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MLRC/NAA/NAB 2012 Media Law Conference Sept. 12-14, 2012 | Reston, Virginia

> MLRC Annual Dinner November 14, 2012 | New York, NY

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Second Circuit Reverses Troubling Federal District Court Decision Affecting the Rights of Copyright Owners to Combat Online Piracy

By Cliff Sloan and Chris Clark

On April 5, 2012, in the closely watched case of <u>Viacom v. YouTube</u>, the Second Circuit vacated a federal district court decision granting summary judgment to YouTube and Google, and sent the case back to the district court for further proceedings. In its decision, the Second Circuit reversed a number of troubling conclusions reached by the district court that threatened the protection of creative content in the online world.

Viacom alleges that YouTube knowingly built a business based on copyright infringement. According to Viacom, YouTube's founders deliberately built a large audience through pervasive copyright infringement of popular videos. YouTube maintained that, as long as it removed videos in

response to specific notices, it was shielded from liability under the Digital Millennium Copyright Act ("DMCA"). YouTube's position was that it had no further obligation beyond taking down specific videos after receiving take-down notices.

The district court recognized that "a jury could find that the defendants not only were generally aware of, but

welcomed, copyright-infringing material being placed on their website." But it nevertheless granted summary judgment for YouTube and Google (which acquired YouTube) because, in the district court's view, they were entitled to complete immunity from copyright liability under the DMCA safe harbors. That decision, and its suggestion of sweeping immunity for online enterprises built on a business model of copyright infringement, posed a significant threat to content creators and owners.

The Second Circuit reversed in part and remanded to the district court for further proceedings. The Second Circuit's 39-page decision contains several rulings, three of which are particularly relevant for content owners:

Actual and "Red Flags" Knowledge: Item-specific?

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The DMCA safe harbor is not available to an entity if it fails to take down infringing content when it has "actual knowledge" of the infringement or when it has what is known as "red flags" knowledge (awareness of "facts or circumstances from which infringing activity is apparent"). 17 U.S.C. § 512(c)(1)(A)(i)-(ii). One important issue in *Viacom v. YouTube* was whether such knowledge has to be item-specific.

The Second Circuit agreed with the district court and with YouTube and Google that, under the DMCA, both types of knowledge must be item-specific. Importantly, however, the Court of Appeals also determined that a reasonable jury

might find that, in this case, YouTube had item-specific knowledge, and the Court sent the issue back for further consideration. The Second Circuit emphasized vivid e-mails from YouTube executives that may reflect actual knowledge of infringement, or "red flags" knowledge.

For example, when one YouTube executive suggested that YouTube should

"start being diligent about rejecting copyrighted/inappropriate content" and pointed to "a cnn clip . . . on the site today," another YouTube executive strongly objected to taking down the CNN video:

"we should just keep that stuff on the site. i really don't see what will happen. what? someone from cnn sees it? he happens to be someone with power? He happens to want to take it down right away. he gets in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video

(Continued on page 5)

down."

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The Second Circuit pointed to this evidence and other emails to reverse the district court, and concluded that "the plaintiffs may have raised a material issue of fact regarding YouTube's knowledge or awareness of specific instances of infringement."

Willful Blindness

In a very important ruling, the Second Circuit emphasized the importance of "willful blindness" as a basis for culpable knowledge and found that the district court had failed to address it. The Court of Appeals squarely held that "the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA," and remanded for the district court to consider the issue. This principle of willful blindness provides a potent tool against enterprises that develop a business predicated on piracy and that then seek to remain willfully blind to the theft of intellectual property they have provoked and welcomed. The Second Circuit's opinion establishes that a claim to DMCA immunity in such circumstances can be vigorously challenged.

Right And Ability To Control

In still another important ruling, the Second Circuit addressed the scope of the right-and-ability-to-control limit to the DMCA safe harbor. The DMCA requires that, if an entity has the "right and ability to control" activity on its site and receives a financial benefit from infringing activity, it must take down the infringing content or lose immunity. 17 U.S.C. § 512(c)(1)(B). The Second Circuit rejected the district court's narrow interpretation of the "right and ability to control" requirement. It concluded that the district court "erred by importing a specific knowledge requirement" into

the right-and-ability-to-control inquiry.

Instead, it held that the right-and-ability-to-control provision "requires something more than the ability to remove or block access to materials posted on a service provider's website." Although it did not spell out exactly what would satisfy that "something more" standard, it relied on a Supreme Court case with enormous resonance and power in the online liability context – the Supreme Court's *Grokster* decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, *Ltd.*, 545 U.S. 913 (2005).

Here, too, the Second Circuit's interpretation of the right-and-ability-to- control limit on DMCA immunity, and its invocation of the instructive example of *Grokster*, may provide a powerful weapon to combat DMCA immunity claims by those who have built businesses on infringement. The Second Circuit remanded for the district court to consider the issue "in the first instance" and to evaluate, under the correct legal standard, whether there is sufficient evidence that YouTube had the right and ability to control the infringing activity.

While not every legal conclusion that the Second Circuit reached is the most desirable from a content owner's perspective, on balance it is a helpful opinion that corrects a number of troubling conclusions from the district court's summary judgment decision. The district court proceedings on remand will provide additional insight into how these rulings will affect the ability of content owners to protect copyrighted material in the online environment.

Cliff Sloan is a partner in intellectual property and litigation and Christopher Clark is a litigation associate at Skadden, Arps, Slate, Meagher & Flom. They filed an amicus brief in support of Viacom and reversal in the Second Circuit on behalf of a coalition of more than 20 content owners and public interest organizations, including media, entertainment, and sports companies and associations. A full listing of counsel is contained in the Second Circuit's decision.



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Fourth Circuit Decision Sets Up Keyword Trademark Cases for Trial

Trial Required to Decide Trademark Infringement Evidence

By Mark Sableman

The Fourth Circuit's first foray into keyword trademarks use, in *Rosetta Stone. Ltd. v. Google, Inc.*, (April 9, 2012), provides a roadmap to those who, like the plaintiff, the Rosetta Stone language-learning company, challenge use of their trademarks as key words to trigger search-engine sponsored ads. Among other things, it rejects the newest attempt at an easy pretrial defense for search engines (trademark functionality), and it reemphasizes that the focus of such cases must be on proving infringement at trial through traditional proof such as surveys and evidence of actual confusion.

The Rosetta Stone decision is likely to become the key precedent for what could be considered the third wave of trademark keyword litigation. In each wave, appeals courts

have rejected trial court decisions that had embraced easy-out pretrial defenses for the search engine companies. The first wave ended with the Ninth Circuit's *Playboy Enterprises*, *Inc.* v. *Netscape Communications*, 354 F.3d 1020 (9th Cir. 2004), decision, which rejected a trial court's conclusion that keyword use wasn't actionable if the trademarks used were also

normal English words. The second wave ended with the Second Circuit's rejection in *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009) of the then-popular notrademark-use defense adopted by several district courts. With *Rosetta Stone*, the Fourth Circuit rejected yet another attempted legal defense, and reaffirmed the message of *Playboy* and *Rescuecom* – that these cases must go to trial, and be decided based on basic trademark infringement evidence.

Keyword Ads and Trademark Law

At core, the decision rests on two familiar principles that disputed issues preclude summary judgment, and that trademark infringement depends on the fact-finder's conclusion based on all of the facts. The court concluded that Rosetta Stone presented sufficient facts to preclude summary judgment, and it made it clear that no legal doctrine or defense could shortcut the full presentation and review of all evidence at trial.

The trial court had entered summary judgment for Google on the core direct trademark infringement claim, based on two theories: (1) that Rosetta Stone had created no triable issue on infringement, and (2) that Google was protected because its keyword use of the trademark was functional. The Fourth Circuit rejected both conclusions.

First, the court found that Rosetta Stone had presented viable evidence of infringement. Among other things, Rosetta Stone had conducted discovery into Google's decadelong AdWords experiences, including several policy changes as to whether and how trademarks could be used. It argued as

evidence of knowledge of likely infringement Google's reversal in 2009 of its long-standing policy against allowing competitor trademarks in advertising copy. It presented evidence that at the time Google made such changes, Google in-house studies indicated that consumer confusion would increase (as would revenues and

litigation). Also, Rosetta Stone presented both anecdotal evidence of confusion, and an expert consumer confusion survey showing net confusion of 17%.

The appeals court found such evidence clearly sufficient to avoid summary judgment, and criticized the trial court for making reliability and weight decisions that were more properly left for the jury.

Interestingly, the appeals court agreed with the trial court that not all of the multiple factors in the traditional trademark infringement analysis were relevant, and that the trial court acted properly in disregarding most of the factors. The standard factors were designed for traditional trademark infringement situations, and are irrelevant "in the context of a referential or nominative type of use" as with keywords. The court's rejection of "the robotic application of each and every

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factor" is somewhat courageous given the love most lawyers and judges have for prescribed multi-factor tests, and the court's gimlet-eye view of rote factor analysis could be useful in the analogous area of copyright fair use, which is also plagued with sometimes rigid and wooden factor-by-factor analysis.

On the trial court's second basis for summary judgment on direct trademark infringement, the "functionality" defense, the appeals court readily rejected that ruling as a complete misunderstanding of the trademark functionality doctrine. That doctrine holds that a functional aspect of a trademark (something that is essential to the use or purpose of the product or service) is not protectable as a trademark. But the court stressed that functionality is viewed as the trademark owner uses the product or service, not as the alleged infringer does. It held that the trial court erred by viewing functionality from Google's perspective (the fact that Google use the ROSETTA STONE mark in a referential and nominative manner), not from Rosetta Stone's (where Rosetta Stone uses the mark in a clearly distinctive non-functional manner).

After disposing of the trial court's rulings on direct trademark infringement, the court then turned to Rosetta Stone's contributory infringement and vicarious liability claims, its federal trademark dilution claim, and its state law unjust enrichment claim.

As to contributory infringement – a favorite theory of trademark owners who object to search engine use of their trademarks to trigger competitive ads – the court found that Rosetta Stone had made out a triable claim, essentially because of evidence from discovery that "reflected Google's purported allowance of known infringers and counterfeiters to bid on the Rosetta Stone marks as keywords." The district court had relied on *Tiffany (NJ) Inc. v. eBay, Inc.,* 600 F.3d 93 (2d Cir. 2010), in finding that evidence insufficient, but the Fourth Circuit pointed out that *Tiffany* reflected a conclusion at the end of a bench trial, not a summary judgment disposition.

As to vicarious liability, the court affirmed summary judgment for Google because of the lack of any evidence that Google acted jointly with any of its advertisers to control the counterfeit Rosetta Stone products that were sold through infringing AdWords ads.

On the trademark dilution claim, the appeals court found triable issues, and reversed the district court's summary judgment. The district court had concluded that Rosetta

Stone had not associated itself with the ROSETTA STONE mark, and that that finding alone was sufficient; the appeals court held that Google had to also prove that its use of the mark qualified for the statute's fair use exemption. And the appeals court held that the district court's conclusion of no dilution was based on an improperly truncated analysis.

Finally, the court affirmed summary judgment for Google on a state law unjust enrichment claim because Rosetta Stone had failed to alleged the relevant elements.

The underlying themes of the Fourth Circuit will be familiar to both trial and trademark lawyers:

- summary judgment is inappropriate when material facts are disputed;
- trademark infringement focuses on harm to consumers and the ways in which the trademark owners use the mark, generally not on how or why the alleged infringer uses the mark; and
- infringement ultimately depends largely on evidence about how consumers perceive the alleged infringing use.

But as basic as these themes are, they have been only slowly perceived and applied in keyword trademark cases. It seemed a few years ago, after *GEICO v. Google, Inc.*, 2005 WL 1903128 (E.D.Va. 2005), that these cases would finally move on to such evidence and such trials. But that development was sidetracked by the no-trademark-use defense that the Second Circuit ultimately rejected in *Rescuecom*, and new proffered defenses like the "functionality" defense now rejected by the Fourth Circuit.

It has now been almost a decade and a half since the first keyword case presented itself in the ancient days before Google was the dominant search engine. We've had three waves of appellate court rulings confirming that the basic principles of trademark law apply to these situations. Perhaps now the stage is finally set for trials that will address the key issues presented by these cases—whether consumers are confused by trademark keyword-based search engine ads.

Mark Sableman is a partner with Thompson Coburn LLP in St. Louis. Clifford M. Sloan, Mitchell S. Ettinger, and Jennifer L. Spaziano, of Skadden, Arps, Slate, Meagher & Flom, LLP, in Washington, D.C., represented Plaintiff-Appellant Rosetta Stone, and Margret Mary Caruso, Cheryl A. Galvin, Henry Lien and Austin D. Tarango, of Quinn, Emanuel, Urquhart & Sullivan, LLP, in Redwood Shores, California, represented Defendant-Appellee Google.

US Supreme Court to Hear First Sale Copyright Doctrine Case

Does Doctrine Apply to Works Produced Abroad and Resold in the U.S.?

The Supreme Court this month agreed to hear an appeal of a divided Second Circuit panel decision holding that the first sale doctrine does not apply to copyrighted works produced outside the U.S. but imported and resold here. *Kirtsaeng v. John Wiley & Sons, Inc.,* No. 09-4896 (2d Cir. Aug. 15, 2011), *rev. granted*, No. 11-697 (U.S. April 16, 2012).

The "first sale doctrine" under the Copyright Act (17 U.S.C. § 109(a)) allows the owner of a copyrighted work to resell it without limitations from the copyright holder after the initial sale. In relevant part § 109(a) provides:

the owner of a particular copy ... lawfully made under this title, or any person

authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy (emphasis added).

Another section of the Copyright Act, however, prohibits the importation of copyrighted works into the United States without the authority of the copyright

owner. 17 U.S.C. § 602(a)(1) provides in relevant part:

Importation into the United States, without the authority of the owner of copyright under this title, of copies ... of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies ... under section 106

The Second Circuit majority found that § 602(a)(1) was "obviously intended to allow copyright holders some flexibility to divide or treat differently the international and domestic markets for a particular copyrighted item." Calling

this a difficult case of statutory construction, the majority concluded that the first sale doctrine is best interpreted as applying only to works produced in the United States.

The Supreme Court was set to address the first sale doctrine two years ago when it agreed to hear an appeal in *Omega S.A. v. Costco Wholesale Corp*. In *Costco*, the Ninth Circuit held that the "first sale doctrine" only applies where the disputed copies were made or previously sold in the United States with the authority of the copyright owner. The Court however merely issued a <u>per curiam affirmance</u> (with no opinion) on a 4-4 vote as Justice Kagan had recused herself from the case. According to news reports, Justice Kagan will participate in *Kirtsaeng* and therefore may cast the deciding vote.

§ 602(a)(1) was "obviously intended to allow copyright holders some flexibility to divide or treat differently the international and domestic markets for a particular copyrighted item."

Background

In September 2008, John Wiley & Sons, Inc. ("Wiley"), a publisher of mass market books and textbooks, sued PhD student Supap Kirtsaeng for copyright infringement for reselling foreign edition textbooks in the U.S. To earn money to pay for his doctoral studies, Kirtsaeng enlisted his friends and family in Thailand

to ship him foreign edition textbooks which he resold on websites such as eBay.

Among the books that Kirtsaeng sold in this fashion, were eight textbooks published by Wiley Asia, Wiley's wholly-owned subsidiary that publishes foreign editions of textbooks for that market. Before trial, the District Court held that the first sale doctrine did not apply to foreign editions. Ultimately, the jury found Kirtsaeng liable for willful copyright infringement and imposed damages of \$75,000 for each of the eight works, totaling \$600,000. Kirtsaeng appealed, arguing that the District Court erred in prohibiting him from raising the "first sale doctrine" as a defense in the case.

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On appeal, the Second Circuit majority affirmed that the first sale doctrine does not apply to works manufactured outside the United States. The opinion written by Judge Cabranes and joined by Judge Katzman acknowledged the tension between § 602(a)(1) and § 109(a), but found persuasive the Supreme Court's analysis of a related issue in *Quality King Distributors, Inc. v. L'anza Research International, Inc.* Although *Quality King* involved goods that had been manufactured in the United States and not abroad, there was language in the *dicta* that suggested that the first sale doctrine does not apply to foreign-manufactured items.

The Second Circuit majority first evaluated the phrase "lawfully made under this title" in § 109(a). It determined that the text of the provision is unclear, as it "could plausibly be interpreted to mean any number of things, including: (1) 'manufactured in the United States,' (2) 'any work made that is subject to protection under this title,' or (3) 'lawfully made under this title had this title been applicable.""

It determined that because the language is ambiguous, it should adopt an interpretation that uses § 602(a)(1) and *Quality King* as guidance. The Second Circuit found that applying the first sale doctrine to every work, including those manufactured abroad, would lessen the force behind § 602(a) (1). It also found that the *dicta* in *Quality King* also supported this interpretation of the first sale doctrine.

Judge J. Garvan Murtha dissented, writing that the first sale doctrine should apply to any US-copyrighted work, regardless of where it was manufactured. This meant that the § 602(a) right should be qualified by the first sale doctrine. Judge Murtha also pointed to the Third Circuit decision in *Sebastian Int'l, Inc. v. Consumer Contacts (PTY)LTD*, where the Third Circuit noted its "uneasiness" with reading the "lawfully made under this title" phrase in § 109(a) so that it turns on the place of manufacture. Judge Murtha determined that, contrary to the majority opinion's emphasis on where the goods were manufactured, the focus should be on whether the copy was authorized by the U.S. rights holder. The judge concluded that, because this case involved foreign copies manufactured by Wiley's wholly-owned subsidiary, the goods were indeed authorized.

Petition for Certiorari

Defendant's <u>petition for certiorari</u> asks the Supreme Court to resolve the legal uncertainty surrounding the application to the first sale doctrine to foreign-made copies. The Question Presented states:

This case presents the issue that recently divided this Court, 4-4, in *Costco Wholesale Corp. v.Omega*, S.A., 131 S. Ct. 565 (2010). Under § 602(a)(1) of the Copyright Act, it is impermissible to import a work "without the authority of the owner" of the copyright. But the first-sale doctrine, codified at § 109(a), allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of the copy without the copyright owner's permission.

The question presented is how these provisions apply to a copy that was made and legally acquired abroad and then imported into the United States. Can such a foreign-made product never be resold within the United States without the copyright owner's permission, as the Second Circuit held in this case? Can such a foreign-made product sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in this country, as the Ninth Circuit held in Costco? Or can such a product always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad, as the Third Circuit has indicated?

The petition argues that the Second Circuit's interpretation was incorrect in light of the Copyright Act's language and *Quality King*. It claimed that the Court, in *Quality King*, found that the § 602 right was derivative of the § 106 right to distribute, which is subject to the first sale doctrine. According to Kirtsaeng's petition, this then meant that § 602 is also subject to § 109.

<u>eBay Inc.</u>, the <u>Retail Industry Leaders Association</u>, and <u>Public Knowledge</u> filed amicus briefs in support of Kirtsaeng.

In its brief, eBay Inc. argued that the Second Circuit ruling would harm trade, e-commerce, and secondary

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markets, by creating a burden on participants of these markets to undertake the impossible task of determining the legal status of each alleged copyrighted work. The Retail Industry Leaders Association took a similar position in the matter, highlighting the importance of the first sale doctrine to retailers, wholesalers, and consumers who purchase authentic "gray market" goods for resale. The Second Circuit holding may give copyright owners means to stifle low-priced competition through parallel importations and aftermarkets.

Public Knowledge, in its brief, argued that the Second Circuit's interpretation led to "manifestly absurd results" and allowed copyright holders to control indefinitely the distribution of any foreign-made copy, which may have the consequence of encouraging rights holders to move their manufacturing operations abroad.

The American Intellectual Property Law Association filed an amicus brief in support of neither party and urged the Supreme Court to resolve the legal confusion surrounding the application of the first sale doctrine to copies made abroad for the sake of stability and uniformity in intellectual property laws.

John Wiley & Son's Brief in Opposition to Certiorari argued that the Second Circuit decision was consistent with the Supreme Court's decision in *Quality King* and that copies made by a foreign distributor are not made "under" the Copyright Act. Moreover, this interpretation preserves the purpose of § 602(a)(1) to enable copyright holders to treat international and domestic markets differently with respect to a particular copyrighted item.

Sam P. Israel, NY, NY; and Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP, NY, NY, represented defendant on his Petition for Certiorari. Plaintiffs <u>brief in opposition to certiorari</u> was filed by Theodore Olson, Gibson, Dunn & Crutcher LLP, Washington, D.C.

Questions or comments about the MediaLawLetter?

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Press Asserts Constitutional Right of Access to Guantanamo Commissions

First Time Media Permitted To Make Access Motion

By Julia Atcherley

In a major step forward, earlier this month a military commission for the first time recognized the right of the press to be heard in opposition to the closure of proceedings of a Guantanamo military commission. On April 11, 2012, David Schulz, of Levine Sullivan Koch & Schulz, LLP, appeared before a military judge at the U.S. Naval Base in Guantanamo Bay, on behalf of ten news organizations (Miami Herald, Fox News Network, The McClatchy Company, National Public Radio, New York Times, The New Yorker magazine, Reuters, Tribune Company, Wall Street Journal, and Washington Post) to argue in support of public access to a pre-trial hearing in the case of *United States of America v. Abd al Rahim Hussayn Muhammad al Nashiri*.

Background

Nashiri is the alleged mastermind of the bombing of the U.S.S. Cole off the coast of Yemen. As disclosed in a report by the CIA Inspector General, and widely reported, Nahiri was subjected to a variety of "enhanced interrogation techniques," including waterboarding. Nashiri was expected to testify about his interrogation during a hearing on April 11, 2012 on a defense motion seeking an order permitting the defendant to meet with his attorneys without being shackled to the floor. Because any testimony Nashiri might give about his interrogation is still considered to be "classified," the trial judge was asked to consider whether the hearing should be closed.

A <u>letter</u> was filed by the ten news organizations objecting to any closure of the hearing. The letter asserted that the public's right to attend the hearing was guaranteed by the First Amendment, so that before any closure the judge was required to make specific findings that open proceedings would pose a substantial probability of endangering national security, that no less alternatives to closure were available, and that any closure ordered was narrow and effective.

The press asserted that no proper basis existed to close testimony with respect to the information about Nashiri that is already publicly known, including his interrogation, regardless of whether the information technically was still considered classified. In their view, no significant threat

could exist to national security from the discussion of already public information in an open proceeding. They also argued that a more narrow alternative to closing the proceeding would be to allow the press to observe by video on a time-delay basis, so any truly threatening information disclosed could be blocked in real time (an option that exists given the high-tech courtroom built at Guantanamo). Finally, they argued that a de-classified transcript of the proceeding should be made publicly available on an expedited basis if any portion of the proceeding were closed.

Military Commission Oral Argument

After receiving the letter, the presiding judge, Col. James L. Pohl, agreed to hear oral argument on the journalists' objections. Col. Pohl ultimately side-stepped a decision on whether Nashiri's testimony could be given in an open courtroom by granting the defendant's motion to be unshackled without taking any testimony. Nevertheless, the Military Commission's recognition of the press' right to be heard in opposition to any motion to close the proceedings set a significant legal precedent.

This is believed to be the first time that a non-party has been permitted to make an access motion to a military commission at Guantanamo. The transcript is available here. In an interview with *The Miami Herald*, Eugene Fidell, a lecturer in military justice at Yale Law School, described the press' opposition as "arguably the first major test of this iteration of the commissions...somebody has got to take a hard, independent look at what's classified and why." He commented that, "if the purpose of [closure] is to avoid embarrassment to the government, that is not a valid reason to conceal anything...if the purpose is to cover up criminal activities, that is not a valid reason to conceal it, either."

The news organizations that objected to closed proceedings were represented by David Schulz, Steven Zansberg, and Julia Atcherley of Levine Sullivan Koch and Schulz, LLP. The lead prosecution lawyers are Gen. Mark martins and Anthony Mattivi and Nashiri is being defended by Navy Lt. Cmdr. Stephen Reyes and Michel Paradis, all of the Office of Military Commissions.

MLRC MediaLawLetter

Circuit Affirms Summary Judgment for Nashville TV Station in Wrongful Arrest Libel Case

Fair Report, Lack of Actual Malice, Single Publication Rule Protect Broadcaster

By Patricia A. Foster

The Sixth Circuit affirmed summary judgment in favor of Sinclair Television of Nashville d/b/a/ WZTV-Fox 17 in a defamation and false light action arising from a news report describing and depicting plaintiff Paula Milligan's arrest during a multi-state fugitive roundup. Milligan v. United States et al., , 2012 U.S. App. LEXIS 4457 (6th Cir. 2012) (Moore, Cole, Beckwith, JJ.).

Although Paula Milligan was arrested as reported, police arrested the wrong person due to a series of clerical mistakes that confused plaintiff's identity with that of the wanted person with the same name. In a published opinion, the

appellate panel affirmed that the news report was privileged as a fair report of official actions and statements, was substantially true, and was made without actual malice.

The Sixth Circuit also affirmed that the single publication rule rendered immaterial the plaintiff's arguments regarding the continued availability of the news report on Fox 17's website even after the media defendant was notified

that the police had arrested the wrong Paula Milligan.

Background

In October 2006, law enforcement officials across 24 states conducted Operation Falcon III ("the Operation"), a week-long fugitive round-up in which U.S. Marshals and local police officers located and apprehended over 10,000 individuals wanted on outstanding federal, state or local felony warrants. In Nashville, Tennessee, U.S. Marshals conducted the Operation in conjunction with officers at the Metropolitan Nashville Police Department ("Metro"). In preparation for the Operation, clerks in Metro's Warrants Division prepared an arrest file for each warrant to be executed.

On October 24, 2006, a team of officers in possession of an arrest file for plaintiff Paula Milligan arrived at her home and arrested her despite her insistence that they had the wrong person. As it turned out, Mrs. Milligan was correct. Unbeknownst to the arresting officers, Metro's Warrants Division made several clerical errors when processing a warrant for "Paula Milligan a.k.a. Paula Rebecca Staps" that led to the erroneous creation of the arrest file for Mrs. Milligan, whose address and physical description were markedly different from the wanted individual. The original warrant, which might have revealed these errors, remained on file in the Warrant Division during Mrs. Milligan's arrest.

> On November 1, 2006, all criminal charges against Mrs. Milligan were dropped as it became clear to the court that she had been erroneously arrested.

> Before the Operation began, U.S. Marshals contacted local media outlets and offered an opportunity to ride along and report on the Operation. WZTV-Fox 17 accepted and was assigned a ride-along on October 24, 2006, the day of Mrs. Milligan's arrest. Fox 17's reporter and

videographer observed and filmed Mrs. Milligan's arrest from the public street in front of her house as she was escorted to a police car and driven away. Fox 17's reporter was told by the Public Affairs Officer that Mrs. Milligan was arrested on four counts of forgery and one count of identity theft. As a condition of the ride-along, Fox 17 agreed not to broadcast its report until the Operation concluded on November 2, 2006 to avoid tipping off other fugitives.

On November 2, 2006, the day after criminal charges against Mrs. Milligan were dropped, the Marshals' news embargo lifted and Fox 17 broadcast its news report. Fox 17's report focused on the Operation and began with the statement, "With warrants in hand, teams of officers swarmed

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across Middle Tennessee." The news report described the thousands of arrests, some for drug and sex related crimes, and included brief video footage of the two arrests that Fox 17 observed during its ride-along.

Specific to plaintiff Milligan, the report stated, "Their first arrest came early - Paula Milligan wanted on four counts of forgery and one count of identity theft." Also on November 2, 2006, Fox 17 posted its news report onto its website. On November 3, 2006, Mrs. Milligan's attorney contacted Fox 17 demanding that Fox 17 stop broadcasting its news report because Mrs. Milligan was arrested in error. Fox 17 made no further broadcast of "Operation Falcon III" and removed all direct links to the news report from its website. However, due to technical difficulties, the original report was accessible on Fox 17's website through a keyword search until November 13, 2006 when it was removed completely.

Mrs. Milligan and her husband sued the United States and Metro for claims including civil rights violations, false arrest, false imprisonment, and assault and battery. The Milligans also sued Fox 17 for defamation, false light invasion of privacy, and outrageous conduct.

District Court's Decision

The district court granted Fox 17's motion for summary judgment on July 21, 2009. *See Milligan v. United States*, 644 F. Supp. 2d 1020 (M.D. Tenn. 2009).

The court found that the news report was privileged as a fair report that provided an accurate impression of an official government action. The district court was not persuaded by plaintiffs' claims of falsity from the statements that Mrs. Milligan was "wanted" and that the arresting officers held "warrants in hand." Likewise, the court was not persuaded by plaintiffs' contentions that Fox 17 knew or should have determined before broadcast that the wrong Paula Milligan was arrested.

Calling plaintiffs' circuitous attempts to demonstrate actual malice to be merely "a house of inferential cards," the district court granted summary judgment to Fox 17 on all claims. *Milligan*, 644 F. Supp. 2d at 1037. It also granted partial summary judgment to Metro and later dismissed plaintiffs' claims against the United States for lack of subject matter jurisdiction. Plaintiffs' remaining claims against Metro proceeded to trial where a jury found no violation of Mrs. Milligan's constitutional rights. Subsequent to trial,

plaintiffs reached a settlement with Metro that resolved all issues between these litigants.

Sixth Circuit Decision

The Milligans appealed the district court's dismissal of their claims against the United States and Fox 17. In affirming summary judgment on the Milligans' defamation and false light claims against Fox 17, the Sixth Circuit agreed that the news report was governed by Tennessee's qualified fair report privilege. Mrs. Milligan's arrest, although erroneous, was an official action. Fox 17's news report was a fair and accurate portrayal of that arrest.

Like the District Court, the Sixth Circuit panel did not agree that the report's reference to "warrants in hand" imposed any liability on Fox 17. Even if the arresting officers did not physically hold the original warrant during Mrs. Milligan's arrest, the court determined that this "insignificant, technical discrepancy" was insufficient to defeat the fair report privilege. *Milligan*, 2012 U.S. App. LEXIS 4457 at *25.

Turning to the actual malice question, the court found no reckless disregard for truth. No evidence demonstrated that the reporter entertained serious doubts as to the truth of Mrs. Milligan's arrest. Therefore, the court rejected plaintiffs' contention that Fox 17 should have reviewed the arrest file, investigated the original warrant, or followed the subsequent court proceedings.

Finally, the Sixth Circuit relied upon Tennessee's single publication rule to reject plaintiffs' argument that actual malice might be found from the fact that the broadcast was accessible on Fox 17's website through a keyword search despite Fox 17's efforts to remove the broadcast from its website. Although prior case law addressed the single publication rule in the context of the statute of limitations, the Sixth Circuit used the rule to disregard any purported factual dispute over post-publication actions that were immaterial to the dispositive issues of falsity and fault. Because Plaintiffs failed to provide a basis for establishing actual malice, the court affirmed summary judgment on both the defamation and false light claims. The Sixth Circuit also affirmed the dismissal of claims against the United States.

The late Richard Goehler and Patricia Foster of Frost Brown Todd LLC, Cincinnati, OH, represented WZTV-Fox 17. Plaintiff was represented by Andy L. Allman, Kelly, Kelly, & Allman, Hendersonville, TN.

Court Rules News Report Presenting Both Sides of Dispute Is Not Grossly Irresponsible

By Michael Berry

On February 22, 2012, a New York trial court granted summary judgment in favor of Cablevision Systems Corporation, News 12 Long Island, and one of its reporters, Holli Haerr, in a case arising from a news report about a married couple's claim that a landlord declined to rent them an apartment because the husband had AIDS. The court, Justice Karen V. Murphy of the Nassau County Supreme Court presiding, held that News 12 was not grossly irresponsible in reporting the couple's charges of discrimination because the station accurately reported both sides of the dispute. The court also ruled that the report did not suggest that News 12 endorsed the couple's claims and concluded that "editorial judgment as to the facts to be included in a story must be left to the media." See Levy v. Johnson, 2012 NY Slip Op 30639(U) (N.Y. Sup. Ct. Nassau Cnty. Feb. 22, 2012).

Factual Background

In January 2009, a fire destroyed the apartment where Ennis and Sharon Johnson were living, forcing them to move temporarily into a hotel with the assistance of the Red Cross, while the Nassau County Department of Social Services emergency housing unit helped them look for a new apartment. Their post-holiday tragedy was widely reported by the local press.

The Johnsons soon found a new apartment and sought to rent it from the landlord, Jay Levy. The apartment was considered Section 8 housing, which was to be subsidized by the government. The Johnsons represented that they were eligible for Section 8 housing, and Levy agreed to rent them the apartment so long as the rent would be "guaranteed by a governmental agency."

Levy sent his assistant to meet Mrs. Johnson to get the lease executed and to pick up the first month's rent. While they were together, Mrs. Johnson informed the assistant that her husband was at a hospital receiving treatment for AIDS. The assistant relayed this information to Mr. Levy, who immediately called off the deal. The assistant passed this decision on to Mrs. Johnson, who then called Mr. Levy. Mrs. Johnson claimed that during their call, Mr. Levy told her that

he could not rent to someone with AIDS because he was worried about his tenants and the children living in the building.

The Johnsons turned for help to Robert Halpern, an attorney with the non-profit Nassau-Suffolk Law Committee. After speaking to the Johnsons, Mr. Halpern called Mr. Levy, who, according to Mr. Halpern, told the lawyer that he did not want someone with AIDS in the building. Mr. Levy also told Mr. Halpern that the Johnsons did not meet the requirements for Section 8 housing and that they had lied on their rental application.

The Johnsons retained a personal injury attorney to pursue a claim on their behalf. That attorney contacted News 12. Holli Haerr, a News 12 freelance reporter, was assigned to work on the story. She interviewed the Johnsons and their attorney. She then contacted Mr. Levy, who flatly denied the Johnsons' claims. Ms. Haerr also interviewed Mr. Levy's lawyer, who agreed to speak on camera. The lawyer denied that Mr. Levy refused to rent to the Johnsons because of Mr. Johnson's HIV status and explained that the real reason for Mr. Levy's decision was that the Johnsons had lied about being eligible for Section 8 housing. Finally, Ms. Haerr interviewed Mr. Halpern, who told her that Mr. Levy had said that he backed out of the deal because Mr. Johnson had AIDS.

News 12 proceeded to broadcast a report about the Johnsons' allegations. That report included statements from the Johnsons claiming that Mr. Levy refused to rent to them because Mr. Johnson had AIDS, and Mr. Halpern's account of his conversation with Mr. Levy, in which he allegedly said the same thing. The report also included an on-screen statement from Mr. Levy's lawyer denying the allegations, explaining "there was absolutely no discrimination," and stating that "the prospective tenants advised my clients that they were working Section 8 tenants," which was "a lie."

Mr. Levy responded to the broadcast by filing a defamation suit against the Johnsons, Mr. Halpern, Cablevision, News 12, Ms. Haerr, and others affiliated with News 12. In the suit, he claimed that News 12 falsely reported that he had discriminated against the Johnsons because of Mr. Johnson's AIDS status.

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The Summary Judgment Ruling

After the close of discovery, News 12 moved for summary judgment, arguing that its report about the dispute between the Johnsons and Mr. Levy dealt with a legitimate matter of public concern and that Mr. Levy could not establish that either it or its employees had been grossly irresponsible. Plaintiff opposed the motion by contending that News 12's report did not mention the letter agreement requiring the Johnson's rent payments to be guaranteed by the government, complaining that the station did not report the Johnsons failed to meet that condition, and arguing that News 12 "styled" its report to portray Mr. Levy as a landlord who discriminates against people with AIDS.

The court sided with News 12 and granted summary judgment in its favor. The court's decision began by holding that the report dealt with a matter of public concern. As the court explained, "[d]iscrimination in housing against individuals infected by HIV is certainly newsworthy." In light of this ruling, plaintiff was obliged to show that News 12 had been grossly irresponsible.

Turning to that issue, the court discussed various cases in which courts previously held that media defendants had not been grossly irresponsible, including cases in which "a reporter relied on an unsworn report of a law enforcement officer" that proved to be inaccurate and where a reporter drew "the wrong conclusion from an official account." The court explained that reporters do not "have to interview every possible witness" to comply with the required standard of care and that summary judgment on gross irresponsibility grounds may be appropriate even when the alleged "inaccuracy is material."

Turning its attention to the case at hand, the court held that News 12 did not act in a grossly irresponsible manner. It had consulted with "appropriate sources." The report was reviewed by "supervising personnel." And, the report "attribute[d] the statement alleging discrimination to the Johnsons and Halpern." As the court explained, "there is no indication that [the] News 12 defendants set forth the facts of the story as their own."

The court next addressed plaintiff's arguments, noting that his contentions were directed at implications allegedly arising from News 12's reporting of accurate facts. Citing *Chapin v. Knight Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993), the court stated that a report is only actionable if it

"affirmatively suggest[s] that the author intends or endorses" the defamatory innuendo. In this case, the court held, the report did not suggest that News 12 "endorse[d] the Johnson's position," even if the language used in the report was "somewhat colorful." Moreover, the court stressed, contrary to plaintiff's claim, News 12 did include Mr. Levy's position that the Johnsons had lied in the agreement about their Section 8 eligibility, which was "covered by plaintiff's attorney" in his on-air comments.

The court closed its discussion of gross irresponsibility with a ringing endorsement of the press's right to control the content of its reporting:

...courts have generally suggested that editorial judgment as to the facts to be included in a story must best be left to the media. Courts must be slow to intrude not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must always be left to writers and editors.

Conclusion

The court's decision stands as a significant step in the development of the gross irresponsibility standard. Under its holding, the press is protected for reports on newsworthy disputes when those reports accurately portray both sides' positions, even if one of the sides would have liked additional information included in the report.

Plaintiff is proceeding to trial in his case against the Johnsons and has not indicated whether he intends to appeal from the court's summary judgment ruling.

Michael Berry is a partner in the Philadelphia office of Levine Sullivan Koch & Schulz, LLP. Cablevision, News 12, Holli Haerr and the other News 12 defendants were represented by David A. Schulz and Amanda Leith of Levine Sullivan Koch & Schulz, LLP. Following the submission of the summary judgment motion in this case, Ms. Leith began work at NBCUniversal. Plaintiff Jay Levy is represented by Beth Rogoff of Kardisch, Link & Associates, P.C. The Johnsons are represented by Frederick K. Brewington of the Law Offices of Frederick K. Brewington. Robert Halpern is represented by Gregg Weinstock of Garbarini & Scher, P.C.

Court Dismisses Libel and Privacy Claims Over Republication of Book Review

Republisher's Privilege Protects Website; Photo Not an Advertisement in Disguise

By Kenneth P. Norwick

It is by now well established that, by virtue of §230 of the federal Communications Decency Act, a website that contains material provided by third parties (without significant editorial involvement by the site) will be immune from claims – e.g., libel; invasion of privacy – based on the content of that material. But what about a scenario generally outside the scope of §230, where a website is sued over third party content it sought out and published? That was one of the issues in *Pisano v. English*, No. 25146/09 (N.Y. Sup. Nassau Cty. March 22, 2012) (Adams, J.)., in which a New York State Supreme Court Justice recently granted summary judgment dismissing all claims.

Background

Leonard Levitt, a veteran journalist whose primary beat for decades has been the New York City Police Department, published a book in 2009 entitled "NYPD CONFIDENTIAL: Power and Corruption in the Country's Greatest Police Force." The book received several favorable reviews, including one from the *New York Post*, one of the City's major dailies. Included as part of the *Post* review was a montage of photographs of three unidentified (apparent) policemen, with black bars placed over their eyes. Neither the policemen, nor the photographs, appeared in or were in any way alluded to in the book.

Thereafter, Levitt included the *Post* review, along with several others, on his website, <u>www.nypdconfidential.com</u>. At a different place on the site there was a link through which the viewer could order the book.

Libel Suit

In due course one of the policemen, an officer with the New York City Port Authority, sued the *Post* and Levitt for libel, violation of New York's "Right of Privacy" statute, and other claims, seeking damages of \$5 million on each claim. All claims against the *Post* defendants were then settled, leaving Levitt alone to defend the same claims as against him. The New York Civil Liberties Union provided him with a volunteer pro bono lawyer for that defense.

At his deposition, the plaintiff testified that he was not aware of anyone who saw the *Post* review on Levitt's website and that could not point to any damage to his reputation as a result of that rendition of the review. Nevertheless, he also testified that he didn't know if his claimed \$5 million in damages were enough. He also testified that some of his own police co-workers didn't recognize him in the photos in the *Post* review. He further testified that after consultation with his lawyer neither he nor his lawyer made any protest or take-down demand to Levitt with respect to the inclusion of his photo in the *Post* review on the website.

As a result, the *Post* review with its photos remained on the site until the plaintiff commenced suit, at which point Levitt first learned of the plaintiff's grievance and he immediately removed all the photos. The plaintiff conceded that he was a

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public official and that Levitt had nothing to do with the creation of the *Post* review.

Both sides moved for summary judgment. Among other things, the plaintiff argued that Levitt's site did not qualify for §230 immunity. He also argued that the juxtaposition on Levitt's site of the *Post* review and the link to purchase his book rendered the use of his photo in the review an "advertisement in disguise" and thus actionable under the New York privacy statute.

Decision

In a terse and brief opinion, the Court granted summary judgment dismissing all

NEW YORK POST

Not the Usual Suspects

NYC's highest ranking police face their own grilling from a veteran cops reporter

by T.J. ENGLISH

On a rainy Palm Sunday night in 1984, 10 women and children were gunned down execution-style at a house located in Brooklyn's 75th Precinct. It was a drug-related massacre that still stands as the largest mass murder in the city's history.

At a press conference following what became known as the Palm Sunday Massacre, Police Commissione Ben Ward was nowhere to be seen. The highest ranking official in the NYPD was incommunicado.

He was on a drinking bender with his mistress, a fact that was reportedly covered up by nearly everyone in city government, including then-mayor Edward I. Koch. Ward's having been missing-in-action during the worst crime in his tenure as commissioner would not be known for nearly a year, until newspaper reporter Leonard Levitt made the claim.





claims against Levitt. First, it found that the plaintiff did not raise a triable issue as to actual malice. Then, with respect to Levitt's argument that the libel claims should be dismissed because he had no responsibility for the creation of the *Post* review and relied on the *Post* for its legitimacy – analogizing to §230 -- the Court held:

[A] re-publisher of a work may rely on the research of the original publisher, absent proof that the republisher had or should have had substantial reasons to question either the accuracy of the article or the good faith of the reporter, see Rinaldi v Viking Penguin. Inc., 52 NY2d 422; Karaduman v Newsday. Inc., 51 NY2d 531; Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369). Mr. Levitt has therefore established a prima facie entitlement to summary judgment as to the first, second and fourth causes of action and the plaintiff has failed to create a triable issue of fact.

With respect to the plaintiff's "advertisement in disguise" argument, the Court declared, in its entirety:

Contrary to the plaintiff contention, his use of the photograph also cannot be accurately characterized as "advertisement in disguise," see Messenger v Gruner & & Jahr Print & Publ., 94 NY2d 436; McCormick v County of Westchester, 286 AD2d 24, 29) and, in any event, the public interest exception applies, see Polimeni v Asbestos Lead & Hazardous Waste Laborers' Local 78, 89 AD3d 826, 827.

Although the Court never mentioned §230, and applied the common law "republishers" (or "wire service") privilege to Levitt's website, the decision would seem to hold that a website that reproduces material from another source – at least in the absence of reasons to question that material – should, in New York at least, be protected from liability based on the content of that material, at least with respect to libel claims — although it would seem the same privilege should apply to privacy claims as well.

Kenneth P. Norwick, a partner at Norwick, Schad & Goering in New York City, represented Leonard Levitt in this matter. Plaintiff was represented by Barbara Lee Ford, Floral Park, New York.

MLRC MediaLawLetter

Court Strikes Claims Against Lawyer Rating Website Under Washington Anti-SLAPP Statute

Awards Defendant Fees and \$10,000 in Statutory Damages

By Bruce E.H. Johnson and Ambika K. Doran

A federal district court in Washington applied the state's new anti-SLAPP law to strike claims brought by an attorney dissatisfied with his rating on the website Avvo.com. *Davis v. Avvo, Inc.*, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) The court also awarded Avvo its attorneys' fees and \$10,000 in statutory damages, just five years after dismissing similar claims brought by other attorneys against the same website

Avvo.com, operated by the defendant, provides profiles of lawyers, including their specialty, disciplinary history,

experience, peer endorsements, reviews, and a numerical rating. Attorneys may not opt out, but they can update their profile. The plaintiff, Florida health care attorney Larry Joe Davis, Jr., was dissatisfied with this model, in particular because, he alleged, Avvo.com erroneously listed his practice area as "employment/labor," gave him a poor rating, and prompted a prospective employment client to call him. Davis was

able to log on to his profile page to correct certain information and claimed that once he did, his rating improved.

Davis originally filed suit in Florida, alleging libel and violation of two state statutes. He later amended the complaint, which was removed to federal court based on the parties' diversity. Davis again amended his complaint after Avvo filed a motion to dismiss under Fed. R. Civ. P. 12(b) (6). The court did not reach the merits of that motion, instead granting Avvo's motion to transfer the case to the Western District of Washington. The Florida court found that Davis had agreed to Avvo.com's Terms of Use, which included a forum selection clause, when he registered and logged in to update his profile.

When the case reached Washington, Avvo filed a motion to strike the complaint pursuant to the state's anti-SLAPP statute, RCW 4.24.525. The law requires the moving party to

show by a preponderance of the evidence that the lawsuit targets "an action involving public participation," and the responding party to show a probability of prevailing on the merits by clear and convincing evidence. The court had "no difficulty" finding Avvo met its burden because its website "provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer." It found that the profile pages are a "vehicle for discussion of public issues ... distributed to a large and interested community."

Thus, the burden shifted to Davis to show a probability of prevailing on his claims. Although Davis alleged that the court should apply Florida (not Washington) law, the court disagreed, based the Terms of Use. And it dismissed his claims, which in the most recent complaint included misappropriation of likeness, false advertising, and violation of the Washington Consumer Protection Act. The court found Davis had not alleged or

discussed the elements of the first two claims, and that a prior decision barred his consumer protection claim. In that case, *Browne v. Avvo*, the same court dismissed similar claims brought by other disgruntled attorneys, finding that Avvo does not "engage in trade or commerce," and that Davis had presented "no evidence, let alone clear and convincing evidence, to demonstrate there is any probability of prevailing on his []CPA claim." 525 F. Supp. 2d 1249 (W.D. Wash. 2007).

The decision in *Browne*, the court found, was dispositive. It granted Avvo's motion strike, and awarded it its attorneys' fees and \$10,000 in statutory damages.

Bruce E.H. Johnson and Ambika K. Doran, Davis Wright Tremiane LLP, WA; and Susan Tillotson Bunch, Paul R. McAdoo, and Greg Thomas of Thomas & LoCicero, FL, represented Avvo. Geoffrey Belzer of Wilson Elser Moskowitz Edelman & Dicker LLP also represented Avvo.

Los Angeles Times Wins Suits Brought By Lap-Band Lawyer and Doctors

Court Strikes Wiretap and Unfair Competition Claims

By Kelli L. Sager and Jeff Glasser

For most of the last two years, residents of Southern California have been inundated with billboards and other advertisements for "Lap-Band" weight-loss surgery, thanks to a saturation marketing campaign by surgery centers affiliated with a marketing company using the moniker "1 800 GET THIN." For roughly the same period of time, the *Los Angeles Times* has been fending off lawsuits filed by the marketing company, the two Beverly Hills doctors who own the surgery centers affiliated with the "1 800 GET THIN" campaign, and – most recently – the lawyer representing them all. *Silverman v. Hiltzik*, (Cal. Super. Jan. 2012) (Weintraub, J.).

The most recent lawsuit, brought by the lawyer for the 1

800 GET THIN, LLC marketing company and brothers Julian and Michael Omidi, the principals behind affiliated surgery centers, was dismissed by the Los Angeles Superior Court in January. In this case, lawyer Robert Silverman Times columnist sued Michael Hiltzik, claiming that Hiltzik had violated California laws against surreptitious recordings



(Cal. Penal Code § 632) and unfair competition (Cal. Bus. & Prof. Code § 17200) by allegedly secretly recording Silverman in phone interviews related to the *Times*' reporting.

In fact, Hiltzik never recorded any calls. But because Hiltzik was a defendant in several lawsuits filed by Silverman, and because Silverman insisted on being the "spokesperson" for the Omidis and 1 800 GET THIN, Hiltzik put Silverman on notice that any <u>future</u> calls between them would be recorded. Silverman then sued, both individually and purporting to be a representative of a "class" of interviewees, claiming that the notification must mean that

Hiltzik had been recording all of his conversations with individuals he interviewed using his home telephone line.

Silverman's counsel also used billboards along California freeways to solicit calls from anyone who had been the victim of "fraud" or "wiretapping" by the *Los Angeles Times* – even though neither fraud nor wiretapping was at issue in the lawsuit, and the *Times* was not even a named defendant.

Anti-SLAPP Motion to Strike

In considering Hiltzik's motion to strike under California's anti-SLAPP statute, the Court found that Silverman failed to provide admissible evidence showing that

> Hiltzik ever recorded any of conversations between them. The Court rejected the claim that Hiltzik's email notice was an "admission" of past recording, holding that the "September 8, 2011 email does not make any admission of having recorded phone conversations in the past. Moreover, this e-mail is not sufficient to establish that defendant recorded

the underlying phone conversations because to draw such an inference would be too speculative."

The Court also rejected declarations submitted by Silverman that he and an associate heard "clicking and electronic sounds" that they concluded must have been caused by surreptitious recording, finding that there was "no foundation for [Silverman's] conclusion that what he heard could only be sounds of recording."

The Court also held that, in any event, Silverman did not have an objectively reasonable expectation that conversations

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with a columnist for publication in the newspaper would not be overheard or recorded. Applying the California Supreme Court's decision in *Flanagan v. Flanagan*, 27 Cal. 4th 766 (2002), the Court found that it had to "examine the specific circumstances to see if the plaintiff had a reasonable expectation that the telephone conversations with defendant were being recorded or not."

The Court found that "Plaintiff Silverman knew at the time that the underlying conversations took place that Defendant Hiltzik was a newspaper reporter who was seeking information regarding articles that would likely be published in the Los Angeles Times" concerning "matters of public interest." Given these facts, "the circumstances were such that [Silverman] could reasonably objectively, not subjectively speaking, expect that the communications [with Mr. Hiltzik] may be recorded." The *Times*' fee motion is pending.

Other Lawsuits Against The Times

This was one of several unsuccessful lawsuits filed by Silverman and his clients against the *Times* and its journalists. Michael Omidi sued for defamation after the *Times* reported on disciplinary proceedings before the California Medical Board that had resulted in Omidi being placed on probation. Los Angeles Superior Court Judge Michael C. Solner dismissed the complaint, finding that the statements at issue were absolutely privileged as a fair and true report of official government proceedings, and awarded the *Times* its attorneys' fees and costs.

In another lawsuit, Julian Omidi claimed he was defamed when the *Times* reported on his Medical Board proceedings, which included a discussion of his failure to disclose a burglary conviction for stealing exams. Omidi claimed that because the conviction was later dismissal nunc pro tunc after he completed probation, that meant the conviction "did not

happen." Los Angeles Superior Court Judge Rolf Treu rejected the attempt to change historical facts, granted the *Times*' SLAPP motion, and awarded attorneys' fees and costs to the *Times*.

The marketing company, 1 800 GET THIN, LLC, filed its own lawsuit in federal court, claiming that the *Times* and its journalists violated the Lanham Act by referring to 1 800 GET THIN in articles and comments appended to the end of *Times* articles. United States District Court Judge Otis D. Wright, II dismissed the Lanham Act trademark false designation of origin claim, finding that the nominative fair use defense applied because the *Times* defendants (1) could not have referred to plaintiff's marketing service without invoking the "1 800 GET THIN" trademark since the service is not otherwise readily identifiable; (2) they used no more than was reasonably necessary to refer to the plaintiff's service; and (3) by the plaintiff's own admission, the negative articles would not have suggested that the marketing company sponsored or endorsed the articles.

The Court also rejected the plaintiff's Lanham Act false advertising claim, finding that a news report that included references to a trademark was not commercial speech and did not constitute a use in connection with commercial advertising or promotion under the Lanham Act. The marketing company's attempt to amend its complaint to add claims for antitrust violations and RICO also was rejected by the federal district judge, who found that permitting the amendment would be "futile" since no such claims could be stated.

The Omidis and 1 800 GET THIN, LLC recently abandoned appeals of these three decisions; Silverman did not file a notice of appeal of the adverse decision in his case.

Kelli L. Sager, Rochelle Wilcox, Jeff Glasser, Lisa Kohn, Davis Wright Tremaine LLP, and Karlene W. Goller, Los Angeles Times Communications LLC, represented the Los Angeles Times, columnist Michael Hiltzik and reporter Stuart Pfeifer.



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Wrongful Death Lawsuit Against A&E Dismissed on Jurisdictional Grounds

Plaintiff Sued Broadcaster for Scuba Accident

On February 13, 2012, a Texas trial court issued findings of fact and conclusions of law finding that it did not have personal jurisdiction over A&E Television ("AETN") in a wrongful death case filed by plaintiff Tammy DeWolf on behalf of herself and her children. <u>DeWolf v. Kohler, et al.</u>, No. 46416 (Tex. Dist., Harris County) (Rendon, J.).

Background

DeWolf sued AETN and a number of other individuals under the Death on the High Seas Act ("DOHSA"), and for wrongful death, negligence and gross negligence and violations of the Texas Deceptive Trade Practices Act. All of the claims were based on an ill fated scuba diving trip on which plaintiff's husband lost his life. The claims against our AETN, a non-Texas resident, were all based on the plaintiff's allegation that her husband watched a television series broadcast by AETN that, on occasion, included an indivdual who accompanied the deceased on the ill fated scuba trip.

After being removed by another defendant and then remanded back to state court, AETN filed a Special Appearance asserting that the court did not have either general or specific jurisdiction over AETN, a Delaware corporation with its principal place of business in New York. AETN argued there was no personal jurisdiction based on the

simple fact that the program was broadcast in Texas, and allegedly watched by plaintiff's husband in Texas, when there were no other contacts with Texas and there was no evidence the broadcast was in any way directed towards Texas or the plaintiff (or her husband), and no connection between the broadcast and the operative facts of the matter.

Ruling on Jurisdiction

After briefing and a hearing on AETN's Special Appearance, the court granted the Special Appearance and dismissed all claims against AETN with prejudice. Nevertheless, approximately a month and a half after the court's dismissal of AETN, DeWolf filed a Motion for Reconsideration.

After a hearing on the Motion for Reconsideration, at which time AETN again argued that there was no basis for jurisdiction based on the alleged contacts and operative facts in the case, the court denied the Motion for Reconsideration. DeWolf then filed a Request for Findings of Fact and Conclusions of Law. AETN submitted proposed findings of fact and conclusions of law, which the court adopted in its entirety.

Laura Prather and Catherine Robb of Sedgwick LLP, Austin, TX, represented AETN in this matter.

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Lawsuit over Disclosure of Actress's Age Survives Motion to Dismiss

Plaintiff Stated Breach of Contract and Deceptive Business Claims

An unusual lawsuit against the popular website Internet Movie Database (IMDb.com), and parent company Amazon.com, for disclosing the true age of an actress has survived, in part, a motion to dismiss. <u>Hoang v. Amazon.com</u>, No. C11-1709 (W.D. Wash. March 28, 2012) (Pechman, J.).

The plaintiff, Huong Hoang (better known as "Junie Hoang"), made headlines around the country alleging that the website damaged her acting career by revealing her true age. She brought a variety of claims, including wiretap and fraud.

Those claims were dismissed, but the District Court concluded she adequately pled a straightforward action for breach of contract and deceptive business practices.

Background

In 2011, plaintiff filed a "Jane Doe" lawsuit against defendants over the disclosure of her birth date in her online profile showing she was forty years old. She claimed this

damaged her career in an industry where "youth is king." The District Court dismissed that complaint without prejudice, holding that the alleged injury was "not severe enough to justify permitting her to proceed anonymously."

In January 2012, plaintiff filed a complaint under her own name, asserting claims for wiretap, fraud, breach of contract and deceptive business practices. Plaintiff alleged she created an "IMDb Pro" account for career purposes. A pro account, which costs approximately \$150 a year, gives access to additional information about the entertainment industry, such as company contacts and job postings. She alleged that

IMDb used the personal information she provided for her account for its separate online profile of plaintiff. In addition, she alleged that IMDb used the information she provided to "scour public record databases and other sources for purposes of discovering Plaintiff's birthdate" and that IMDb added that information to its website.

Motion to Dismiss

The court dismissed the wiretap claim for failure to state a

claim. The Washington wiretap statute creates a cause of action where a party "intercepts" a private communication not intended Plaintiff herself for them. supplied IMDd with credit card and related information so a wiretap claim could not possibly apply. Plaintiff's fraud claim failed for lack of specificity and was dismissed with leave to amend.

The breach of contract and deceptive practice claims, however, were sufficient to survive a motion to dismiss. Plaintiff alleged

that IMDb violated its Subscriber Agreement and Privacy Policy which, among other things, states that IMDb Pro "carefully and sensibly" manages information from its customers. Furthermore, its policy states that IMDb "use[s] the information that you provide for such purposes as responding to your requests, customizing future browsing for you, improving our site, and communicating with you."

Defendants argued that the alleged data mining was consistent with its Subscriber Agreement and Privacy Policy.

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For instance, it could fall under the rubric of IMDb's promise to use information for "improving our site." However, the District Court found that "the plain language of the contract does not permit Defendants unfettered use of the personal information that Plaintiff provided for the purposes of processing payment."

While this does not prove a breach of contract, it was enough to state a claim.

Plaintiff's unfair and deceptive business practices claim like her contract claim, survived the motion to dismiss. Washington's Consumer Protection Act requires a deceptive practice in trade or commerce, harm to the public interest and injury to plaintiff. Plaintiff's allegation that IMDb had a standard business practice to misuse customer information harming her and others was adequate to state a claim.

The District Court noted that the lawsuit was "unusual," but it rejected defendant's claim that the suit was frivolous and sanctionable.

Amazon.com and IMDB were represented by Breena M. Roos, Ashley Locke, Charles C. Sipos, Perkins Coie, Seattle, WA. Plaintiff was represented by John W Dozier, Jr., Dozier Internet Law, Glen Allen, VA; and Randall Moeller and Derek Alan Newman, Newman & Newman, Seattle, WA.



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MLRC MediaLawLetter

CNN Denied Expeditious Anti-SLAPP Exit From Lawsuit Over Closed Captions for News Videos

Claims Do Not Arise from CNN's Protected Publishing Activities

By Thomas R. Burke and Ronnie London

In a lawsuit alleging violations of California's civil rights and disabilities laws against Cable News Network, Inc. ("CNN") for not providing real time closed captioning for news videos available on CNN.com, , a federal judge in San Francisco denied CNN's anti-SLAPP motion to terminate the case, which it argued targets its free speech activities and lacks a probability of succeeding. *Greater LA Agency on Deafness, et al., v. Cable News Network, Inc.*, No. C 11-03458, 2012 U.S. Dist. LEXIS 40168 (N.D. Cal. March 23, 2012).

While observing during oral argument that CNN's news videos obviously involved free speech, the court nevertheless ruled that CNN failed to show the claims filed by plaintiff (Greater Los Angeles Agency on Deaf-ness ("GLAAD")) arise from CNN's First Amendment-protected publishing activities. The court thus never reached CNN's defenses on GLAAD's claims.

CNN argued that the state laws on their own terms do not reach online content, that GLAAD's claims are barred by the supremacy of federal law that already governs what online videos must – and need not – be captioned, and that its First Amendment rights would be violated if a court forced CNN to caption online news, both in principle and because it would single out CNN.com (and none of its news competitors) while allowing captions to potentially introduce inaccuracies into CNN's online news coverage.

Anti-SLAPP Motion

CNN moved under California's powerful anti-SLAPP statute, Code of Civil Procedure Section 425.16 et seq., which is designed to ensure that free speech and petitioning activities are not chilled by the filing of lawsuits that are not likely to succeed. Enacted two decades earlier, the law intentionally was designed to broadly protect <u>First Amendment</u> activities, especially after a 1997 amendment expressly required that the courts broadly construe the statute, after the Legislature determined that state courts were applying it too narrowly.

Though GLAAD's suit targets how CNN.com publishes

its news videos online, the court, through Magistrate Judge Beeler of the federal Northern District of California, denied CNN's motion under what is commonly referred to as "prong one" of the two-part anti-SLAPP statute. Under the statute's two-part inquiry, the defendant need only make a prima facie – or bare – showing that the the claim(s) against them arise from acts in further-ance of protected free speech on some issue(s) of public interest — after which, the burden shifts to the plaintiff to show a "probability" of prevailing in their case.

The court misconstrued CNN as contending in prong one that "all media defendants are entitled to move to the anti-SLAPP state's second prong without any further showing" and that it was CNN's refusal to use closed-captioning that was its exercise of free speech. CNN merely emphasized that the media frequently relied on the anti-SLAPP statute to protect their newsgathering and publishing activities and that GLAAD's claims indisputably arose from CNN's constitutionally-protected publishing activities about the news of the day.

The court held that for news videos that CNN already chose to post voluntarily, having to add closed captions involved simply translating a video's audio track and does not "arise from" First Amendment news gathering and dissemination, as GLAAD did not target specific speech or practices related to producing it. Overlooking California Supreme Court precedent that makes clear that a defendant need not show that a plaintiff in an anti-SLAPP motion sought to "chill" free speech, the court also noted that prongone of the anti-SLAPP statute was not satisfied because GLAAD did not seek to change the expressive content or otherwise interfere with CNN's editorial discretion.

CNN made an evidentiary showing that as yet – in the absence of a federal regulatory regime – CNN does not currently caption news videos out of a conscious decision to avoid imperfect technology that would undermine its editorial standards by producing inaccurate closed captioning of the news. The court also summarily rejected CNN's evidence that GLAAD's lawsuit singles out CNN alone, would increase its production costs, and place it at a competitive

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disadvantage that none of its competitors would face. Crediting such effects, the court claimed, would mean the anti-SLAPP law could effectively be used to bar legal requirements that carry financial costs from ever reaching the news media.

In light of these holdings, the court never reached the question of whether GLAAD could show a probability of prevailing on the merits of its claims. Denial of the anti-SLAPP motion may thus be something of a pyrrhic victory, especially as Judge Beeler specifically noted her prong-one ruling does not foreshadow anything regarding prong two – that is, the "merits" of GLAAD's legal claims were not decided.

During oral argument on the anti-SLAPP motion, Judge Beeler earlier expressed serious concerns about the constitutionality of forcing CNN to caption its news videos using an as yet unidentified technology, resulting possibly in inaccurate reporting, making all the more curious the holding that GLAAD's suit did not arise out of CNN's First Amendment-protected conduct. At the hearing, Judge Beeler also expressed clear doubt over how the federal Communications Act's closed captioning provisions, which are overseen by the FCC, did not preempt the relief GLAAD seeks, confer exclusive jurisdiction on the FCC to hear GLAAD's claims, and/or otherwise require the agency to have "first crack" at the unique captioning issues raised.

The court also raised concerns over whether applying California's antidiscrimination and disabilities laws to CNN.com as GLAAD seeks would violate the Commerce Clause by imposing an effectively national (or even global) standard for captioning CNN.com's videos, which originate outside California and, of course, are viewed world-wide.

CNN has taken the immediate appeal that the anti-SLAPP motion allows, such that not only will the U.S. Court of Appeals for the Ninth Circuit consider the prong-one issue afresh, it will be empowered to reach the prong-two merits issues as well, if it wishes. A media amici coalition is being formed and interested media entities are invited to support CNN's anti-SLAPP arguments on appeal.

CNN is represented by Thomas R. Burke, a partner in the San Francisco office of Davis Wright Tremaine LLP, Jeff Glasser, an associate in the San Francisco office, along with Janet Grumer, a partner in the firm's Los Angeles office and Ronnie London, Of Counsel in the firm's Washington, D. C. Office. Plaintiff GLAAD is represented by Daniel Jacob, Edward Kelly and Jennifer Olson.



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Supreme Court of Canada Rolls Out Welcome Mat for Libel Tourists

Defamation "Occurs" When and Where Defamatory Statement Is Published to Third Party

By Paul B. Schabas, Ryder Gilliland, Erin Hoult, and Max Shapiro

The Supreme Court of Canada has released two decisions regarding assumed jurisdiction in defamation matters that leave the door to libel tourism wide-open in Canada. The two cases – <u>Breeden v. Black</u>, 2012 SCC 19 and <u>Éditions</u> <u>Écosociété Inc. v. Banro Corp.</u>, 2012 SCC 18 – involve defamation suits commenced in Ontario against non-resident defendants.

Facts and Background

Black involves defamation lawsuits brought by Conrad Black, the former chairman of Hollinger International, against members of a special committee of the Hollinger Board and its advisors, almost all of whom were Americans, that issued press releases and a report to the Securities and Exchange Commission regarding Black's tenure at Hollinger – a U.S. company. Black, who gave up his

Canadian citizenship to accept a peerage in England (and is now completing a jail term in the U.S., making him inadmissible to Canada without a discretionary permit from the Minister of Immigration), sued in Ontario as the defamatory words were posted on Hollinger's website and widely reported in the Canadian (and international) media. The U.S. criminal case against Black reached the U.S. Supreme Court in 2009, with a decision reported at *Black et al.* v. *United States*, 561 U.S. _(2010).

In *Banro*, an Ontario-based mining corporation sued Quebec-based defendants in relation to an allegedly defamatory French language book. 5,000 copies of the book were printed and 108 copies were available to be purchased or read in Ontario (93 in bookstores and 15 in libraries). The

book was also available for sale via the defendants' website.

Like the lower courts, the Supreme Court held that the Ontario courts have jurisdiction in both *Black* and *Banro*. The Court also found that there was no reason to decline to exercise jurisdiction in either case, as the defendants had not shown there was a clearly more appropriate forum.

Test for Assuming Jurisdiction over Tort Claims

In a judgment released concurrently with *Black* and *Banro*, *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 ("Club

Resorts"), the Supreme Court clarified the "real and substantial connection" test that Ontario courts apply in tort claims generally, to determine whether they have jurisdiction over foreign defendants who have not agreed nor attorned to their jurisdiction. In Club Resorts, the Supreme Court concluded that to meet this test, the plaintiff has the burden of identifying a "presumptive connecting factor" that links the subject matter of the litigation with the

forum. The Court identified four non-exhaustive presumptive connecting factors, as follows:

- the defendant is domiciled or resident in the province;
- the defendant carries on business in the province;
- the tort was committed in the province; and
- a contract connected with the dispute was made in the province.

If a presumptive connecting factor exists, then unless the defendant rebuts the presumption the court must assume (Continued on page 27)

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jurisdiction over all aspects of the case.

The presumption will be rebutted only if the defendant establishes "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points to a weak relationship between them." However, the Supreme Court cautioned that the presumptive connecting factor of carrying on business must be applied with care. To be "carrying on business" requires some "form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction." Activities such as advertising or making one's website available in Ontario, on their own, would not constitute "carrying on business" in Ontario.

Club Resorts Applied to Defamation Claims: The Door Is Open to Libel Tourism

From *Black* and *Banro*, it is clear that the chief basis on which to establish jurisdiction in a transnational defamation case is that of the location of the tort (i.e. presumptive connecting factor #3 from *Club Resorts*).

In particular, the Supreme Court confirmed, without analysis, that under Canadian law the tort of defamation "occurs" when and where a defamatory statement is published to a third party.

Further, the Court confirmed that the single publication rule is not the law of Canada, stating: "every repetition or republication of a defamatory statement constitutes a new publication." The Court also confirmed that a defamation plaintiff does not even have to prove actual publication (i.e. that the book in question was actually read by someone) at the jurisdiction stage. Rather, the plaintiff "need only allege publication and its allegations should be accepted as pleaded unless contradicted by evidence adduced by the defendants."

Despite submissions related to various U.S. statutes that address libel tourism, and the proposed changes being considered by the U.K. Parliament to address that problem, the Court explicitly rejected a jurisdictional test based on either the place of substantial publication (as suggested by the appellants in *Banro*) or based on the location of the subject

matter and the conduct giving rise to the defamation complained of (as suggested by the appellants in *Black*).

The practical result of *Black* and *Banro* is that whenever a plaintiff can demonstrate that at least one copy of an allegedly defamatory publication made its way into Ontario, or was read by someone in Ontario on the internet, Ontario courts will have presumptive jurisdiction over any non-resident defendant. Having stated such a broad rule, the Court did not engage in any analysis as to how a defendant might displace the presumption in a future case, and simply accepted that jurisdiction existed.

Forum Non Conveniens

Libel tourism is also unlikely to be limited by *forum non conveniens*. This doctrine allows a court which has already determined that it has jurisdiction to use its discretion to

conclude that another jurisdiction would be better suited for the trial of the issues. In *Club Resorts*, the Court clarified that a defendant making a *forum non conveniens* argument has the burden of showing that another forum is "clearly more appropriate" to dispose of the dispute.

There is no strict test; instead, a defendant can raise a number of factors to show why it would be more fair and efficient for the dispute to be heard elsewhere. Such factors may, but need

not, include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

In the *Black* and *Banro* cases, the Court made reference to concerns of forum-shopping and libel tourism, but such concerns appear to have held little sway in the outcome of either case.

For example, the Court stated in *Black* that any juridical advantage that might accrue to a plaintiff in its chosen forum (such as the more plaintiff-friendly libel laws of Canada as

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compared to those of the U.S.) "should not weigh too heavily" in the *forum non conveniens* analysis. Moreover, the juridical disadvantage to defendants must also be weighed in the balance.

The Court emphasized that it is particularly inappropriate to heavily weigh a juridical advantage in favour of the plaintiff where the corresponding benefit that would accrue to the defendant in the foreign jurisdiction reflects "a deeply rooted and distinctive legal tradition" (such as American defamation law, which has fundamental differences from Anglo-Canadian common law), which comity requires be respected. Despite all this, the Court did not decline jurisdiction, citing the "fairness" of letting Black proceed in the place where he had established his reputation, as well as showing deference to the judge at first instance.

In *Banro*, the court acknowledged that the majority of the copies of the book in issue were in Quebec, but went on to say that the number of copies in Ontario (only 108 of 5,000) "remains substantial". What might be seen as the old standby of libel tourists who have suffered minimal damages in the chosen forum – that is, that a declaratory judgment may be "as valuable" to the plaintiff as any pecuniary award – was also accepted as meaningful in *Banro*.

Unresolved Question: What Law Applies to Transnational Defamation Claims?

Notably, and unfortunately, the Supreme Court in *Banro* left "for another day" one of the most pressing questions impacting transnational defamation claims, namely what substantive law should be applied to determine the claim. Typically, the law to be applied in tort claims in Canada is that of the place of the tort (the *lex loci delicti*).

In *Banro*, the Court left open the possibility of a new rule in defamation matters in the future. The Court suggested, without making any statement on the matter, that the law of the place of the most substantial harm to reputation, as has been adopted in Australia by statute, may be a more appropriate choice of law rule in defamation matters. That this issue remains unresolved can only add to the uncertainty facing foreign defendants sued in Canadian defamation actions. This uncertainty is especially troubling in light of the very different defamation law principles in the U.S., as well as the libel law changes being contemplated in the U.K. This will also require clarification soon.

Paul Schabas, Ryder Gilliland, Erin Hoult, and Max Shapiro are members of the Media Law Group at Blake, Cassels & Graydon LLP in Toronto. Paul, Ryder, and Erin represented the appellants Richard C. Breeden and Richard C. Breeden & Co. before the Supreme Court in Black.

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

Scandalizing the Court; Access to Extradition Docs; Twiter Libel; ISP Liability and More

By David Hooper

A curious piece of litigation has arisen out of the memoirs published by a former Cabinet Minister Peter Hain in respect of his memoirs *Outside In*. He described his time serving as Secretary of State for Northern Ireland in the last Labour Government.

The Courts of Northern Ireland took a fairly interventionist approach to Judicial Review and this had lead to a number of clashes between the Government and the local Judiciary. Foremost amongst these was a spat about the appointment of an official called the Interim Victims Commissioner and this had led to what was ultimately a successful application for Judicial Review which was heard by Mr Justice Girvan in *Re Downes (Application for Judicial Review)* 2006 NIQB77.

Girvan J had granted Judicial Review in November 2006 finding the Government guilty of applying improper political pressure and forming the view that the evidence submitted on behalf of the Government was so lacking in frankness and candour that the papers should be referred to the Attorney General. An independent QC, Peter Scott has investigated the matter. He concluded that although there were serious shortcomings in the way the matter had been handled by the Government, he did not consider that there was any intention to mislead or obstruct the Court. He did find that many of the criticisms made by Girvan J were well-founded.

Hain had not taken too kindly to his criticisms, although he had ironically found himself in the position of having to approve the appointment to the Northern Ireland Court of Appeal of Mr Justice Girvan, who had not been overly impressed by the veracity of Hain's case. When Hain came to write his memoirs, he did not mince his words about the learned judge. He referred to the litigation as "pantomime absurdly given credence by Judge Girvan" and he referred to his "high-handed and idiosyncratic behaviour." Girvan LJ (as he had now become, thanks in part to Hain) took particular exception to a passage which read "with my officials I thought the Judge was off his rocker, a view

privately expressed to me by the Lord Chancellor, Charlie Falconer who was equally bemused."

Hain may well have been settling scores, but he no doubt felt that he was entitled within the limits of the law to give as good as he got. Readers would probably have thought he was blowing off steam rather than actually questioning the judge 's sanity, whose promotion he had after all approved. Prudently he had sent his manuscript to the Cabinet Office and the Northern Ireland Office and, so far as one as one can gather, neither of those departments raised any concerns about what Mr Hain proposed to say about the Judge. To the surprise of some, however, proceedings have now been launched in Northern Ireland accusing Hain and his publisher of committing Contempt of Court by "scandalizing the Court" and seeking their committal. Committal can include imprisonment, but presumably the Attorney General of Northern Ireland will be asking for no more than a financial penalty.

The evidence submitted by the Attorney General accuses Hain of baseless attacks upon the integrity and impartiality of the Judge and the Court. In his view it constitutes an unwarranted attack on the conduct, motivation, competence and sanity of a senior member of the Judiciary and, he asserts, creates a real risk that public confidence in the Judiciary would be undermined.

Collectively, the Judiciary of Northern Ireland are a group deserving of the highest admiration. At least one senior Judge was assassinated during the troubles in Northern Ireland and the Judges under the Diplock system had, during the course of the troubles, to replace juries and represented a bastion of liberty for the accused, throwing out cases where the evidence was flawed, even where the accused were paramilitaries of some notoriety in a way which all would recognise as characterised by the highest level of impartiality and integrity.

Time will tell however whether these undoubted qualities of the Northern Irish Judiciary have temporarily deserted them in permitting these proceedings to take place and

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In cases where documents

were placed before a Judge

and referred to in the course

of proceedings, the default

position should be that

access should be permitted

on open justice principles

and where access was

required for a proper

journalistic purpose.

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whether it was wise to rise to Hain's bait. The Case will initially be heard in a Divisional Court in Northern Ireland presided over by one of Girvan LJ's three colleagues in the Northern Ireland Court of Appeal and from there an Appeal would lie to the Supreme Court of the United Kingdom. Advocates of free speech might find this all a mite ponderous.

Hain has stood by what he wrote in the book claiming it is criticism that he is entitled to make of a judgement given in open Court in a case of undoubted political interest. There will be those who argue that the approach adopted in Northern Ireland to the concept of scandalizing the court is well past its sell-by date.

One has to blow a fair amount of dust of legal volumes to find comparable precedents and the last comparable cases appear to be in the very early part of the twentieth century

long before the European Convention of Human Rights. Mr Hain may be reminding the Northern Irish Court of an English decision in Attorney General v Harris [2001] 2 FLR 895 where Mr Justice Munby observed "there is, I think, much to be said for the view that Judges must be kept mindful of their limitations and their ultimate public responsibility by a vigorous stream of criticism expressed with candour, however blunt. Moreover a much robust view must in my judgement be taken today than previously of what ought to be allowed to pass as permissible criticism."

Overall, the parameters of what is permissible criticism of Judges particularly in cases of particular public interest is an important area of freedom of speech where the exercise of a public function by a Judge ought, it might be argued, to be a legitimate area for robust criticism, however one-sided or extravagant.

No doubt the Case will also produce some insight with much poring over the various dictionaries of modern slang as to what one should make of slang phrases such as "off his rocker" and whether the person using such a phrase really is questioning the sanity of a senior member of the Judiciary. It may also help resolve the controversy of whether the reference to rocker has or has not anything to do with rocking chairs. The case is likely to cast light on what you can and cannot say about a Judge whose decision you strongly disagree with and the probability is that the courts will take a different view in the twenty-first century to those of the early twentieth.

Open Justice

In civil cases, documents which are referred to or are placed before the Court, even if they may not be read out, are available for inspection by third parties including the press. In R (Guardian News and Media Limited) v the City of Westminster Magistrates Court [2012] EWCA 420, the question arose as to what documents the press were entitled to review when such documents had been referred to in criminal proceedings.

The case concerned two UK citizens, one of them a London solicitor, who were accused of bribery of a Nigerian official allegedly on behalf of a subsidiary of the US

> company Haliburton. The US authorities were seeking the extradition of the pair for trial in the United States. The operation of the extradition treaty between the United Kingdom and the United States is a matter of considerable controversy.

The Guardian wanted to examine an affidavit from a US senior trial attorney, the witness statements submitted on behalf of the Department of Justice, and correspondence between the UK Serious Fraud Office and the US Department of Justice. These were documents which had been referred to in Court but had not been read out. The District Judge, Caroline

Tubbs, had refused the paper permission and this refusal was upheld in the Administrative Court [2010] EWHC 3376.

The Court of Appeal, however, took a radically different view and Lord Justice Toulson delivered a very important judgment on the question of open justice. Quis Custodiet Ipsos Custodes he asked. It is for the Courts to determine the requirements of the open justice principle subject to any statutory provisions, he answered. It follows that the Courts have an inherent jurisdiction to determine how the principle should be applied. He rejected arguments that the provision of such documents was exempted by either by an exception in the Freedom of Information Act or the Criminal Procedure Rules.

Under Article 10 of the European Convention of Human Rights the Strasbourg case law appeared to support the (Continued from page 30)

Guardian's position but it was not, in the Judge's view, entirely clear. His decision was based on common law principles and the guiding principle should be to enable the public to understand and scrutinise the justice system of which the Courts are the administrators. One senses a slightly different approach to that prevailing in Northern Ireland.

In cases where documents were placed before a Judge and referred to in the course of proceedings, the default position should be that access should be permitted on open justice principles and where access was required for a proper journalistic purpose. This needed to be balanced with counter-arguments that it might be necessary to withhold the documents to protect the interests of others – a classic example might be the interests of vulnerable children where there was no particular public interest to be served by publicising the documents.

Here there clearly was a serious journalistic purpose involving a debate about how issues of corruption were being dealt with and how the system of extradition was being operated. This was also notable for the intervention of *Article 19* which helpfully cast light on the practice in foreign jurisdictions including Canada, New Zealand, South Africa and the United States.

The question was what liability, if any, did Google have for abusive posts placed on Blogger.com by third parties over which they had no control. None, Mr Justice Eady, firmly concluded.

A £90,000 Tweet

The case of <u>Cairns v Modi</u> (2012) EWHC 756 serves as a salutory reminder of the risk of libel that can arise out of tweets.

Cairns was a well-known New Zealand cricketer who had been contracted to play in the very lucrative Indian cricket series, IPL. The Defendant was Chairman and Commissioner of IPL and his tweet alleged that Cairns had been fired from the IPL because he was involved in match-fixing. Large sums of money are bet on the outcome and progress of these games and there have been instances of corruption.

The original tweet was reckoned to have been seen by no more than 65 people in the UK. The tweet had been picked up by an online cricket service called "Cricinfo." It was soon taken down after a complaint was made and it was seen by about a thousand people. Cricinfo settled Cairns' libel claim for £7,000 plus costs.

Clearly publication was very small. The Judge rejected accusations of libel tourism, as both Cairns and Modi lived in

England and had close connections with the country. The allegations were extremely serious and went to the heart of Cairns' livelihood. What started as a tweet ended up as a very substantial trial with Cairns being subjected to aggressive questioning, accusing him of cheating and dishonesty. The Judge awarded £75,000 damages which he ordered to be increased to £90,000 as a result of the aggressive way in which the case had been conducted by Modi's Counsel. Modi was ordered to pay £400,000 on account of costs.

Libel Liability of an Internet Service Provider

Of wider general importance was the decision of Mr Justice Eady in <u>Tamiz v Google Inc</u> [2012] EWHC 449. The question was what liability, if any, did Google have for abusive posts placed on Blogger.com by third parties over

which they had no control. None, Mr Justice Eady, firmly concluded. The posts, although very unpleasant, were essentially vulgar abuse and he did not consider that there was a sufficiently substantial tort in this jurisdiction to justify a trial. Google were not the publisher at common law. Their role was passive and they exercised no editorial control over what was published and simply, through their internet services, provided a platform whereby this could be published.

What was interesting about this judgment was that it moved away from the earlier decision of Mr Justice Morland in *Godfrey v Demon* where an internet service provider was held to become liable, applying the old notice-board principles, once they were notified of the defamatory posting and failed to take it down. In Mr Justice Eady's view, mere notification did not render Google the publisher. Publishing and having the opportunity to remove it were not to be precisely equated.

Furthermore, Mr Justice Eady examined Regulation 19, Electronic Commerce (EC Directive) Regulations 2002. There the internet service provider is not liable where it does not have actual knowledge of the unlawful activity or information or where a claim for damages having been made, the internet service provider is not aware of the fact or circumstances from which it would have been apparent to the

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The Committee does not

suggest a new law of

privacy. Rather it wants the

existing law to work better

and less expensively.

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internet service provider that the activity or information was unlawful.

Applying that to the *Tamiz* case Mr Justice Eady concluded that Google was entitled to have time to consider and to be provided with proper background information in order to form a view as to whether the material was unlawful. The mere making of a complaint would not deprive it of the protection of Regulation 19.

Privacy Injunctions and Their Perils

The perils of bringing in haste applications for privacy injunctions was strongly underlined in the decision of Mr Justice Tugendhat in <u>Giggs v News Corporation</u> Newspapers [2012] EWHC 431. In its anonymised form this case had first come to us under the initials CTB. It started off looking like a tawdry kiss and tell story regarding a leading footballer being headlined "Footie Star's affair with Big Bro's

Imogen." Big Brother is a reality television show on which Imogen had had her 15 minutes of fame.

Giggs's name, although anonymised, was chanted by football crowds and he was eventually named in Parliament. The case proved to be something of a disaster for him. However, he was perhaps somewhat unwisely advised to seek

damages in respect of the re-publication of these allegations, but this led to a further series of legal disasters. The case was struck out by the Court for non-compliance with the Court orders and when his lawyers sought to have the action reinstated, the judge refused to do so, concluding that no useful purpose would be served by the continuance of the litigation.

The case shows that there is a significantly higher risk in bringing such privacy claims than was perhaps originally contemplated by claimant advisers. Furthermore if one brings such an action, one has to do so on the basis that it will be pursued to judgment rather than brought and then quietly buried, once the interlocutory injunction has been obtained. What was particularly interesting in the Giggs case were the comments by Mr Justice Tugendhat about the third party Article 10 rights that are engaged when such non-disclosure injunctions are obtained.

This means that all parties to the litigation are bound to comply with the Court's timetable and to have the matter adjudicated. What had happened in this case was that the matter had not been set down for trial and the parties had between themselves agreed various extensions of time including for service of the defence. One could quite see why the newspaper did not want to push the case forward, as it involved the expenditure of considerable sums in legal fees and in the circumstances of a privacy action an uncertain outcome. However the judge has made it clear that both parties must comply with the Court's timetable and that if extensions to that timetable are sought, they will need to show that it is necessary and proportionate to third party rights, as the third parties are at that stage themselves restricted in what they can publish and their Article 10 rights are thereby affected.

The case of <u>Spelman v Express Newspapers Limited</u> [2012] EWHC 355 showed that the Court will look carefully at the prospects of success in applications for privacy

injunctions and will, where necessary, evaluate issues of public interest. In that case the 17 year old son of a cabinet minister initially obtained an injunction, but this was set aside by Mr Justice Tugendhat who felt that the story which concerned the alleged taking of steroids by the young rugby player did appear to involve a legitimate story and the judge

was unable to conclude that it was more likely than not that the claimant would succeed in establishing his case about a reasonable expectation of privacy.

Parliamentary Committee Report on Privacy

A Joint Committee of the House of Commons and House of Lords had been appointed in July 2011 and has <u>recently reported</u>. It raises some interesting questions about the operation of the law of privacy and about the body which will replace the Press Complaints Commission. The Committee does not suggest a new law of privacy. Rather it wants the existing law to work better and less expensively.

The Committee felt that if a newspaper intended to publish a story about the private life of an individual, the subject of the article should be informed before publication

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unless there were compelling reasons not to. In other words the Committee had some sympathy with Max Mosley's argument which had been rejected in the European Court of Human Rights. The Committee was also concerned about the flouting of privacy orders on social network sites and want companies such as Google to take "practical steps" to limit the potential for breaches of injunctions and they want Courts to be proactive about serving notices on social networking platforms.

How this will work in practice and whether this is simply an expression of wishes remains to be seen. Of particular interest was what they said about the establishment of a new independent regulator in place of the Press Complaints Commission. The Committee appeared to favour powers for the new Commission to fine the media and to order the publication of apologies including the control of the size and location of the apology. They expect all media organisations to sign up to this new regulator failing which parliament should consider statutory oversight.

Privacy Injunction Statistics

On 15 March 2012 the Ministry of Justice published the first statistical report on privacy injunctions covering the period August-December 2011. This followed the recommendation of the Master of the Rolls Committee which had reported on *Super Injunctions, Anonymised Injunctions and Open Justice*. Nothing very startling emerged. There were four new applications for Interim Injunctions to prevent the publication of private or confidential information, but these did not appear to involve the press. There were three sets of proceedings to consider whether to continue or amend Interim Injunctions previously granted and there were two sets of proceedings to decide whether to issue a Final Injunction.

The Defamation Bill

The Government has also published its response to the report of the Joint Committee on the Draft Defamation Bill. This is all part of the progress to a passing of a new Defamation Act. On the whole the Government has rejected the Committee's attempt to strengthen the Bill. The Joint Committee had for example suggested the test of serious and substantial harm in defamation cases. The Government proposes to stick to its original test of serious harm.

Jury Deliberations

The appeal by Times Newspapers to the European Court of Human Rights concerning its fine of £15,000 plus costs of £27,000 for breaching Section 8 Contempt of Court Act 1981 which prevents the disclosure of votes cast, statements made, opinions expressed or arguments advanced during jury deliberations has been rejected by a chamber of seven judges who concluded that was a lawful restriction of freedom of speech to preserve the secrecy of the jury room. Michael Seckerson v. United Kingdom, Apps No 32844/10 & 33510/10.

The newspaper had interviewed a juror about his concerns over the conviction by a jury on which he had served of a childminder who was convicted of manslaughter. In this respect therefore the American system of interviews with jurors and the explanation of how they reach their decision remains fundamentally at odds with the UK system.

A Libel Failure: Get Serious

<u>Dell'olio v Associated Newspapers</u> [2011] EWHC 3272. Nancy Dell'olio is someone best known for being famous and the fame has derived from such matters as being the former partner of the former English football team manager and a turn on the reality show "Strictly Come Dancing." The Daily Mail reported her dalliance with an aging thespian Sir Trevor Nunn in what the judge termed unflattering and even insulting terms.

The story was captioned "Return of the Man-Eater" and readers can probably guess the rest. However, as her lawyers chose to bring a claim based on a defamation said to be based on her depiction as a "serial gold digger" rather than on any adulterous manifestation of her ardour for Sir Trevor, the judge concluded that this did not cross the threshold of seriousness and rejected the claim.

She had not identified any factual inaccuracies in the article and the case is an illustration of the principle laid down in *Thornton v Telegraph Media Group* for deciding whether there is sufficient seriousness in the alleged libel to merit a trial. For there to be an actionable defamation, it must substantially affect in an adverse manner the attitude of other people towards the claimant or have some tendency to do so. Claimants will be unwise to bring cases which the Court feel lack substance and strike the Court as trivial.

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

Shield Laws Down Under: Decision That Newspaper Divulge Sources Now on Appeal

By Peter Bartlett

The Australian position regarding shield laws continues to be a subject of great debate, interest and change. Similarly to the MLRC in the United States, interest groups in Australia have been strong advocates for the introduction of comprehensive shield laws for many years, and have continued to lobby for the protection of journalists sources. In this regard, recent developments have been both positive and negative.

Positive Steps Taken To Protect Journalists' Sources

On the positive side, we have had the implementation of the Evidence Amendment (Journalist Privilege) Act 2011 (Cth). The Act provides that if a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor their employer can be compelled to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained. See Evidence Amendment (Journalist Privilege) Act 2011 (Cth), s 126H (1).

The protection may not apply if the public interest in disclosing the evidence outweighs any adverse effect of the disclosure on the informant, and the public interest in the communication of facts and opinion to the public by the news media. *Id.* at 126H (2).

Interestingly, a left-leaning Australian political party secured an amendment just prior to the passage of this Bill which extended the definition of "journalist" to include "a person who is

engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium." *Id. at* 126G (1).

This is notable in that it will likely extend the protection to bloggers, citizen journalists and other online news disseminators. The Act only applies in Federal related matters. However, there is also a shield law provision that is applicable in the state of New South Wales (Sydney), and two other states (Victoria and Western Australia) have since announced plans to introduce similar shield laws. Such legislation represents a step in the right direction to enable journalists to investigate and publish public interest stories which may otherwise be stymied by fear of legal implications for their sources.

Negative Outcomes for Protection of Journalists' Sources

Despite the above legislative advancements, the practical and judicial setbacks in the field of protection of sources have been somewhat disillusioning. In 2007, two *Herald Sun* reporters were convicted of contempt of court and fined \$7,000 each for refusing to disclose their confidential sources. A more contemporaneous example is that of Gina Rhinehart, the richest woman in Australia, who is currently seeking the disclosure of sources from the *West Australian* newspaper following disclosures about the Rhinehart family feud.

A particularly negative outcome however, was the decision made by the Supreme Court of New South Wales in February 2012 in *Liu v The Age Company Limited* [2012] NSWSC 12. In this case, Minter Ellison acted for the defendants being *The Age*, a leading Australian newspaper, and three of its journalists. The decision was detrimental in the precedent that it may potentially create regarding the protection of sources, and is subsequently now under appeal.

Overview of the Case

In February 2010, *The Age* published an article which alleged that businesswoman Ms Helen Liu had made significant monetary payments to a former Australian defense minister, Mr. Joel Fitzgibbon in order to "cultivate him as an agent of political and business influence." The allegations were accompanied by quotes from documents which were alleged to have been Ms Liu's own records. The article was researched and written by three journalists for The Age, and as expected, attracted significant public attention.

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In response, proceedings for preliminary discovery were brought by Ms Liu against *The Age* and its three journalists. She argued that the documents which were quoted by *The Age* were either forged or falsely attributed to her, and as such, provided the basis for a defamation claim by her against the individual or group who provided them to the journalists. Such a claim was impossible, however, when Ms Liu did not know the identity of the sources.

The relief sought by her in these proceedings was therefore a court order that *The Age* and its three journalists be required to provide oral disclosures as to the identity and further description of the person or persons who provided the

relevant documents to them, and the manner and circumstances in which those documents were obtained. Further, the claim requested that all memoranda, notes, notebooks, audio recordings, video recordings, diaries, draft articles, correspondence and records of interview which may identify the sources or provide further description be produced to the court.

The defendants argued in response that the legislative rule for preliminary discovery should be read down, in that disclosure of sources in these

circumstances should be prevented by the implied constitutional freedom of political communication on matters of government and politics. Unlike in the United States, Australia does not have a constitutionally enshrined Bill of Rights. In contrast, it has very limited and judicially implied protections for rights such as freedom of expression, one being the implied freedom of political communication laid down by the High Court of Australia in *Lange v Australian Broadcasting Corporation* [1991] HCA 25.

Because the article discussed matters of government such as Mr. Fitzgibbon's political integrity as a result of the alleged financial dealings, it was therefore argued that requiring the defendants to disclose their sources would unduly burden this implied freedom of political communication, in that it would substantially restrict the ability of the media to obtain sensitive information from informants.

On this basis, it was further argued the previously uncertain "newspaper rule" should be influential to the Court in using its discretion to refuse any order compelling disclosure of sources regarding matters of government or politics. This is a rule, historically utilized in defamation cases, which permits publishers to avoid the disclosure of sources in the face of a trial. It was argued that the Court should hold that the rule be absolute in such circumstances of political and government reporting.

The Judgment and its Implications

After almost a year long deliberation, Justice McCallum

exercised her discretion in favour of Ms Lui, ordering that The Age and its three journalists be required to "give discovery to the plaintiff of all documents that are or have been in their possession which relate to the identity or whereabouts of the sources." *Liu v The Age Company Limited* [2012] NSWSC 12, 213.

McCallum J held that the rules pertaining to preliminary discovery did have the capacity to effectively burden, and thus offend, the implied freedom of political communication. However, she also held that the rules were nonetheless

reasonably appropriate and adapted to serve a legitimate end that was still compatible with our system of representative and responsible government. She expressed the view that, in contrast to the arguments put forward by the defendants, our system of government is "likely to be adversely affected" by excluding all confidential sources of political information from the operation of the rule, in that it may result in a lack of

As such, she stated that an "absolute protection for journalists' sources would ... threaten the constitutionally prescribed system of government, just as would an unqualified freedom to defame people involved in government and politics." *Id.* at 47.

public scrutiny and accountability. Id. at 58-59.

Further, McCallum J held that the previously uncertain "newspaper rule" should not be recognized as conferring any right or entitlement to protection for journalists or

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newspapers. Similar arguments were utilized here, in that her Honour argued that if such a rule were absolute, this would result in an unchecked or unqualified capacity to engage in defamation of politicians or government figures.

This decision was disappointing in its failure to take the opportunity to enhance and uphold Australia's already very limited protections for freedom of speech and protection of sources under the common law. McCallum J's judgment sets a relatively low threshold for enabling a Court to require journalists and publications to disclose the identity of their sources, even in a discussion of political and governmental matters where there is a clear public interest in encouraging the capacity for investigative reporting. This is likely to result in an increased and inappropriate use of an action for a preliminary discovery order to require the disclosure of journalistic sources.

As noted above, the case is currently listed for hearing in the Court of Appeal. It is my opinion that The Age and its three journalists have strong points for appeal on both evidentiary and substantive grounds.

Conclusion

As discussed above, recent developments in media law have seen both positive and negative change in the area of shield laws and the protection of sources. However, should the judgment in *Liu v The Age Company Limited* be upheld on appeal, this is likely to represent an unbalanced step backward in the promotion of press freedom and the public's right to receive information regarding political matters. It will therefore be an interesting and significant case to follow.

Peter Bartlett is a partner with Minter Ellison, Melbourne, Australia. Ella Furphy, a Law Graduate at Minter Ellison, assisted with this article.

MLRC UPCOMING EVENTS

MLRC/Stanford Digital Media Conference

May 21-22, 2012 | Stanford, California

MLRC/NAA/NAB 2012 Media Law Conference

Sept. 12-14, 2012 | Reston, Virginia

MLRC Annual Dinner

November 14, 2012 | New York, NY

Defense Counsel Section Annual Meeting and Lunch

November 15, 2012 | New York, NY

The Computer Fraud and Abuse Act Meets the Ninth Circuit

Act Does Not Criminalize Mere Misuse of Data or Infractions Against Terms Of Use

By Jeremy D. Mishkin

In a widely-anticipated opinion, the Court of Appeals for the Ninth Circuit – sitting en banc – has ruled that the Computer Fraud and Abuse Act (18 U.S.C. § 1030), a law which was originally enacted to punish "hacking," does not criminalize mere misuse of data or infractions against web pages' Terms of Use. *United States v. Nosal*, No. 1-10038 (April 10, 2012). In so holding, the 9th Circuit has sharply differed from other Circuits and thus may have paved a path to Supreme Court review.

Background

Plaintiff David Nosal was a former employee at Korn/Ferry. After he left Korn/Ferry he persuaded some people who were still employed at the firm to help him start a new business that would compete with Korn/Ferry. That "help" took the form of having them log into the Korn/Ferry computer system, obtain valuable company data and provide it to Nosal. At the time they did so, the remaining employees were authorized users of the Korn/Ferry system, although the firm had a policy that forbade disclosure of confidential information. Nosal was indicted under the CFAA for aiding and abetting the remaining employees in "exceed[ing their] authorized access" with intent to defraud.

The CFAA establishes that it is a crime whenever someone

...knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value...

(§1030(a)(4)

The CFAA defines "unauthorized access" as:

to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.

 $(\S1030(e)(6)).$

Scope of the Computer Fraud and Abuse Act

The Ninth Circuit was called upon to determine whether Nosal, who had not himself accessed his ex-employer's computer, would be exposed to criminal penalties as a result of encouraging others who had authorized access but were subject to a non-disclosure policy. Whether his conduct was criminal therefore depended on whether the employer's non-disclosure policy was effectively incorporated into the applicable provisions of the Act.

The Court held that Nosal could not be prosecuted under the CFAA. Chief Judge Kozinski's opinion for the en banc majority understood that the real stakes were much higher than the acquittal or conviction of Nosal, since the terms under review have the potential to implicate an enormous amount of wholly innocuous behavior. (It is worth noting that Chief Judge Kozinski himself was the subject of what many regarded as a "hacking" incident when a disgruntled litigant attempted to smear the Chief Judge by obtaining access to computer files that the Chief Judge had thought were not accessible to others. Disciplinary proceedings against the Chief Judge resulted in all charges being dismissed.)

The Government's position would have subjected virtually every computer user who transgressed an (Continued on page 38)

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organization's policies, or a website's Terms of Use, to potential criminal penalties.

Minds have wandered since the beginning of time and the computer gives employees new ways to procrastinate, by g-chatting with friends, playing games, shopping or watching sports highlights. Such activities are routinely prohibited by many computer-use policies, although employees are seldom disciplined for occasional use of work computers for personal purposes. Nevertheless, under the broad interpretation of the CFAA, such minor dalliances would become federal crimes.

(slip op. at 3866)

Having seen an actual instance in which a failure to abide Terms of Service on a social networking site has led to an indictment, *U.S. v. Lori Drew*, 259 F.R.D. 449 (C.D. Cal. 2009), the Court was unimpressed with the Government's assertion at oral argument that it would never prosecute such minor infractions. (Slip op. at 3870)

The Chief Judge noted that "[o]ur access to...computers is governed by a series of private agreements and policies that most people are only dimly aware of and virtually no one reads or understands." (slip op. at 3868) The Court was unwilling to believe that Congress intended to impose criminal penalties based on such poorly defined and constantly changing standards.

Nevertheless, the *Nosal* decision is at odds with other Circuit Courts' interpretation of the CFAA (c.f. *U.S. v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); U.S. v. John, 597 F.3d 263 (5th Cir. 2010); IAC v. Citrin, 440 F.3d 418 (7th Cir. 2006), all of which upheld broader interpretations of the key phrases.

Chief Judge Kozinski's opinion criticized those cases for looking "only at the culpable behavior of the defendants before them, and fail[ing] to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of 'exceeds authorized access." (Slip op. at 3871) Will the Supreme Court step in? The clock is ticking.

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Colorado Repeals Its Antiquated Criminal Libel Statute

By Steven Zansberg

On April 13, 2012, Colorado's Governor John Hickenlooper signed into law Senate Bill 12-102 and thereby repealed Colorado's criminal libel statute. Colorado's criminal libel law was one of only fifteen such state laws still on the books, was first enacted in 1883, in the section of Colorado's statute books addressing crimes against the public peace (adjacent to a statute criminalizing dueling in public). Under the criminal libel statute, it is a class 6 felony (carrying a penalty of up to 18 months in prison and a fine of up to \$100,000) to publish statements "tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive." See Colo. Rev. Stat. §18-13-105.

Notably, truth is *not* a defense to criminal libels that blacken the memory of the dead or expose the natural defects of the living. In 1991, Colorado's Supreme Court held that the statute could not, consistent with the First Amendment, be applied to any publication concerning a public official or public figure on a matter of public concern. *See People v. Ryan*, 806 P.2d 935 (Colo. 1991).

Howling Pig Case Spurred Repeal

State Senator Greg Brophy's bill repealing the law was inspired by a lengthy civil case that arose from an aborted criminal libel prosecution -- "The Howling Pig" case -- that twice made its way to the Tenth Circuit Court of Appeals. See Mink v. Suthers, 482 F.3d 1244 (10th Cir. 2007); Mink v. Knox, 613 F.3d 995 (10th Cir. 2010). In 2010, that court held that the criminal libel statute could not be applied to satire or parody, such as the content of a college student's web-based comedic newsletter "The Howling Pig," when it poked fun at a University of Northern Colorado business professor (who passed away this past January).

When local police received a complaint from the professor about his being negatively portrayed in the online newsletter, the police obtained a search warrant for the student's home and seized his computer on suspicion that it contained evidence to establish the crime of criminal libel. The ACLU of Colorado represented the college student,

Thomas Mink, and obtained a TRO requiring the police to return his computer.

Mink sued the police department and prosecutor's office and asked the United States District Court for Colorado to declare Colorado's criminal libel statute unconstitutional. (The MLRC joined several other press organizations in an amicus brief supporting Mink's position.) However, the trial court declined to reach the issue, finding the constitutional challenge to the statute was mooted by the District Attorney's announcement that he would not prosecute Mink under the Act.

Nevertheless, Mink pursued his civil rights claim against the assistant district attorney who had authorized the search warrant for his home in violation of his rights under the Fourth Amendment. The District Court granted summary judgment to Mink in June 2011, and while a third appeal was pending, the case settled in December 2011, with the assistant district attorney paying Mink \$425,000.

According to the Colorado Attorney General's office (which testified in support of Brophy's bill repealing the law), the state's criminal libel statute has been invoked 24 times since 2007, and usually in cases in which other charges (e.g. harassment) were also filed. Senator Brophy proclaimed "[t]his bill will take the heavy hand of government out of prosecuting individuals for exercising their first amendment right."

The bill was passed unanimously by Colorado's State Senate and by a vote of 36-27 in the House of Representatives; Governor Hickenlooper signed the bill into law only four days after it was sent to him. Mr. Mink has himself reported on the this positive byproduct of his case at http://thehowlingpig.com/

Unless a voter-initiated referendum qualifies for the November 2012 ballot that addresses the issue of criminal libel, Senate Bill 12-102, repealing the criminal libel statute, will take effect on September 1, 2012.

Steve Zansburg is a partner in the Denver, Colorado office of Levine, Sullivan, Koch & Schulz LLP. He authored the media amicus brief in the Howling Pig case challenging the constitutionality of the Colorado criminal libel statute.

No Qualified Immunity for Police Defendants Sued Over Criminal Libel Arrest

Louisiana Criminal Libel Statute Unconstitutional as Applied to Defendant

A Louisiana man arrested for criminal libel, and jailed overnight in leg irons, can pursue federal civil rights claims against the police officials who obtained and executed the arrest warrant. <u>Simmons v. City of Mamou</u>, et al., No. 09-663 (W.D. La. March 15, 2012) (Foote, J.).

Even though the arrest was made pursuant to a valid warrant, the defendants were not immune from suit because they 1) should have known that the Louisiana criminal libel law was unconstitutional as applied to the facts of the case; and 2) defendants withheld exculpatory facts in their affidavit to obtain the arrest warrant.

Background

The bizarre criminal libel case arose out of a controversy about the behavior of a local police chief. The plaintiff, a retired police officer, emailed his local newspaper, the *Ville Platte Gazette*, asking why it had not reported on the alleged arrest of Greg Dupuis, Chief of Police of the Town of Mamou. Plaintiff also asked whether the newspaper was going to report on another incident involving Dupuis where the Police Chief allegedly interfered with a DUI investigation of one of his officers. Plaintiff and the newspaper engaged in an exchange of emails as the newspaper tried to verify the story.

Although the newspaper never published anything about these incidents, its inquiries fueled local discussion about Dupuis' conduct. Dupuis asked the newspaper to reveal its source of information about him. After the newspaper refused, Chief Dupuis subpoenaed the newspaper and obtained the email exchange between plaintiff and the editors. Dupuis and another officer submitted an affidavit to a local judge in support of an arrest warrant for plaintiff for violating Louisiana's criminal libel statute, La. Rev. 14:47. Plaintiff was arrested and held in jail overnight, spending some time in leg irons.

In a news report about the arrest, the *Ville Platte Gazette*, quoted Chief Dupuis stating "I will be actively searching for

the person or persons involved in this defamatory campaign against me . . . and now it will come to an end." According to the article, a second officer stated "police were actively investigating the matter to uncover additional sources of the rumor and more arrests would be forthcoming."

Section 1983 Claims

The criminal libel charge against plaintiff was apparently dropped. Plaintiff then brought a Section 1983 action against Chief Dupuis and other police defendants alleging they violated his First, Fourth, and Fourteenth Amendment rights. Defendants moved for summary judgment on the basis of qualified immunity.

Denying immunity to Chief Dupuis and other defendants, the District Court began by noting that "in the present case, a citizen was handcuffed, arrested and held overnight for sending a private email communication to a local newspaper which informed the paper of possible misconduct of a public official. There can be no doubt that such a communication constitutes protected speech in this country."

Louisiana's criminal libel statute was declared unconstitutional by the Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964) in so far as it failed to include an actual malice requirement. The District Court noted that to comport with *Garrison*, a defamatory statement must be made with knowledge of falsity or reckless disregard. "As officers charged with enforcing Louisiana law, Defendants are presumed to know the law."

Here the district court found "not a scintilla of evidence" of actual malice and this fact was withheld in the officers' affidavit for arrest. In short, defendants "relied on an unconstitutional statute, withheld relevant facts and evidence from Judge Fuselier, and misrepresented the nature of Plaintiff's communication with the Gazette Thus, as to Defendants Ortis and Dupuis, the warrant cannot and does not provide any shield from liability for the arrest which followed."