (who discussed search curation) and Microsoft's Jon Zieger

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Paul Saffo, giving his presentation "Welcome to the Creator Economy." Also, pictured: David J. Blumberg of Blumberg Capital, far right, and Riaz Karamali, Sheppard Mullin, center.

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(who discussed personalization of search results). Simon J. Frankel, Covington & Burling, capped the discussion with an overview of the current state of DMCA protection for search providers.

David McCraw of the New York Times led a conversation about the media environment in the post-Wikileaks world, in which, according to panelist David Vigilante of CNN, “information is moving faster than what the law can keep up with.” Other panelists, including Jennifer Granick of Zwillinger Genetski and David Ogden of WillmerHale, provided analysis of the potential for application of the Espionage Act to some journalists, but noted the uncertain state of the law. Part of the discussion focused on the legal issues surrounding the establishment by the media of WikiLeaks-like electronic dropboxes in which members of the public can securely submit documents to the press. In particular, the panel felt that the Wall Street Journal’s implementation of this idea, “WSJ SafeHouse,” was so overburdened with legal disclaimers and caveats that it offered little comfort to would-be whistle-blowers.

Prior to the final panel, noted forecaster and Stanford University Professor, Paul Saffo, gave a presentation entitled, “Welcome to the Creator Economy.” Saffo described the potential implications of what he described as our “profound” shift from the consumption of mass media, such as television, in a “consumer economy,” to participation with personal media, such as the web, in a “creator economy.”

The final panel discussion, led by Riaz Karamali, Sheppard Mullin, featured analysis of future trends by venture capital specialists. The VCs – David Blumberg of

Blumberg Capital, Tim Draper of Draper Fisher Jurvetson and Howard Hartenbaum of August Capital, and joined by journalist Chris O’Brien of The San Jose Mercury News – made clear they are looking for game changing ventures. They noted that most start-ups are global from the day they open their doors and have to respond to a global marketplace. Chris O’Brien said that the Internet and the web were thought to be synonymous but the app culture has changed that analysis. Now it is the app versus the open web.

As infrastructure becomes cheaper, and more of a commodity, the value will be in the service overlay of a venture. The venture capital panelists seemingly took a dim view of regulation of the marketplace, and it was speculated that the technology changes, moving faster and faster, are moving the marketplace too fast for government to effectively institute regulation.

Among the other topics discussed were the rise of tablet computers, innovations in social media to market products, and recent IPO’s and acquisitions.

The audio tapes from the sessions will be posted on Stanford University iTunes, and likely on the MLRC website as well, within the month. MLRC will let its members know when the audiotapes are available.

This year’s conference was co-chaired by Steve Tapia, Corporate Counsel, DirectTV Regional Sports Networks, Andrew Bridges, Partner, Winston & Strawn, and Chair-Emeritus, James Chadwick, Partner, Sheppard Mullin.

Our sponsors were Axis Pro, GreenbergTraurig, Bingham, Jackson Walker LLP, CNA, Microsoft, Covington & Burling LLP, the National Association of Broadcasters, Davis Wright Tremaine LLP, Sheppard Mullin, Dow Lohnes, WilmerHale; and special thanks go out to Google, which sponsored the reception held at the Stanford Faculty Club.



David McCraw of the New York Times, right, and Jennifer Granick of Zwillinger Genetski, from the panel “Wikileaks: The Media, The Law, the World.”

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