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Seventh Circuit Rules Illinois Eavesdropping Act Likely Unconstitutional as Applied to Open Recording of Police Officers

By Richard O'Brien, Robert D. Leighton, Linda Friedlieb and Matt Taksin

On May 8, 2012, the Seventh Circuit weighed in on the controversy over the constitutionality of statutes making it unlawful to record police officers in public engaged in their public duties. In <u>ACLU v. Alvarez</u>, No. 11-1286, a 2-1 panel ruled that an Illinois statute that criminalizes audio recording conversations, whether or not those conversations are private, likely violates the First Amendment's free-speech and free-press guarantees when applied to recording police officers' conversations while on duty in public.

The case was brought by the American Civil Liberties Union of Illinois ("ACLU") against Cook County States Attorney Anita Alvarez.

Nowhere had this issue received as much attention as Illinois. The Illinois Eavesdropping Act, 720 ILCS 5/14-1, et

seq. (the "Act"), was one of the most restrictive in the nation—making the audio recording of a police officer carrying out his duties in public without officer consent a felony punishable by up to fifteen years in prison. There have been at least fourteen recent prosecutions under the Act.

The Seventh Circuit ruling is a significant victory for the right to freely gather and record information about the conduct of government officials in public

places performing their public duties. The Seventh Circuit's decision is consistent with the First Circuit's ruling in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), which held that "[b] asic First Amendment principles" answer "unambiguously" that there is a right to record police carrying out their duties in public.

The Illinois Eavesdropping Act

The Act makes it a felony to audio record "all or any part of any conversation" unless all parties to the conversation give their consent. Since 1994, the Act has covered any oral communication regardless of whether the communication was intended to be "of a private nature under circumstances justifying that expectation." Violation of the statue by recording a law enforcement officer performing his duties is a class 1 felony and may carry a prison term of four to fifteen years.

Nearly all states and the federal government have an eavesdropping statute. But Illinois' statute is an outlier. Only three states prohibit recording even where there is no reasonable expectation of privacy. Two of those states (Massachusetts and Oregon) do not extend the ban to open and obvious recording (as opposed to surreptitious recording). The Illinois statute, however, applies to the recording of conversations where there is no expectation of privacy, and applies to open and obvious recording.

The ACLU's Lawsuit

The ACLU monitors police activity during demonstrations and other gatherings, and in 2010 sought to expand its monitoring program to include audio recording of police. In August 2010, in a pre-enforcement action, the ACLU filed a complaint in the Northern District of Illinois seeking declaratory judgment that the Act violates the First Amendment and seeking a preliminary injunction against enforcement of the Act against the ACLU's proposed program. ACLU of

Illinois v. Alvarez, No. 1:10-cv-05235 (N.D. Ill.).

The ACLU alleged that it would have recorded police activities during demonstrations but for fear of prosecution under the Act. The ACLU further alleged that the Act violates the First Amendment, as applied, by prohibiting openly audio recording police officers without their consent when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful.

The ACLU moved for a preliminary injunction and Alvarez moved to dismiss. The district court dismissed the

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complaint under Rule 12(b)(1), holding that the ACLU failed to allege a credible fear of prosecution.

In November 2010, the ACLU moved to amend judgment and file an amended complaint, which contained additional allegations regarding standing. In January 2010, the district court denied the ACLU's motion. The court held that although the ACLU's amended complaint sufficiently alleged a fear of prosecution, the ACLU's complaint had a different standing defect in that it had not alleged a cognizable First Amendment injury because the First Amendment did not protect "a right to audio record."

The ACLU's Appeal

The ACLU appealed both the original dismissal and the denial of amendment. On September 13, 2011, a Seventh Circuit panel consisting of Judges Posner, Sykes, and Hamilton heard oral argument. (The audio recording of the argument is available at the Seventh Circuit's web site at http://www.ca7.uscourts.gov.)

The Seventh Circuit's majority opinion is a ringing endorsement of First Amendment protection for audio recording police engaged in their public duties in public places. *ACLU of Illinois v. Alvarez*, No. 11-1286, 2012 WL 1592618 (7th Cir. May 8, 2012). Writing for the majority, Judge Sykes explained that "[t]he Illinois eavesdropping statute restricts a medium of expression commonly used for the preservation and communication of information and ideas, thus triggering First Amendment scrutiny." The court found that the State's Attorney's position that "openly recording what police officers say while performing their duties in traditional public fora—streets, sidewalks, plazas, and parks—is *wholly unprotected* by the First Amendment" was "extreme" and "extraordinary."

Indeed, "[i]f, as the State's Attorney would have it, the eavesdropping statute does not implicate the First Amendment *at all*, the State could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result." Thus, even "under the more lenient intermediate standard of scrutiny applicable to content-neutral burdens on speech, this application of the statute very likely flunks" because it "restricts far more speech than necessary to protect legitimate privacy interests."

In reaching the conclusion that the Act burdens speech, the court observed that "[t]he expansive reach of this statute is hard to reconcile with basic speech and press freedoms" and "the First Amendment limits the extent to which Illinois may restrict audio and audiovisual recording of utterances

that occur in public." Moreover, "the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of government."

The court recognized the important role of emerging technologies in information gathering and dissemination, finding that "[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments." That is to say, "[a]udio and audiovisual recording are communication technologies, and as such, they enable speech." And the court accepted the ACLU's argument that the act of making a recording with modern technologies and publishing that information are both necessary links in a unitary chain of expression. Indeed, the court concluded that "[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."

Moreover, in applying "at least" intermediate scrutiny, the court found that the law lacked a "reasonably close fit" between the espoused interest of privacy and the means of protecting it—that is, prohibiting all recording of conversations regardless of whether there is an expectation of privacy.

Specifically, the court found that "conversational privacy" is not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events. And communications of the type the ACLU plans to record "lack any 'reasonable expectation of privacy' for purposes of the Fourth Amendment." Moreover, the court rejected Alvarez's argument that the ACLU's program threatened the Act's purpose of effective law enforcement.

Judge Posner filed a dissenting opinion in which he expressed skepticism that the ACLU challenge presented any First Amendment claim. He wrote that the majority opinion was at odds with social values of privacy and public safety and expressed fear that the decision could cast doubt on both other states' eavesdropping statutes and other bodies of law protecting the right to privacy. He also predicted that "[t]he constitutional right that the majority creates is likely to impair the ability of police both to extract information relevant to police duties and to communicate effectively with persons whom they speak with in the line of duty."

The ACLU is represented by Harvey Grossman, Adam Schwartz, and Karen Sheley; and Richard O'Brien, Linda Friedlieb, Robert Leighton, Matthew Taksin of Sidley Austin LLP.

Appropriation Artist Tests the Scope of 'Fair Use' With the Second Circuit

Volley of Questions for Both Sides in Oral Arguments Leaves Outcome Murky

By Itai Maytal

Without signaling to either side any clear advantage, the Second Circuit Court of Appeals heard oral arguments last week in the appeal of appropriation artist Richard Prince from a decision that found him liable for copyright infringement for using photographs of another artist without permission. Patrick Cariou v. Richard Prince, et. al., No. 08 Civ. 11-1197 -CV (2d Cir.).

What the poker-faced three-judge panel ultimately decides in this case, which involves the scope of fair use in the art world, is anticipated to have implications extend far beyond the dispute's subject matter.

Background

In March 2011, Judge Deborah A. Batts ruled that Prince had infringed the copyright of French photographer Patrick Cariou when Prince incorporated 41 photographs shot by Cariou

into his art gallery exhibition in New York. Patrick Cariou v. Richard Prince, et. al., No. 08 Civ. 11327, 2011 WL 1044915 (S.D.N.Y. March 18, 2011). Prince took the original pictures, which were ethnographic photographs of Rastafarians in the tropical jungles of Jamaica, altered them though tinting, additions of paint and the placement of oval shapes over their eyes and mouths, and then incorporated them into a series of mural-sized collages with images of guitars and naked women.

The Gagosian Gallery, which showcased his exhibition, "The Canal Zone," sold some of the 29 paintings in the series for more than \$10 million. Meanwhile, Cariou offered evidence in discovery that a gallery owner had cancelled a planned show of his work because she felt it had been "done already" by the Gagosian Gallery and because she did not want to be seen as capitalizing on Prince's reputation.

After both artists and the gallery cross-moved for summary judgment, Judge Batts examined the paintings and found in favor of the Plaintiff on the basis that objectively, and by Mr. Prince's own admissions, the Canal Zone collages did not, as she said they must for fair use, "comment on,

> relate to the historical context of, or critically refer back to the original work[s]" Cariou.

> She issued then permanent injunction requiring that all works and materials relating to Prince's "Canal Zone" be "delivered up for impounding. destruction, or other Plaintiff determines," and that the Defendants "notify in writing any current or future owners of the Paintings of whom they are or become aware that the

disposition, as Paintings infringe the



Left: image from Patrick Cariou's "Yes, Rasta"; right: Richard Prince's "Graduation"

copyright in the Photographs, that the Paintings were not lawfully made under the Copyright Act of 1976, and that the Paintings cannot lawfully be displayed."

Summary of the May 21, 2012 Hearing **Before the Second Circuit**

Oral Arguments by Counsel for Richard Prince

In the hearing on Monday, May 21, Jonathan D. Schiller of Boies, Schiller & Flexner LLP, representing Prince, began the arguments before Judges Barrington D. Parker, Peter W.

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Hall and J. Clifford Wallace from the Ninth Circuit, sitting by designation. Schiller's main argument was that the case be remanded to have the 29 works individually assessed, which he said the lower court opted not to do.

He also argued that the lower court made a clear error in law in holding that the art as a whole was not transformative because it did not comment on Cariou's works. This argument, he said, runs afoul of the *Blanch v. Koons*

standard, which only requires for transformativeness that the second work "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006). Here, Schiller said that Prince did just that with Cariou's work, as evidenced by (1) the physical alterations to Cariou's photographs in Prince's collages, (2) the different aesthetic goals between Prince and Cariou and (3) the massive appeal for his paintings from an entire different audience than Cariou's. Schiller's apparent goal is to have the lower court evaluate each of Prince's works as perceived by its audience, which might be proved by anything from personal opinion to objective market fact.

Judge Wallace interrupted Schiller and asked him to address the Plaintiff's argument that

Prince failed to raise below, and thus waived, his objection that the lower court should have analyzed each of the paintings separately rather than evaluating them as a whole. "That's a pretty good argument," Judge Wallace said.

Schiller responded by arguing that the incorporation of Cariou's works into Prince's collages varies from mural to mural and that no court could reasonably conduct any fair use analysis without evaluating the paintings individually. Judge Wallace added, in apparent assistance to Schiller, that perhaps the objection was not waived because it is the law.

That led Judge Hall to question Schiller's main argument in the appeal that the transformative aspect of the series

should not depend on what Prince initially said in a deposition about his intentions - which apparently had nothing to do with the intentions behind the original photographs – but instead should turn on whether the works add something new as perceived by others.

"What's the proof that the works are perceived differently?" Judge Hall asked. Schiller responded that it is undisputed fact that Prince's works attracted different end users than Cariou's works.

Judge Wallace then stated that while he was not an art critic, "it looked like at least 10 of the paintings would not qualify as transformative." But he then questioned whether this was a determination best left to the district court judge to resolve rather than "humble judges" of the appellate court. Schiller said it was ultimately a question for a jury. Judge Wallace then reminded Schiller that Prince did cross-move for summary judgment as to all of his paintings, thereby waiving the issue for trial. Schiller responded that the lower court erroneously made inferences in favor of market harm for the Plaintiff that would have to be resolved with a jury as it is a factual issue in dispute. He then reserved two minutes for his reply.



Top: image from Cariou's "Yes, Rasta"; bottom: image from Prince's "Canal Zone" catalogue

Oral Argument by Counsel for Patrick Cariou

Daniel J. Brooks of Schnader Harrison Segal & Lewis LLP, representing Cariou, began his presentation by arguing that Prince's actions harmed the market for his client's work. This immediately sparked a rebuttal by Judge Parker who pointed out that while Canal Zone works sold for millions "on this side of the river" in Tribeca, Cariou's photographs sold for only a couple of thousand euros and were otherwise abandoned in an out-of-print book that was stored somewhere in Dumbo, Brooklyn.

"It seems like the market factor is clearly a loser argument (Continued on page 7)

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for you," Judge Parker said. Brooks responded that he had undisputed testimony from a gallery owner that showed the Plaintiff clearly lost an exhibition opportunity because of Prince's work. "If that is your proof, it seems pretty attenuated" Judge Parker said.

The judge then reiterated that the exhibition was directed at a different market. But Brooks pointed out that the "different market/audience" analysis was not the test for market harm under the fair use standard. Citing to *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd,* Brooks stated that market harm to an original work is recognized even when a secondary use is not competing in the same market. *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.,* 99F.2d 1366, 1377 (2d Cir. 1993)(book containing detailed plot summaries of television episodes could lead someone who used an episode

to refer to the book instead of renting the videotape.)

Judge Parker than shifted the colloquy to the issue of permanent injunction issued below, asking Brooks why it was the public within interest and how was his irreparably client harmed by the Prince exhibition. The judge said he was particularly troubled by the potential destruction of Prince's



Images from Prince's "Canal Zone" catalogue

art that was allowed by the order: "It sounds like something that would appeal to the Huns or the Taliban," Judge Parker said. Cariou's lawyer responded that this is a case involving two artists and that his client has no interest in destroying art.

Brooks than conceded to the court that while the injunction was not granted below through the proper procedure – Judge Batts did not apply the four-part test *of eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) – the court here had a fully-developed record before it to grant injunctive relief on its own.

Going through the various factors, Brooks pointed out there was no adequate remedy at law because Cariou would have to speculate about his actual damages. He also argued that the balance of hardships favored injunctive relief given that Prince's supposedly minimal efforts to create his collages pale in comparison to the six years Cariou spent in remote location in Jamaica shooting his photographs. Brooks conceded though that the public interest was in equipoise because enjoining the sale of appropriation art would deprive the public of the opportunity to purchase that art even though there is a strong public interest in ensuring appropriation art does not diminish creative incentives of other artists. On balance, though, Brooks concluded that the factors favored injunctive relief.

In response, Judge Parker re-aired his skepticism about the market harm to Cariou given his belief that Prince was marketing to a different market and end user. Brooks responded that Prince's different end-user market did not give him the right to infringe another artist's copyright. Brooks added that the Defendants' concerns about the chilling effect

of this case is overdrawn given that they have no empirical evidence in support of their argument, and that future appropriation artists will simply be able to buy, as they have before, royalty -free licenses from image houses like Getty images, which he said is their "raison-d'etre."

Finally, Judge Wallace returned the colloquy to the question of whether the lower court had to make

findings on the record for each of the 29 paintings as to fair use. Brooks responded that the record made clear that Judge Batts did examine each painting and, in combination with Prince's deposition testimony, found they were infringing as a whole. Besides, Brooks noted that under the Second Circuit decisions of *Castle Rock Entm't, Inc. v. Carol Pub'g Group, Inc.* 150 F.3d 132 (2d Cir 1998)(trivia book for viewers of Seinfeld) and *Twin Peaks, supra*, the court could decide copyrighted images are infringing as a whole. Judge Wallace asked if Brooks was conceding that the court had to look at each painting for its determination of fair use. Brooks answered that even if 10 out of the 29 are found to be infringing, there is liability. When Judge Parker asked then

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why Cariou needed an injunction for its liability, Brooks responded that his client never moved for an injunction, just for liability.

Reply by Counsel for Richard Prince

On reply, Schiller, counsel for Prince, addressed questions again about evaluating the pictures as a group instead of individually. He attempted, at the request of Judge Parker, to distinguish *Castle Rock* and *Twin Peaks* from this case by saying, unlike here, that those cases involved secondary works that appealed to the same audiences as the original work.

As such, this case is not controlled by those decisions and the correct result is that it be remanded for additional individual review and written determinations.

Schiller also argued that the Court should not rely solely on post-hoc rationalizations, like Prince's testimony, in deciding whether a work is infringing or not, but to look at work itself for any new expression, meaning or message from the "raw materials" and the audience it is intended for. That spurred Judge Parker and Hall to ask how the court is supposed to do that.

"Doesn't your test depend on the intellectual sophistication of a judge?" Judge Parker said. His colleagues might frequent the Met, he said, "I might be up at Yankee Stadium. Your test might not take care of that." Schiller responded by saying this is not a subjective inquiry and "it doesn't require the court to go back to school to get a master's degree in art."

Judge Hall pressed him again for guidance in their review of the paintings. Schiller attempted to satisfy the request by advising the court to focus on the objective fact of a different market and purpose for Prince's work.

The appellate panel than took the case under advisement.

Implications of the Appellate Court's Ruling

Whichever way the court rules, various interests groups have submitted amicus briefs arguing that its implications would extend far beyond the art world.

Google, in an amicus brief drafted by Durie Tangri LLP, argued that to the extent the panel accepts the opinion below that commentary or criticism are necessary for a finding of transformative use, that would jeopardize an emerging category of digital uses that do not comment on the works they incorporate. For example, Google argued that search

indexes have a wholly different purpose than the expressive works they index and should be considered transformative even though they do not comment or criticize.

The Andy Warhol Foundation, in an amicus brief drafted by the Stanford Law School Center for Internet and Society, Bingham McCutchin LLP and art lawyer Virginia Rutledge, argued that if the lower court ruling stands, it would call into question "established modes of artistic expression" and chill "future creativity." It argued that appropriation art is "part of a long and important tradition of visual art" and the district court's decision threatens this important form of expression.

Moreover, the Foundation argued that articulated intent by an artist is not and cannot be the *sine qua non* of transformative use. While not arguing to ignore Prince's testimony or his intentions, it argued that, "transformative meaning may also be established on the face of a defendant's work, and the perceptions of an ordinary observer." Indeed, some legal observers have expressed concerns that placing too great an emphasis on subjective intent in fair use analysis may significantly impair its cost-saving value as an affirmative defense since a defendant may not be able to raise it without volunteering for a deposition.

Meanwhile, the American Society of Media Photographers and the Picture Archive Council Of America, Inc, in an amicus brief drafted by Kirkland & Ellis LLP, argued that if the lower court ruling is reversed, and the court finds that unauthorized use of copyrighted photographs in appropriation art is not infringement, it would impair the ability of its members to earn a living from their work and continue creating and archiving new copyrighted works.

"If creators were unable to generate income from their work by licensing it for uses such as the one here, it would effectively kill the golden goose, advancing the interests of one art form over another at the cost of making new source materials less available to all," they argued.

Still other commentators have considered this case as quaint and "almost Victorian." With visual media being shared constantly and without limit on the Internet, some artists use appropriated material on a regular basis and are not likely to change their practices as a result of the Prince case or others like it.

Regardless, all of the policy concerns and market realities outlined by the amici may yet inform the Second Circuit panel as it arrives at its decision in this case in the months to come.

Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP in New York.

Copyright, Trademark and Defamation Claims Against Random House and Movie Producers Dismissed

Plaintiff Claimed Book and Movie Failed to Include His Role at Facebook

By Brad Ellis

A federal magistrate judge in Massachusetts has thrown out an attempt to force a publisher to tell a plaintiff's version of the founding of Facebook. *Greenspan v. Random House, Inc. et al.* (D. Mass. May 9, 2012). Aaron Greenspan, a Harvard classmate of Facebook co-founder Mark Zuckerberg, alleged that the Random House book *The Accidental Billionaires*, written by Ben Mezrich, and the movie based on

it, *The Social Network*, defamed him and were falsely marketed as "non-fiction" because they failed to include Greenspan's perceived contributions to the founding of the revolutionary social networking site.

Greenspan also included claims of copyright infringement of his own book, Authoritas: One Student's Harvard Admissions and the Founding of the Facebook Era ("Authoritas") an autobiography that describes Greenspan's encounters with Zuckerberg while at Harvard.

Background

In his complaint, Greenspan alleged that while a student at Harvard in 2003 he created a website called houseSYSTEM which included a feature called The Facebook. Greenspan alleged that

Zuckerberg and he exchanged numerous emails and that Zuckerberg was a regular visitor to his site. According to Greenspan, Zuckerberg incorporated many of his ideas into Facebook. Since then, Greenspan claimed, Zuckerberg "systematically" excluded him from any recognition for

Zuckerberg's success, and Greenspan has fought a public campaign to set the record straight.

In 2008, Greenspan's long-running personal dispute with Zuckerberg became a legal one when Greenspan petitioned the United States Patent and Trademark Office to cancel Facebook's registered trademarks for the term "Facebook." In May, 2009, Greenspan entered into a confidential settlement with Facebook and Zuckerberg.

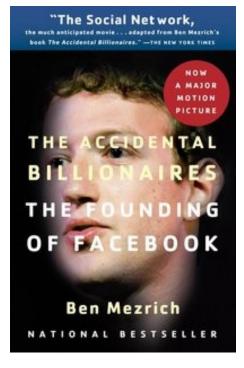
Also in 2008, Mezrich began work on The Accidental Billionaires. The book depicts Zuckerberg's creation Facebook along with fellow Harvard student Eduardo Saverin, including their eventual falling out, as well as Zuckerberg's interaction with Harvard classmates Tyler and Cameron Winklevoss. The book mentions Greenspan a few times, including that he had created houseSYSTEM and its constituent component The Facebook. But, Mezrich writes that no one paid attention to that site and Zuckerberg's site was very different. The film does not mention Greenspan at all.

When researching his book, Mezrich contacted Greenspan for an interview, but Greenspan declined, referring Mezrich to his book *Authoritas*. Greenspan had pitched his book to Random House,

which turned it down. Mezrich lists *Authoritas* among his many sources for the book.

Although he attempted to state claims for copyright infringement, unfair competition and false advertising and defamation, Greenspan's principal complaint was with the

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failure of the book and film to credit him for his alleged role in creating the popular social networking site. Greenspan named as defendants Random House and Mezrich, as well as the film's producer and distributor, Columbia Pictures.

Motion to Dismiss

In granting defendants' 12(b)(6) motions, Magistrate Judge Robert B. Collings applied long settled principles to dispose of Greenspan's copyright infringement claims which were based on one scene in the book and film depicting a meeting between former Harvard President Larry Summers and the Winklevoss twins. Greenspan alleged the scene infringed on a scene in his book depicting a meeting between himself and Summers.

The more interesting aspect of the case was Greenspan's attempt through defamation, and Lanham Act unfair competition and false advertsing claims to, in effect, force publication of his own perceived role in the origins of Facebook. The alleged basis of the Lanham Act claims was the labeling of the works "nonfiction" as well as unsupported allegations that the publisher and author of the book had paid for "five-star" reviews and made bulk purchases of the book to boost sales numbers.

According to Greenspan, the works were in fact fiction because they failed to properly depict his role in the origins of Facebook. As to the "nonfiction" label, the Court held that the term "only means that the literature is based on true stories or events, not that every statement is in fact demonstrably true." The Court found the remaining allegations concerning reviews and book purchases to be "conclusory" and further that there were no facts alleged showing that these alleged misrepresentations influenced consumer purchasing decisions. In any event, Greenspan had failed to allege damages recognized under the Lanham Act — that Greenspan's business was harmed through loss of sales or goodwill associated with products.

Turning to the defamation claims based on the omission of references to Greenspan, defendants argued that purported "selective omission of [Greenspan's] role" in the founding of Facebook, could not, by definition, satisfy the "of and concerning" requirement of a defamation claim. "Defamation by omission," if it exists at all, typically involves omission of key facts causing the listener or reader to infer something false about the plaintiff. It should not support a defamation claim regarding a work that omits any reference to plaintiff at all.

The Court took a different approach. The Court held that defendants' choice to omit reference to Greenspan did not give rise to a reasonable inference that he was "irrelevant in Facebook's origins." And, even if that were a reasonable inference, that would not "hold the plaintiff up to scorn, hatred, ridicule or contempt.

Essentially Greenspan contends that the harm resulting from the omissions was that he was robbed of his proper recognition for his role in the origins of Facebook; that is not a claim of defamation."

Accordingly, because the actual references to Greenspan in the book and the omission of references of his claimed role in the creation of Facebook from the book and film were not susceptible of defamatory meaning, the Court did not reach the question of whether the omissions were of and concerning Greenspan.

While the motions to dismiss were under submission, Greenspan attempted to file an amended complaint. The Court rejected that effort. Greenspan has appealed.

Random House and Mezrich are represented by Steve Contopulos, Brad Ellis and Chris Munsey of the Los Angeles office of Sidley Austin LLP, along with Boston counsel Benjamin McGovern of Holland & Knight LLP. Columbia Pictures is represented by Kevin Baine and Megan Hughes of Williams & Connolly LLP in Washington D.C., along with Boston counsel Dustin Hecker of Posternak Blankenstein & Lund LLP.



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Magazine Page Congratulating Michael Jordan on Hall of Fame Induction is Noncommercial Speech

In February, a federal court in Illinois held that a magazine page designed by a Chicago-area supermarket to commemorate Michael Jordan's induction into the Basketball Hall of Fame constituted noncommercial speech. *Jordan v. Jewel Food Stores, Inc.*, No. 10 C 340, 2012 WL 512584 (N.D. Ill. Feb 15, 2012) (Feinerman, J.).

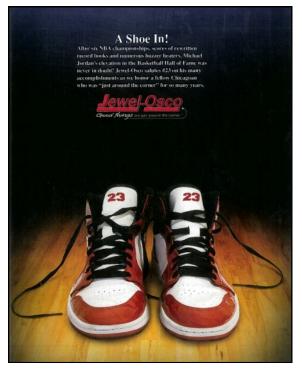
Jordan claimed that the supermarket improperly used his identity in violation of state and federal law. The court ruled the page was non-commercial and entitled to full First Amendment protection.

Background

The case arose from a special commemorative issue of Sports *Illustrated* magazine published in 2009 in honor of Michael Jordan's induction into the Basketball Hall of Fame. Time Inc., the publisher of the magazine, asked multiple businesses to design pages paying tribute to Michael Jordan to be published in the special issue. One of the businesses that accepted Time's offer, Jewel Food Stores, Inc. (Jewel), designed a page congratulating Jordan on his induction that became the subject of this litigation.

Jewel, a subsidiary of Supervalu

Inc., operates about 175 grocery stores in the Chicago area under the trade name of Jewel-Osco. Jewel's magazine page displayed a picture of red, white, and black (Chicago Bulls' colors) basketball shoes sitting on a hardwood court. The tongues of the shoes were emblazoned with the number 23 that Jordan made famous during his time with the Chicago Bulls. The page was titled "A Shoe In!" and displayed the following message:



After six NBA Championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

The page also displayed Jewel-Osco's logo and the store's slogan: "Good things are just around the corner." Jewel did not pay to have the page placed in the magazine; rather, it agreed to sell the commemorative issue at its stores and to stock it in special displays. Jewel did not receive permission from Jordan before submitting its page for publication.

Jordan sued Jewel in Illinois state court in Cook County, alleging violations of the Illinois Right of Publicity Act, the Lanham Act, the Illinois Consumer Fraud and Deceptive Trade Practices Act, and the common law tort of unfair competition. Jewel removed the case to federal court and filed third-party suits for both contribution and

indemnification against its marketing vendor, Vertis, Inc. and against Time. In response, Time filed third-party counterclaims against Jewel and its parent company, Supervalu.

Jordan filed a cross-motion for partial summary judgment asking the court to declare that Jewel's page made commercial use of Jordan's identity. Jewel filed a motion for summary judgment on all of Jordan's claims and his cross-motion. In its motion for summary judgment, Jewel argued

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that the page constituted noncommercial speech, thereby giving it full First Amendment protection and enabling the corresponding defenses that could defeat Jordan's claims.

Commercial/Noncommercial Determination is a Question of Law

The court deemed the determination as to whether the page was commercial speech or noncommercial speech to be "significant and potentially dispositive." Citing the Supreme Court's decision in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) and a litany of lower court decisions, the court established that such a determination "presents an issue of law for the court." Moreover, looking to *Youngs Drug* and the Seventh Circuit's application of it in *United States v. Benson*, 561 F.3d 718 (7th Cir. 2009), the court and both parties agreed that in making that primary determination, the court should consider as subsidiary questions of law (1) whether the speech was an advertisement, (2) whether it referred to specific products or services, and (3) whether it was driven by economic motivations.

However, Jordan argued that a jury should be used to resolve any disputed material facts relevant to the commercial/noncommercial question. In its ruling, the court found that the use of a jury at this point was unnecessary because "Jordan and Jewel dispute not the material historical facts surrounding Jewel's page, but the legal conclusions to be drawn from those facts." The court strengthened its conclusion that a jury was not needed in this determination by pointing out that any disputed facts in a ruling on Jewel's motion for summary judgment would be decided in Jordan's favor anyway.

Magazine Page Not Commercial Speech

To determine whether the page constituted commercial speech, the court followed the Supreme Court's precedent set in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989) and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) to ask "whether the speech proposes a commercial transaction."

Citing the Seventh Circuit's application of that test in Commodity Trend Serv., Inc. v. Commodity Futures Trading

Comm'n, 149 F.3d 679 (7th Cir. 1998), the court explained that "speech is not commercial if it does not propose a commercial transaction."

In conducting this primary inquiry, the court considered whether the use of Jewel's slogan and logo on the page constituted a commercial proposal. The court noted that the text and images of the page were devoted to celebrating Jordan's achievements, not to highlighting the store or its products. Additionally, the logo was merely used to identify the speaker, Jewel, not to put the focus on its stores.

Likewise, the court found the use of Jewel's slogan to be a "play on words" that personalizes Jewel's message without taking the focus away from Jordan.

Beyond these specifics of the page, the court noted that the overall context of the page fit within the congratulatory theme of the issue, thereby avoiding focus on Jewel or its products. As a result, the court concluded that "[i]t is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction."

The court then considered the three subsidiary factors that confirmed the noncommercial nature of Jewel's speech. The court found that the speech (1) was not an advertisement and (2) did not refer to a specific product. Moreover, the court argued that because anything done by a corporation presumably has a profit motive, the (3) economic motivation of Jewel's speech is insufficient to turn it into commercial speech. Based on the primary and subsidiary inquiries, the court was satisfied that Jewel's speech was noncommercial.

Though the court reached the conclusion that the speech was noncommercial, it did not decide on the ramifications of that conclusion for Jordan's claims. The court requested that the parties submit further briefs as to "whether the noncommercial status of Jewel's page conclusively defeats Jordan's claims."

In March, the district court denied Jordan's motion for reconsideration and granted summary judgment to Jewel. Jordan has appealed to the Seventh Circuit.

Michael Jordan is represented by Clay A. Tillack, Frederick J. Sperling, and Sondra A. Hemeryck of Schiff Hardin LLP in Chicago. Jewel is represented by Anthony Richard Zeuli of Merchant & Gould P.C. in Minneapolis and David E. Morrison and Oscar L. Alcantra of Goldberg Kohn Ltd. in Chicago.

Sixth Circuit Rejects Interlocutory Appeal in theDirty.com Libel and Privacy Case

Section 230 "Not Imperiled" by Requiring Final Order for an Appeal

The Sixth Circuit refused to hear a website's appeal from a district court decision denying it immunity under Section 230. *Jones v. Dirty World Entertainment, dba Thedirty.com* et al., No. 12-5133 (6th Cir. May 9, 2012) (Kennedy, Siler, Sutton, JJ.). In January, a federal district court in Kentucky held that the website was not entitled to Section 230 immunity from libel and privacy claims over third-party postings because the site 1) encouraged the development of the offensive content; and 2) added a comment endorsing the defamatory postings.

In a short order, the Sixth Circuit concluded that the website failed to show that a substantial public interest would be imperiled if it had to wait for a final order in the case to take an appeal on the Section 230 issue.

Background

The plaintiff Sarah Jones is a Kentucky high school teacher and head cheerleader for the Cincinnati Bengals. The defendant thedirty.com

describes itself as "all about gossip and satire" and invites users to "submit dirt" i.e., "rumors, speculation, assumptions, opinions, and factual information" about ex's and friends.

Jones sued the website over third-party postings stating, among other things, that she "slept with every other Bengal player," had sex with her boyfriend in her classroom and has sexually transmitted diseases.

In August 2010, plaintiff obtained an \$11 million default judgment. Plaintiff's lawyers, however, named the wrong website in their complaint – the dirt.com rather than the dirty.com. Plaintiff then sued the dirty.com and its creator and operator Nik Richie. He moved to dismiss under Section

230.

The district court denied the motion to dismiss, holding that under Section 230 a website is responsible for offensive third-party content when "it in some way specifically encourages the development of what is offensive about the content." *Citing Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) and *Federal Trade Comm'n v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009).

The district court noted the name of the website "in and of

itself encourages the posting only of 'dirt,' that is material which is potentially defamatory or an invasion of the subject's privacy." Moreover, the court held that defendant endorsed the defamatory statements by adding the following comment: "Why are all high school teachers freaks in the sack? — nik."



Motion for Appeal

The website filed an appeal to the Sixth Circuit. Plaintiff

moved to dismiss for lack of appellate jurisdiction. Defendant argued that the Section 230 decision – though not a final order – was appealable under the collateral order doctrine. Under this doctrine, an interlocutory order may be immediately appealed if it 1) conclusively determines a disputed issue; 2) resolves an issue separate from the merits of the action that is too important to be denied review; and 3) will be effectively unreviewable on appeal from a final judgment.

Defendant argued that Section 230 was intended to protect websites both from liability and the costs of litigation.

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Defendants stressed they could not obtain meaningful review of the Section 230 issue after a trial "because once they have incurred the cost and burden of trial, that harm will not be cured even if the district court's order is reversed."

The Sixth Circuit, however, ruled that even assuming Section 230 provides immunity from suit, there must be an important public interest at stake to grant an immediate appeal. "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Quoting Will*

v. Hallock, 546 U.S.345, 353 (2006).

Defendants "failed to demonstrate how a substantial public interest will be imperiled by delaying their appeal until after the district court enters a final order."

Trial in the case is scheduled for November 2012. In a strange twist, in March 2012 plaintiff was indicted for first degree sexual abuse for allegedly having sex with one of her high school students.

Plaintiff is represented by Eric Deters, Cincinnati, OH. Defendants are represented by David S. Gingras, Gingras Law Office, PLLC, Phoenix, AZ; Alexander Ward and Alexis Mattingly, Huddleston Bolen LLP, Huntington, WV.

MLRC UPCOMING EVENTS

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November 15, 2012 | New York, NY

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January 17, 2013 | Los Angeles, CA

Virginia Jury Awards Assistant Principal \$3 Million in Libel Suit Against Newspaper

A Virginia Circuit Court jury this month awarded Phillip Webb, a high school assistant principal, \$3 million in libel damages against the *Virginian-Pilot* newspaper. *Webb v. Virginian-Pilot*, (Va. Cir. jury verdict May 24, 2012). At issue was a December 18, 2009 article which reported on an incident involving Webb's two sons. They were both arrested and convicted of beating up the parent of another student.

Plaintiff alleged the article defamed him by implying he influenced school officials to give preferential treatment to his son, Kevin, who was a student at another area high school and was not disciplined by his school after the incident.

Phillip Webb and his son Kevin filed separate libel suits against the newspaper. As reported last year, Kevin Webb won a \$5 million damage award against the newspaper. See "Virginia Student Wins \$5 Million Libel Damage Verdict," MediaLawLetter Feb. 2011.

The son's case was tried under a negligence standard and went to the jury on the narrow question of whether Kevin Webb had bullied another student. The verdict was reversed by the trial court and was scheduled for a retrial on damages when it settled earlier this year for an undisclosed amount.

Background

The *Virginia-Pilot* article reported that Kevin Webb, then a 17 year old student, had "regularly shoved and taunted [Patrick] Bristol, a special education student," and that Kevin and his older brother Brian went to Bristol's home and beat Patrick Bristol and his 53-year old father. Kevin Webb was charged as an adult with malicious wounding, assault and trespassing. His brother was charged with three felonies. Kevin Webb was found guilty of misdemeanor assault and trespassing, and Brian Webb guilty of misdemeanor assault.

The article also reported that Kevin Webb could have been suspended or expelled from his high school, but he was allowed to remain at school and participate in sports programs. The article noted that his father Phillip Webb was an assistant principal at another area high school and quoted a school official stating that Kevin Webb "did not get preferential treatment because of his dad's position." The reporter had asked Phillip Webb to comment on the story but he declined.

Libel Trial

Plaintiff was deemed a public official and the case was tried under the actual malice standard. Plaintiff's basic theme was that the article gratuitously implicated him in the incident involving his sons and implied he acted improperly, thus seriously harming his reputation. Plaintiff argued there was actual malice because the reporter knew – and the article itself reported – that Kevin Webb did not get preferential treatment because of his father's position. According to news reports, the jury deliberated a bit more than an hour before returning a verdict for plaintiff. The newspaper has moved for JNOV and continues to stand by the truth of the article.

Conrad Schumadine, Wilcox & Savage, Norfolk, VA, represented the Virginian-Pilot. Jeremiah Denton III, Virginia Beach, VA, represented the plaintiff. We hope to have a more detailed account of this trial in an upcoming issue of the MediaLawLetter.

Eleventh Circuit Strikes Punitive Damages Award in Right of Publicity Case Against *Hustler*

By Darrell Solomon

The Eleventh Circuit Court of Appeals recently handed down a victory for the nation's publishers in a Georgia case that considered *Hustler* Magazine's right to illustrate a story about the tragic murder of former model and professional wrestler Nancy Benoit with nude images of Ms. Benoit, without the consent of her estate. In an unpublished decision, the Eleventh Circuit threw out all punitive damages against LFP Publishing Group, LLC d/b/a *Hustler* Magazine ("LFP"), leaving in place only a relatively small actual damages award. *Toffoloni v. LFP*, (11th Cir. May 1, 2012) (Edmondson, Anderson, Farris, JJ.).

A Brief Factual Recap

The Plaintiff was Maureen Toffoloni on behalf of the estate of her daughter Ms. Benoit, who in 2007 was tragically murdered by her husband Chris Benoit, also a celebrity professional wrestler. Media coverage of the tragedy was intense, and at the height of this media coverage, *Hustler* Magazine ran an exclusive story about Ms. Benoit in which it revealed for the first time that before she became a celebrity wrestler, Ms. Benoit had sought to become a nude model. It illustrated the

story with images of Ms. Benoit posing nude and wearing costumes which were taken early in her career in the mid-1980's. Toffoloni brought suit alleging that LFP had violated Ms. Benoit's Georgia common law right of publicity by publishing the images without first obtaining permission from her estate. LFP argued that the images fell within the "newsworthiness" exception to the right of publicity because they illustrated and were part of a news article on a matter of public interest and thus entitled to First Amendment protection.

The Northern District of Georgia initially agreed that the images were newsworthy and dismissed Toffoloni's

The procedural history of the case illustrates the difficulty editors (and their lawyers) face when determining what is "newsworthy," and publishers must act cautiously when making

editorial decisions

concerning publication of photos without consent.

complaint on a Rule 12 motion. But the Eleventh Circuit Court of Appeals reversed and, further, held that the images were not newsworthy as a matter of law, effectively voiding LFP's defense before it had even answered the Complaint. Thus the only issues left to be determined were compensatory damages and Plaintiff's claims for punitive damages and attorneys' fees.

After a week-long trial in the Northern District of Georgia conducted last June, a jury returned a verdict in favor of Plaintiff for \$125,000 in compensatory damages, plus an additional \$19,603,600 in punitive damages. After thanking and dismissing the jurors, the court told counsel that he was

ready to rule on LFP's motion for judgment as a matter of law, which LFP had made at the close of Plaintiff's case. Although he questioned whether there was sufficient evidence to support the jury's finding that punitive damages were warranted, he ruled it was clear that there was no evidence that LFP had acted with specific intent to harm Plaintiff.

The Court cited Plaintiff's admission that LFP did not know of Ms. Toffoloni when it made the decision to publish the article and to evidence that LFP believed the Benoit images were newsworthy. Under Georgia law, punitive damages are capped at

\$250,000.00 when there is no specific intent to harm a plaintiff; therefore, the court entered a verdict in favor of Plaintiff for \$125,000.00 in compensatory damages and wrote down the award of punitive damages to \$250,000.00.

Eleventh Circuit's Decision

Plaintiff appealed to the Eleventh Circuit, arguing that the original punitive damages award should be reinstated. LFP cross-appealed on the ground that punitive damages for a violation of the right of publicity are permitted only where

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the defendant's acts were "of a character to import premeditation or knowledge and consciousness of the appropriation and its continuation," and thus the evidence did not support any award of punitive damages.

Oral arguments were heard in January, and earlier this month, the Eleventh Circuit issued an unpublished opinion in which it remanded to the district court with instructions to vacate in its entirety the award of \$250,000 in punitive damages, thereby leaving Toffoloni with only \$125,000 in compensatory damages. The Court based its ruling on evidence which showed that LFP at all times acted under a sincere and legitimate belief that the images were newsworthy, and thus it had the right to publish them without permission.

LFP had in fact consulted with its legal counsel at three different times – before it bought the images, before it published the images and after it received Toffoloni's cease and desist letter – and all three times, its counsel had instructed LFP that publication was permissible. The Court also agreed with LFP's position that punitive damages were especially inappropriate where even the district court initially agreed with LFP that the images met the newsworthiness exception; it held that "we do not believe that publishers should be held to a higher standard than that of the learned district judge."

The procedural history of the case illustrates the difficulty editors (and their lawyers) face when determining what is "newsworthy," and publishers must act cautiously when making editorial decisions concerning publication of photos without consent. The Eleventh Circuit's ultimate ruling should give publishers confidence that as long as they have a sincere, good faith belief that publication of an item is protected by the First Amendment, at least they likely will not be faced with punitive damages for guessing wrong about whether the court (or a later jury) will argue with the publisher's view of the "newsworthiness" of the images.

LFP was represented by S. Derek Bauer, Barry Armstrong and Darrell Solomon of McKenna Long & Aldridge in Atlanta. Plaintiff was represented by Richard P. Decker and F. Edwin Hallman, Jr. of Hallman & Wingate in Atlanta.



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Maine's High Court Re-Adjusts Burdens in Favor of Plaintiffs in Anti-SLAPP Motions

Decision May Impact States with Similar Anti-SLAPP Statutes

By Sigmund D. Schutz and Benjamin S. Piper

In a plaintiff-friendly decision that has implications for other states with anti-SLAPP statutes, Maine's highest court found that plaintiffs need only show a *prima facie* case to survive an anti-SLAPP motion to dismiss. *Nader v. The Maine Democratic Party*, 2012 ME 57 (April 19, 2012). The Maine Supreme Judicial Court sitting as the Law Court clarified the relative burdens of parties in deciding a special to dismiss under Maine's anti-SLAPP statute, 14 M.R.S. § 556. In a break from prior Maine cases, plaintiffs now need only make a *prima facie* showing to overcome an anti-SLAPP motion to dismiss.

Constitutional Limits Lower Plaintiff's Burden

The *Nader* case originated in 2009, when 2004 presidential candidate Ralph Nader and three of his electors in Maine filed a six-count complaint against the Maine Democratic Party and other entities and individuals associated with the Democratic Party. The complaint alleged that the Defendants sought to prevent Ralph Nader's appearance on the ballot in the 2004 presidential election by filing "twenty-nine 'objectively baseless' complaints with courts and administrative bodies in seventeen states, including Maine, and with the Federal Election Commission (FEC) in the District of Columbia."

The defendants filed special motions to dismiss Nader's complaint pursuant to Maine's anti-SLAPP statute, 14 M.R.S. § 556. The anti-SLAPP motion to dismiss is intended to dispose of baseless lawsuits that are brought to punish defendants for exercising their right to petition the government, a right recognized under both the United States and Maine constitutions. The Superior Court granted the Defendants' motion. Nader appealed.

On appeal, the Law Court began by re-stating the twostep process for deciding anti-SLAPP motions under Maine law. First, the moving party has the burden of showing that the plaintiff's suit was based on some activity that would qualify as an exercise of the moving party's First Amendment right to petition the government. If the moving party satisfies that burden, the second step shifts the burden to the non-moving party to establish that the moving party's exercise of that right "(1) was 'devoid of any reasonable factual support or any arguable basis in law,' and (2) 'caused actual injury' to the nonmoving party."

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While the Law Court previously reviewed the evidence in the light most favorable to the moving party in considering the second step, it acknowledged in *Nader* that this standard "becomes problematic" when the evidence "is disputed and consists only of pleadings and statements in affidavits not yet subject to discovery or trial."

The court concluded that application of its previously adopted anti-SLAPP standard – review of the facts in the light most favorable to the moving party – meant that the nonmoving party will always lose when the parties present conflicting facts. To avoid a construction of the statute that would work an unconstitutional infringement of Nader's right to petition the courts, to access the courts, and to access the ballot, the Court concluded that:

section 556 must be construed, consistent with usual motion-to-dismiss practice, to permit courts to infer that the allegations in a plaintiff's complaint and factual statement in any affidavits responding to a special motion to dismiss are true. This standard, consistent with other dispositive motion practice, requires only that the nonmoving party provide prima facie evidence to support its burden of showing that the moving party's petitioning activity was "devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party."

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Nader, 2012 ME at ¶ 33.

The court characterized this as a "low standard," requiring only "some evidence." Moreover, the nonmoving party need only show that "any, rather than all," of the petitioning activities were devoid of any reasonable factual support or arguable basis in law.

Because the Superior Court had applied a converse summary-judgment-like standard, consistent with the Law Court's prior decisions, the result was a remand for reapplication of the second step of the anti-SLAPP analysis.

Decision Expected to Impact Pending First Circuit Appeal

The *Nader* decision largely endorsed concerns with Maine's anti-SLAPP statute identified by U.S. District Judge Hornby in a federal decision now on appeal to the First Circuit. In *Lynch v. Christie*, 815 F. Supp. 2d 341 (D. Me. 2011), Judge Hornby attempted to reconcile Maine precedent holding that anti-SLAPP motions should be treated like summary judgment motions with the seemingly contradictory command and that the evidence must be viewed in the light most favorable to the *moving* party.

While devoting little discussion to the constitutional issues, Judge Hornby noted that application of the converse summary-judgment-like standard "could raise serious right-to-jury-trial issues in federal court." Despite this concern, Judge Hornby avoided questions as to the proper standard and, instead, relied on the one-sidedness of the evidence before him to deny the anti-SLAPP motion. The *Nader* court clarified the parties' respective procedural burdens in a way that more directly leads to the same conclusion reached by Judge Hornby. The First Circuit is scheduled to hear oral argument in Lynch on June 4.

Future of anti-SLAPP Statutes for Media Defendants?

The "prima facie" burden needed for a non-movant to survive an anti-SLAPP motion means that a careful and determined plaintiff with a willingness to develop a strong case early should be able to overcome such motions. Yet, the Nader decision does not quite sound the death knell for anti-SLAPP litigation. Some plaintiffs may be unwilling or unable to meet its burden, and the statute offers the prospect of fee shifting. Maine's anti-SLAPP statute was already of limited utility to media defendants since it extends only to the right to petition, not to the right to free speech. Prior to Nader, a Maine Superior Court Judge went so far as to say that the news media can never benefit from the anti-SLAPP statute. Demeuse v. WGME, Inc., 2010 Me. Super. LEXIS 63, *19-*20 (Me. Super. Ct. May 4, 2010) ("While the anti-SLAPP statute has afforded protections to the attorney of a petitioning citizen, it was not intended to protect the news media, or its representatives, who have an independent responsibility to report news accurately.") (citations omitted).

The *Nader* decision may have impacts beyond Maine. Three states—Massachusetts, Arizona, and Vermont—have anti-SLAPP statutes similar to Maine's statute. Of greater concern, the Maine court's focus on the burden such statutes impose on the constitutional rights of plaintiffs seeking redress may reverberate. As the *Nader* concurrence noted, anti-SLAPP legislation was originally enacted "in response to a growing trend of deep-pocketed developers effectively silencing public opposition to development projects with the threat or pursuit of resource-draining but ultimately baseless litigation." Yet, the Maine legislature never identified "any crisis in Maine to justify imposing an additional burden on a certain class of plaintiffs."

In Maine the anti-SLAPP statute "has rarely, if ever, been invoked by a citizen group or individual private citizens who seek to avail themselves of the protection of the statute against a resource-draining lawsuit." The implication is that anti-SLAPP statutes are a solution in search of a problem and, more generally, that such statutes must be narrowly construed to avoid unconstitutional application.

Sigmund D. Schutz and Benjamin S. Piper are media attorneys at Preti Flaherty, LLP in Portland, Maine. Ralph Nader and his electors were represented by Harold Burbank, II, Lynne A. Williams, and Oliver B. Hall. Stephen E.F. Langsdorf, also of Preti Flaherty, LLP, represented the Democratic Party and other defendants. The Ballot Project, Inc., was represented by Peter J. Brann and Stacy O. Stitham of Brann & Isaacson in Lewiston, Maine.

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NJ High Court Guts Presumptive Damages in Private Party Libel

Press Association, ACLU Urged Court to Reject Presumed Damages

By Bruce S. Rosen

The New Jersey Supreme Court has all but eliminated presumptive damages in private party libel suits, leaving only the potential for nominal damages where concrete damages have not been established. However, in a rare public misstep, the Court was forced to correct its initial decision – which stated that punitive damages were also possible for litigants – after media lawyers for amici pointed out that state law prohibited punitives based upon nominal damages.

In a per curium decision, the High Court in <u>WJA v. DA</u> (A -77-10, decided May 16, 2012 and corrected on May 21,

2012), also rejected the defendant's claims that the source of the alleged libel, a self-created website accusing his uncle of child molestation, was not a matter of public concern requiring proof of actual malice.

The Court has disparaged the presumptive damage doctrine in slander cases for some time but never eliminated them. The legal argument in the case was largely driven by counsel for the New Jersey Press Association and the American Civil Liberties Union-New Jersey as amici, which seized upon these previous statements and argued that the weight of the law was moving away from

presumptive damages and that juries should not be provided with unlimited discretion in awarding such damages.

Presumed Damages Analysis

The Court rejected the first argument, and went on for three pages about the importance of presumptive damages in private-party/private concern case, saying, that retaining presumed damages in such cases "exemplifies our common law's respect for the private individual's good name by keeping dignitary loss of one's good name a vital part of damages," and question why the state's longstanding

tradition of presumed damages in these instances "should be altered now to force an average citizen to ferret out proof of loss of reputation from any of the world-wide potential viewers of the defamatory Internet transmission about that otherwise private person."

However, the Court then essentially said "never mind" by agreeing – with no real analysis – to amici's second point that unguided jury evaluations of presumed damages should not be permitted, and then, in the original opinion, ruling that only nominal and punitive damages would still be available. The possibility of punitive damages at least put some meat on

the flowery descriptions of the need for retention of presumptive damages, but was soon dismissed to the waste bin.

Thomas Cafferty, representing the NJPA and Frank Corrado, the lead attorney for Amicus ACLU-NJ (who also has media law experience) quickly wrote a letter to the Court informing it that the state's punitive damages act prohibits awards of punitive damages with only nominal damages. The Court notified the parties within hours of the letter being transmitted that a corrected opinion would be issued. Although only a few lines of the decision were removed, without punitive damages the opinion looks

like an empty compromise among the Court's members and its language endorsing presumptive damages could be trouble waiting for another day.

The decision, meanwhile, essentially relegates any private party/private concern any lawsuits without clear compensatory damages to the province of wealthy plaintiffs seeking vindication or for pro se plaintiffs; no lawyer is likely to take such a matter – already a longshot – on contingency.

While amici and defendant appeared to have lost the battle and won the war over punitive damages, the Court continued its troubling walk along the road carved out by its

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The decision essentially relegates any private party/ private concern any lawsuits without clear compensatory damages to the province of wealthy plaintiffs seeking vindication or for pro se plaintiffs; no lawyer is likely to take such a matter – already a longshot – on contingency.

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previous decision in *Senna v. Florimont*, 196 N.J. 469 (2008) which defined whether speech was a matter of public concern under state law whether the speaker was related to the media and the content and context of his speech: his status, ability to exercise due care and his targeted audience.

In *Senna*, the Court said although a private matter between two private parties involved a highly regulated industry (boardwalk gaming) which in previous cases resulted in imposition of the actual malice standard, the matter involved statements by a private parties in a commercial dispute, rather than by the media.

W.J.A. v. D.A. Lawsuit

In W.J.A., the family litigants had a long running on-again -off again history of litigation over the allegations, which resulted in a jury award for \$50,000 for defamation and a court award for \$41,000 for filing a frivolous lawsuit. While the nephew was attempting to vacate the awards, he created a website in which he recounted the sexual abuse allegations and included information from the litigation, soliciting help from others who may have been abused by his uncle and urging visitors to contact authorities. The homepage said the website's mission was to tell all citizens about these allegations. After being contacted by the uncle's counsel, the nephew closed the website, but not before filing a new defamation suit.

The Court said the nephew, who was not connected to the media, had the ability to exercise due care, and did not do so.

The nephew's desire "to publish the Internet statements to the entire country and the fact that the statements refer to previous court proceedings do not necessarily make his allegations a matter of public interest," the Court said," a personal and subjective belief that error occurred in a trial does not transform an essentially private dispute into one that implicates the public interest."

The trial judge denied the uncle's motion for summary judgment despite finding the statements were defamatory per se because he would not permit a jury to evaluate the claim without evidence of cognizable damages. The uncle alleged he suffered emotional distress, which the judge rejected, dismissing the matter. In an appeal, an Appellate Division panel , while reiterating that Internet postings should be classified as libel, rather than slander, said that while presumptive damages, while criticized by the Supreme Court, remained the law.

Counsel for the nephew, a solo practitioner, sought Supreme Court review, and was soon joined by counsel for amici; the amici's briefs formed the core of the legal arguments.

Bruce S. Rosen, a DCS member, was on the brief for Amicus ACLU of New Jersey and is a partner at McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, N.J. Appellate D.A. was represented by Timothy Hinlicky of Egg Harbor, N.J.; Respondent W.J.A. was represented by Stanley Bergman, also of Egg Harbor; amicus NJPA was represented by Thomas Cafferty of Gibbons in Newark, NJ and amicus ACLU-NJ was represented by Frank Corrado of Barry, Corrado & Grassi of Wildwood, N.J.







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Pennsylvania Court Denies Summary Judgment to Scranton Times

In a recent decision, a Pennsylvania trial court denied summary judgment to the *Scranton Times* in a libel suit over articles describing plaintiffs' testimony at a Grand Jury hearing. *Castellani v. Scranton Times*, No. 05 Civ 69, 2012 Pa. Dist. & Cnty. Lexis 10 (Pa. Cmmw. March 4, 2012) (Mazzoni, J.). The court held that the statements complained of were factual and and a jury could find them false and published with actual malice.

Background

Plaintiffs, Randall A. Castellani and Joseph J. Corcoran, were at the relevant time Lackawanna County Majority Democratic Commissioners. In 2005, they sued *The Tribune* and *The Scranton Times* for libel over an article describing their testimony before a Grand Jury investigating allegations of abuse at a local prison.

The article about plaintiffs' testimony was based on a confidential source. The headline in *The Tribune* read, "Dems stonewall grand jury: Corcoran, Castellani evasiveness infuriates jurors, source claims." *The Scranton Times* headline read, "Dems Stonewall: Source: Corcoran, Castellani Vague Before Grand Jury." (The articles were written by reporter Jennifer Henn and appeared in morning and afternoon papers that have since merged.)

Among other things, the article stated that, according to a source, plaintiffs' testimony was "less than candid," "often responding with vague, evasive answers, including 'I don't recall' and 'not that I'm aware of." Moreover, their "testimony really irritated the jurors. [The jurors] were ready to throw both of them out," "had no tolerance for that kind of crap," and "were ready to take out the big hook and yank each of them out of the witness chair."

The articles led to a separate leak investigation which included testimony from the presiding Judge at the Grand Jury who claimed that the descriptions of plaintiffs' testimony was inaccurate.

Plaintiffs sought to obtain the identity of the confidential source. In 2008, Judge Mazzonni ordered the defendants to disclose identity of the confidential source, holding that the state Shield Law did not apply in face of a violation of Grand Jury secrecy laws. The Pennsylvania Supreme Court reversed, stating "the Shield Law prohibits the compelled disclosure of a confidential source's identity, or any

information which could expose the source's identity. Thus, the Shield Law precludes the very type of discovery order issued in the present case. Furthermore, we reject the invitation to fashion a non-textual, 'crime-fraud' exception to the operation of the statute.

Castellani v. Scranton Times, LP, 956 A. 2d 937 (Pa. 2008).

Summary Judgment Motion

Defendants moved for summary judgment arguing the statements were protected opinion; that plaintiffs failed to provide sufficient evidence of falsity and fault; that a third article which repeated the allegations was covered by the fair report privilege. Plaintiffs moved for summary judgment as to falsity.

Judge Mazzoni denied both motions. Although the articles contained some colorful descriptions of the grand jurors reactions, looking at the articles as a whole, he found that "this is not a case where the writer is using loose, figurative or hyperbolic language." The words "stonewall" and "less than candid" could reasonably be understood as meaning that plaintiffs were obstructing a criminal investigation while under oath. Moreover, based on plaintiffs' testimony and Grand Jury evidence issues of fact existed as to falsity.

As to actual malice, the court accepted plaintiffs' argument that a jury could find there was no source or that the source would deny making the published statements. Finally, as to the fair report defense, the court held that it did not protect the publication of a third article in the newspaper which republished the challenged statements and included a statement from the newspaper's managing editor saying the confidential source was contacted and "absolutely stands by his account of the Grand Jury testimony."

On March 30, the Pennsylvania Supreme Court granted an appeal on an evidentiary issue and ordered the trial court to review the admissibility of two judicial decisions concerning the leak investigation. The case is expected to go to trial after this issue is resolved.

Plaintiffs are represented by Richard A. Sprague, Sprague & Sprague, Philadelphia. Defendants are represented by Kevin Abbott, Reed Smith, LLP, Pittsburgh; and Tim Hinton, Jr., Haggerty, McDonnell, O'Brien & Hinton, LLP, Scranton.

Court Dismisses Reality-TV Participant's Publicity Claims Against HBO

By Stephanie Abrutyn and Alia Smith

On May 8, 2012, a New York County trial court dismissed several claims against HBO brought by reality-TV participant John Devenanzio, who claimed that his nickname "Johnny Bananas" related to the show "Entourage" and its "Johnny's Bananas" cartoon gorilla story line. *Devenanzio v. HBO*, (N.Y. Sup. May 8, 2012) (Billings, J.).

The court held that plaintiff's statutory claim for misappropriation of name or likeness was time-barred, that the show's use of the gorilla character named "Johnny" did

not constitute "extreme and outrageous" conduct for purposes of an intentional infliction claim, and that New York does not recognize common law claims for invasion of privacy or the right of publicity.

Factual Background

From 2004 through 2011, HBO distributed the highly successful Original Series *Entourage*, which

Bananas."

Series *Entourage*, which centered on the exploits of actor Vincent "Vinnie" Chase, Vinnie's older and less successful actor-brother, Johnny "Drama" Chase, and their "entourage." In Season 7 of the Original Series, one story line, which began in an episode that premiered on August 15, 2010, involved Johnny Drama's acceptance of a role voicing a cartoon gorilla. The cartoon's creator based the gorilla's appearance on Johnny Drama, named the gorilla "Johnny" after Johnny Drama, and called the show featuring the gorilla (i.e., the show-within-the-show) "Johnny's Bananas." The story line surrounding Johnny Drama's role on "Johnny's Bananas" continued into Season 8. At no time did *Entourage* ever refer, directly or indirectly, to plaintiff John Devenanzio, a reality-TV

personality who claims to be known popularly as "Johnny



Johnny Drama (Kevin Dillon) checking out a drawing of his gorilla doppelganger.

Nevertheless, based upon his nickname, Plaintiff filed a complaint, on October 3, 2011, against HBO and its parent company Time Warner alleging that HBO's use in *Entourage* of the phrase "Johnny's Bananas" violated his rights under Section 51 of the New York Civil Rights Law, which precludes the unauthorized use of a person's name for commercial purposes. He also asserted claims for violation of common law rights of privacy and publicity and for intentional infliction of emotional distress and sought both injunctive relief and damages. Defendants moved to dismiss

the Section 51 claim on the grounds that is was barred by a one-year statute of limitations and that, in any event, New York law does not protect nicknames, the gorilla character was not intended to and cannot reasonably be said to evoke the plaintiff, and Entourage's use of the cartoon gorilla was not a "advertising." use in Defendants moved dismiss the common law claims based on the statute

of limitations and on grounds that no common law publicity rights exist in New York and that the use of the cartoon gorilla was not the type of "extreme and outrageous" conduct necessary to sustain an intentional infliction of emotional distress claim.

The Court's Ruling

In a very brief opinion, the Court dismissed Plaintiff's claims. First, it held that the statute of limitations barred Plaintiff's Section 51 and intentional infliction claims, given that "Johnny" the cartoon gorilla made his first appearance on August 15, 2010, and Plaintiff did not bring suit until October 3, 2011.

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The court rejected the argument that the continued appearance of the gorilla throughout Seasons 7 and 8 somehow extended the limitations period, noting that "the statute of limitations . . . runs from the first telecast, regardless of whether it was republished later." The court also found the intentional infliction of emotional distress claim non-actionable because "the telecast, even if repeated, does not constitute atrocious, indecent, or utterly despicable

conduct meeting the requirements for an intentional emotional distress claim." Finally, the court simply dismissed Plaintiff's common law publicity claims for "failure to state a claim."

HBO and Time Warner were represented by Jay Ward Brown and Alia L. Smith of Levine Sullivan Koch & Schulz, LLP, and by Stephanie Abrutyn, Vice President and Senior Counsel, Litigation at HBO. Plaintiff John Devenanzio was represented by Stephanie Ovadia of the Ovadia Law Firm.

MLRC 2012-13 UPCOMING EVENTS

MLRC/NAA/NAB

2012 Media Law Conference

Sept. 12-14, 2012 | Reston, Virginia

MLRC Annual Dinner & MLRC Forum November 14, 2012 | New York, NY

Defense Counsel Section
Annual Meeting and Lunch
November 15, 2012 | New York, NY

MLRC/Southwestern

Media & Entertainment Law Conference

January 17, 2013 | Los Angeles, CA

Court Confirms First Amendment Protection for Scientific Debate

Research Study Conclusions Held to be Non-Actionable Opinion

By Robert D. Balin and Victor Hendrickson

In a significant win for scientists and the journals that publish their studies, Chief Judge William M. Skretny of the Western District of New York recently ruled that courts—and lawsuits—are not the appropriate forum for resolving disputes within the scientific community.

In <u>ONY, Inc. v. Cornerstone Therapeutics, Inc. et al.</u>, No. 11-CV-1027S (decided May 17, 2012), the plaintiff pharmaceutical company alleged that the "conclusions" published in a scientific research article—specifically,

speculation about why plaintiff's drug was associated with a higher mortality rate in infants than a competitor's drug-were false and misleading. In granting preanswer dismissal of the plaintiff's claims for injurious falsehood, false advertising and deceptive trade practices, the court held that these conclusions constituted nonactionable scientific opinions and hypotheses that merited full First Amendment protection. Recognizing that "[t]he chilling effect of protracted litigation can be especially severe for scholarly journals," the court further ruled that where

a scientific research article "is not misleading with respect to the facts on which it is and is not based, any perceived fault in the method by which the authors reached their conclusions should be subjected to peer review rather than judicial review."

Factual Background

ONY is a pharmaceutical company that manufactures an animal-derived lung surfactant used to treat pre-term infants suffering from respiratory distress syndrome (RDS), which is a leading cause of death in premature infants. One of ONY's competitors, Chiesi Farmaceutici, commissioned a group of neonatologists to conduct a retrospective study comparing the mortality rates of thousands of pre-term infants with RDS

who had been treated at 236 different hospitals with the surfactants manufactured by ONY, Chiesi and one other competing company. The neonatologists then authored an article about their study's findings, which they submitted to the *Journal of Perinatology*, a leading medical journal which is published by Nature America.

In September 2011, after undergoing peer review, the article was published on the *Journal*'s website. Based on the study's finding that ONY's surfactant was "associated with a 49.6% greater likelihood of death" among infants with RDS

than the surfactant manufactured by Chiesi, the authors of the article concluded that, while all three of the studied surfactants were effective in treating RDS, ONY's surfactant was "associated with a significantly greater likelihood of death" than Chiesi's. In the article, the authors set forth the study's methodology (and its limitations) in detail and sought to explain the mortality rate differences, speculating that the "most likely explanation" was due to the higher dosage administered to infants treated with Chiesi's surfactant. Following publication of the article on the *Journal*'s

website, Chiesi's distributor circulated reprints of the article to existing and potential customers as part of its marketing efforts. ONY then demanded that the *Journal* article be retracted, which Nature America declined to do.

ONY filed suit in December 2011, asserting a claim of injurious falsehood against Nature and the editor of the *Journal*. ONY also brought several claims against Chiesi and its distributor arising out of their post-publication marketing uses of the article, including for false advertising under Lanham Act § 43(a) and violation of the New York state deceptive practices act, as well as claims against the authors of the study, the provider of the database used in conducting the study, and even the American Academy of Pediatrics

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(based on its affiliation with the Journal).

In its complaint, ONY did not challenge the mortality rate statistics themselves. Instead, ONY complained that the article's "conclusions" concerning the comparative mortality rates of the competing surfactants were "unreliable" and "misleading". Specifically, ONY claimed that the article had omitted certain key data from the study that would—in ONY's view—have demonstrated that the mortality rate differences were due to factors other than the relative effectiveness of the surfactants. ONY sought unspecified damages, an injunction against further publication of the *Journal* article by Nature and an injunction against any further marketing uses of the article by Chiesi.

All defendants filed pre-answer motions to dismiss the complaint in its entirety on the ground (among others) that the challenged conclusions from the study constituted non-actionable opinions, not assertions of fact.

The Court's Decision

By Decision and Order dated May 17, 2012, the court granted dismissal, holding that the article's conclusions were "non-actionable hypothesis based upon limited and articulated facts." The court noted that the article detailed the research methodology and the specific types of patient data (such as birth weight, gestational age, severity of illness category) on which the authors had based their conclusions. According to the court, even accepting ONY's assertion that the authors had omitted other types of data from the article, this assertion was legally irrelevant. The authors listed the multitude of criteria that they did consider in reaching their conclusions; and they did not imply that they had considered other undisclosed facts. As a result, the court held, the article's audience—specialists in the perinatology field—would undoubtedly recognize the article's conclusions for what they were, the authors' opinions based on the specific study that they had conducted.

The court further found that even the average reader "lacking medical acumen" would perceive the article's conclusions "as debatable hypotheses rather than assertions of unassailable fact" because the authors, in their article, explicitly acknowledged the study's limitations. Moreover,

the authors stated that the study's comparative mortality findings "prompts one to look for a possible explanation for such different outcomes," language further signaling to readers, the court held, that the authors' conclusions constituted opinion, not "proven facts about the efficacy of Plaintiff's product."

Last, while ONY vigorously complained that the authors were biased because Chiesi had sponsored their study, the court found that—as is standard practice with peer reviewed journals--the *Journal* article fully disclosed this sponsorship in a "Conflicts of Interest" statement at the end of the article. Thus, the court ruled, the article "clearly signaled to the reader that the authors were not disinterested observers, thereby leaving the credibility assessment of the authors' opinions ... to the reader."

Conclusion

Scientific studies are often catalysts for vigorous debate, replete with inflamed critiques of their reliability, impassioned letters to the editor and follow-up studies. This process is the very essence of science. By refusing to allow ONY's lawsuit out of the starting gate, Judge Skretny recognized that "[a]cademic freedom is a 'special concern of the First Amendment." His decision re-affirms that scientists, academics and researchers must be accorded breathing room to engage in, and contribute to, scientific debates—without having to look over their collective shoulder for potential plaintiffs unhappy with their conclusions.

Robert D. Balin and Victor Hendrickson of Davis Wright Tremaine LLP, and Nelson Perel of Webster Szanyi LLP, represented publisher Nature America and the editor of the Journal of Perinatology.

J. Kevin Fee of Morgan, Lewis & Bockius LLP represented defendants Chiesi, Chiesi's U.S. distributor and three of the article's authors. Lauren Handel of McDermott Will & Emery LLP represented the study's database provider and one of the article's authors, also defendants. Matthew C. Crowl of Schiff Hardin LLP represented defendant American Academy of Pediatrics. ONY was represented by Mitchell J. Banas, Jr. of Jaeckle, Fleischmann & Mugel LLP in Buffalo, New York.

Court Dismisses RICO, Fraud and Related Claims Over "Three Cups of Tea" Book

Plaintiffs Accused Authors of Fabrications; Selling Fiction as Nonfiction

A Montana federal district court dismissed a purported class action lawsuit against the authors and publisher of the 2006 best seller "Three Cups of Tea," and 2009 follow up book "Stones into Schools," holding that plaintiffs failed to state any claims over alleged fabrications in defendants non-fiction books. *Pfau v. Mortenson*, No. 11-72 (D. Mont. April 30, 2012) (Haddon, J.).

After entertaining four complaints, the court dismissed the lawsuit with prejudice, noting that "the imprecise, in part flimsy, and speculative nature of the claims" made any further amendments futile.

The books, published by Penguin, recount the humanitarian aid efforts of Greg Mortenson in Pakistan and Afghanistan. In April 2011, a 60 Minutes report and an ebook by author John Krakauer questioned the truthfulness of the books and raised questions about the financial management of the Central Asia Institute, Mortenson's foundation.

In May 2011, three Montana residents filed a purported class action suit alleging they were harmed because they purchased nonfiction books filled with fabrications. A similar lawsuit was filed in Illinois, but that suit was voluntarily dismissed and the plaintiff joined the Montana suit. Plaintiffs' fourth amended complaint included claims for RICO violations, breach of contract, breach of implied contract, fraud, deceit, unjust enrichment and negligent misrepresentation.

Defendants moved to dismiss, arguing, inter alia, that the claims were barred by the First Amendment, and that the complaint failed to 1) plead fraud with particularity, 2) meet plausibility standards, 3) plead necessary elements, and 4) allege cognizable injuries.

District Court Decision

Working through each of the claims, the court held that plaintiffs failed to properly plead any claim for relief.

The RICO claim was premised on an alleged eight year

scheme to misrepresent the books as works of non-fiction and falsely portray Mortenson as a hero to boost sales. Plaintiffs alleged they relied on these misrepresentations to buy copies of the book.

The factual allegations, however, were conclusory and failed to meet the *Twombly* and *Iqbal* plausibility standard. Among other things, plaintiffs failed to plead facts to support an enterprise theory or any identifiable racketeering activity under RICO. Plaintiffs' fraud and deceit claims similarly failed the specificity requirement of FRCP 9(b).

Plaintiffs' contract claims failed on separate grounds. First, there was no privity between plaintiffs and defendants to support an express breach of contract claim. *Citing, e.g., Lacoff v. Buena Vista Publishing,* 183 Misc. 2d 600, 611 (N.Y. Sup. 2000) (dismissing consumer complaint against publisher of investment guide book for alleged misinformation). Further, plaintiffs failed to plead a claim for breach of an implied contract by simply alleging that truthfulness was "an implied contractual condition of sale." The court stated that "more is necessary if an implied contract is to be found."

The unjust enrichment claimed was dismissed because plaintiffs failed to plead facts to show "misconduct or fault on the part of the defendant, or that the defendant somehow took advantage of the plaintiff." The remaining claims, including requests for an accounting and injunctive relief, were summarily dismissed.

Plaintiffs were represented by Alexander Blewett, III, Hoyt & Blewett, Great Falls, MT; and Robert A. Langendorf P.C., Chicago, IL. Penguin Group (USA) was represented by Jonathan M. Herman, Dorsey & Whitney, New York. Greg Mortenson was represented by John M. Kauffman, Kasting Kauffman & Mersen, Bozeman, MT; Kevin C. Maclay and Todd E. Phillips, Caplin & Drysdale, D.C. Author David Oliver Relin was represented by Charles E. Hansberry, Garllington, Lohn & Robinson, PLLP, Missoula, MT. The Central Asia Institute was represented by Robert L. Eisenbach, III, Cooley LLP, San Francisco, CA.

English Libel Changes: The Defamation Bill 2012

Changes to English Libel Law Likely to Be Enacted Into Law By Next Year

By David Hooper

After an extensive period of consultation the British Government has this month introduced the <u>Defamation Bill</u> which will significantly reform English Defamation Law. It has to pass through its legislative stages in the House of Commons and House of Lords and is likely to be enacted into law this time next year. It will be debated in the House of Commons on the Bill's Second Reading, which is scheduled to take place on 12 June 2012.

Although there is a degree of hostility towards the press as a result of the phone hacking scandal and what has emerged in the Leveson enquiry and although there are a significant number of people who feel that these changes tilt the law too far in favour of media who they do not altogether trust, the likelihood is that there will not be any significant changes to the bill between now and its

For those who wish to follow the framework of these changes, there are some helpful <u>explanatory notes</u> which were produced by the government to accompany to Defamation Bill.

final enactment.

The likelihood is that there will not be any significant changes to the bill between now and its final enactment.

Serious Harm Requirement

At the heart of the legislative change is the definition clause in Clause 1 that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation to the Claimant. The law has certainly been moving in that direction such as for example the requirement of "a threshold of seriousness" and in the light of cases being thrown out because they did not involve "a real and substantial tort." However, this does appear to raise the bar rather higher and the Courts will not entertain trivial libel cases. This means that even if the various defenses to a libel action do not apply, the Court will still be looking to see whether or not there is a statement which causes serious harm.

Many libel cases in the UK have been of a distinctly trivial nature and in seeking pre-publication advice it will clearly be of assistance to the media that they are less likely to be sued for a trivial mistake.

In a number of respects the Bill codifies the law and does not introduce significant changes but it does incorporate and give effect to a number of changes which have evolved in case law. The aim of the legislation appears to be to remove ambiguities and interpretations, which could vary quite significantly according to which Judge was hearing a particular case and above all to express the law in terms that will be more readily understandable to the world at large.

Honest Opinion

Justification becomes truth (Clause 2) and fair comment becomes honest opinion (Clause 3). In relation to truth the law is more clearly stated in relation to those instances where not everything which has been published can be proved to be true, so that there will be a defense if the article can

overall be proved to be substantially true and what cannot be proved to be true does not cause serious harm to the Claimant.

Much of the complexity of the old law of fair comment is removed. There is now no longer a public interest threshold so that the defense more readily applies to an opinion expressed over a glass of beer. The technicalities relating to whether the comment had been put sufficiently in context and been removed. To that extent the law reflects the decision of the Supreme Court in *Spiller v Joseph (2010) UKSC 53*.

Responsible Publication Defense

The Reynolds Defense becomes a defense of responsible publication on the matter of public interest (Clause 4). Above all the Bill seeks to introduce flexibility and one looks at the

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nature of the publication and its contents. Broadly speaking the law follows the ten criteria set out by Lord Nicholls in Reynolds, although they are reduced to nine in number and the Bill codifies the reportage defense.

Limits on Jury Trials

Likewise the existing practice in relation to jury trials (as illustrated in the recent decision in *Lewis v Commissioner of Police (No.2)* [2012] EWHC 1391 (QB)) will be codified (Clause 11). The presumption in favour of jury actions has been abolished, although there will be a residual discretion to allow trial by jury. Although there was some discussion as to whether companies should be allowed to sue, the law will remain that corporations can sue in respect of damage to their trading reputation, but they will have to establish that the offending words caused or were likely to cause serious harm.

Protection for Websites

One of the most significant changes in the Defamation Bill is in relation to the greater protection now given to operators of websites. Clause 5 of the Bill gives website operators considerably greater protection that the existing law under Section 1 Defamation Act 1996 where the advice was normally to take down offending posts if a complaint of any substance was made. Under Clause 5 however it is a Defense for the operator to show that it was not the operator who posted the statement on the website. The legislation in effect is directing a Claimant to take action against the poster of the defamatory statement and there is a similar provision in clause 10 of the Bill for secondary publishers who would include booksellers and also others involved in the posting of material on a website who were not the publishers of that material.

Clause 10 provides that secondary publishers cannot be sued, unless the Court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. Again one needs to bear in mind that that is subject to a requirement of serious harm and it may well be that the appropriate step for the secondary publisher at that stage would be to cease publishing the offending material.

The Defense under Clause 5 is lost if the Claimant cannot identify the poster of the material and has served an operator of the website in a prescribed form which the operator fails to

respond to. The form of that notice will be settled by Statutory Instrument but it will set out what the Claimant has to state to substantiate his complaint and will give the operator sufficient time to investigate and comply with the notice. What the law is trying to do is to give reasonable protection to Claimants against anonymous postings and in those circumstances it is likely that the operator may be well advised to take the offending post down. The law therefore does not go as far as section 230 Communications Decency Act, but it does significantly change the law in England and the existing regime under Section 1 Defamation Act 1996.

Single Publication Rule

Clause 8 of the Bill introduces the single publication rule into English law so that there is a one year limitation period and serial litigants – often of Russian or Middle Eastern extraction with many millions to their name and a well-known Claimant firm in tow – cannot belatedly bring actions based on publication on the internet or continuing sales in bookshops of an offending book outside the year from the date of original publication. The Court will have a residual discretion to extend the limitation period and the later publication must be substantially the same both in content and nature. It might be possible, for example, to bring an action in respect of publication in the mainstream media or a very prominent website if the original publication was only on some very obscure website.

Libel Tourism

Of particular interest to advisers in the United States will be Clause 9 which deals with the question of libel tourism. It needs to be borne in mind that in relation to claims within the European Union the Brussels Regulation will apply which has its own regime, which in effect does permit a form of for forum shopping. However, Brussels Regulation aside, a Court will not have jurisdiction to hear a libel action in England unless the Court is satisfied that of all places in which the statement complained of has been published England and Wales is clearly the most appropriate place in which to bring the action in respect of the a statement.

It should be noted that the Bill does not extend to Scotland, which has its own libel law and which may well be introducing similar legislation, although this is not it. Up

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until now Claimants have been able to focus on restricting the claim to publication within the UK jurisdiction which may often take the form of hits on a website of a foreign-based organisation which may not have given any particular thought to the fact that it was publishing in the UK. Now however, when a Claimant applies under CPR rule 6.36 for permission to serve a Claim Form out of the jurisdiction, the Court will have to examine evidence as to whether or not the UK is in fact the most appropriate jurisdiction rather than being directed to details of the Claimant's business activities and friends and connections in the UK.

Furthermore even if permission is given, it will be possible under CPR rule 11(1)(a) for the defendant to dispute the Court's jurisdiction and to argue that England is not the most appropriate jurisdiction.

Other Changes

There are a number of other changes. Clause 6 provides that there is a Defense of qualified privilege relating to peer review material in scientific or academic journals. This is likely to be a defense which arises fairly seldom and is a response to the campaign organised by Simon Singh following his experience of being sued by the British Chiropractic Association.

There are also changes to the statutory privilege which extend the absolute privilege and qualified privilege arising under sections 14 and 15 respectively of the Defamation Act 1996. In effect absolute privileged is extended to fair and accurate contemporaneous Court reporting of proceedings in all countries as opposed to selected countries and qualified privilege is extended to government and company information in all, as opposed to selected, countries. Reports of proceedings at a scientific or academic conference held anywhere in the world will attract qualified privilege.

Overall these are very significant changes in the English libel law, so far as the media are concerned. They will not come into effect for at least a year but a number of these proposed changes reflect what has already been happening in the Courts and the likelihood is that Judges where possible will have an eye on the upcoming changes in the law, albeit that there appear to be another 365 shopping days for libel tourists.

David Hooper is a partner at RPC in London.



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Newspaper Wins Privacy Trial

Court Gives Leeway to Report on Lives of Public Figures

By David Hooper

On 24 May 2012 an important judgment was given by Mr Justice Tugendhat in *Trimingham v. Associated Newspapers* Ltd [2012] EWHC1296. A claim had been brought by Carina Trimingham against the Daily Mail and Mail on Sunday for a series of articles which initially she claimed simply infringed her reasonable expectation of privacy but which she had expanded to argue that a series of 57 articles were actionable under the Protection from Harassment Act 1997 (PHA).

Background

Trimingham's complaint was that the newspapers had published a series of articles which had harassed her by including what she said were unnecessary and pejorative references to her sexuality, and the fact that she had been in a lesbian civil partnership. She also complained about what she said were offensive descriptions of her appearance, including that she had cropped spiky hair and a fondness for a form of heavy footwear, the Doc Martens boot. Somewhat bizarrely she had originally sought an injunction seeking to restrict any article in the newspaper suggesting that she was ugly and had a

masculine appearance, but Mr Justice Tugendhat had pointed out the obvious difficulties of the Court trying to enforce such an order.

Trimingham's complaint was that the articles were intrusive and homophobic in nature. Not so claimed the newspapers, Trimingham was the press officer of the then Cabinet Energy Minister, Chris Huhne who was a leading member of the coalition government and was very much in the public eye. Trimingham was a political activist. She had made no secret of her private life and indeed had entered into a widely publicized civil partnership. She had then very publically displaced Huhne's wife of 26 years (and mother of his five children).

Trimingham also had a track record of selling stories to the press about such matters as the private life of Nick Clegg the leader of Chris Huhne's Liberal Democrat party (and also British Deputy Prime Minister) crudely asserting the number of women he had bedded and for good measure sleazy stories about the private lives of actors such as Russell Crowe. It was scarcely a promising basis for a claim which her lawyers supported by a conditional fee agreement.

Trimingham faces legal costs of up to £410,000 as a result of her losing the case, although she had stated that she will be applying to the Court of Appeal for permission to appeal against the ruling. She had had to pay on account of those

costs £250,000 which she had covered under an After the Event insurance policy.

The women in Chris Huhne's life seem to have done him few favors of late. Having dumped his wife in favor of Ms Trimingham, his wife shared with the Sunday Times her disputed recollection that she had agreed to take the rap for a speeding ticket when Huhne's car was photographed speeding in a built-up area in order to save Huhne from losing his license as a result of what is known in the UK as the totting-up procedure where one loses one's license for six months or so, if one commits a number of traffic violations in a given period. Both

Huhne and his estranged wife now face trial in October on a charge of conspiracy to pervert the course of justice.

Huhne has had to resign his position in the government and the atmosphere in the dock at the Criminal Court could in consequence be cut with the proverbial knife.

Harassment and Privacy Claims

The PHA provides both a criminal and a civil remedy where a person pursues a course of conduct which amounts to harassment of another and which he knows or ought to have

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known amounted to harassment of that other. Mr Justice Tugendhat accepted that repeated publication in the media of offence or insulting words about a person's appearance could in principle apply to harassment and this could apply with particular force to a person's sexuality particularly in cases where there were Public Order Act offences involved or breaches of the Equality Act 2010.

However, the importance of this case is that effect was given to the words of Lord Phillips in *Thomas v. News Group Newspaper Ltd [2001] EWCA civ 1233* where he emphasized that harassment must not be given an interpretation which restricts the right of freedom of expression save insofar as this is necessary to achieve a legitimate aim.

Mr Justice Tugendhat rejected Trimingham's claim for a number of reasons. Firstly he considered she was not the purely private figure she claimed to be and that her reasonable expectation of privacy was limited. He held that although the Defendant newspapers had referred to her sexuality in 65 articles over 15 months they had done so only when writing about matters of public interest namely developments in Mr Huhne's personal life which were relevant to his public life and when Ms Trimingham and her conduct were within range of what an editor could in good faith regard as relevant to the story.

The material that had been published about her was defamatory but she had not sued on the grounds of libel seemingly on the basis that what had been published was true

The Judge considered that what Ms Trimingham complained of was not so unreasonable that it was necessary or proportionate to sanction or prohibit such publications in order to protect her rights. Effect was given to the newspaper's freedom of expression and the Judge held that the articles did not amount to harassment but that in any event the newspapers could not be held to have known that these articles would amount to harassment of Ms Trimingham.

The Judge also held that she did not have a reasonable expectation of privacy in respect of the offending articles. The Judge had been particularly unimpressed by Ms Trimingham who initially had admitted that she had passed

information to the Guardian newspaper – scarcely a paper given to publishing salacious tabloid material before admitting in cross examination that she did after all recollect that she had also passed salacious material to The Sun and The People about the private lives of others – a rather different kettle of fish in the world of salacious sexual revelation.

Overall this was a case which will serve as a salutary reminder to Claimants that privacy claims may be easily formulated but they can be difficult to establish. Although harassment claims can be brought against newspapers, they are likely to be very difficult to establish where a newspaper can show that the stories were relevant and of public interest and a reasonable exercise of editorial judgment and within the permitted parameters of freedom of speech. The Court will not be likely to substitute its own judgment as to what was or was not appropriate to publish and unless one can, for example, establish a pattern of gratuitous homophobic articles, such claims are unlikely to be successful.

The media need to be mindful of the possibility of a harassment claim if it can be said that there was a pattern of offensive articles over a period of time which were likely to cause distress and anxiety to the Claimant. However, such a claim is more likely to succeed if it is brought by a Claimant who is not in the public eye who gives evidence with a great deal more candor than the judge found to be the case with Ms Trimingham.

Where there is the requisite degree of public interest, the judge is unlikely to find harassment proved on the basis that he has to give effect to the counterbalancing requirement of freedom of speech and that he will not want to substitute his personal view or taste regarding the articles for the editorial judgment exercised in good faith by the editor. In such cases, it would require misconduct of a serious and sustained nature before harassment could be found.

David Hooper is a partner with Reynolds Porter Chamberlain in London. The Claimant was represented by Matthew Ryder QC and William Bennett instructed by Charlotte Harris of Mishcon de Reya and the Defendant by Antony White QC and Alexandra Marzec instructed by Jaron Lewis and Brid Jordan of Reynolds Porter Chamberlain LLP.

Judge Releases 911 Tape in Jennifer Hudson Family Murders Trial on Media's Motion

By Natalie Spears and Kristen Rodriguez

Judge Charles Burns of the Circuit Court of Cook County, Illinois ordered the release of a 911 tape that was admitted into evidence in the trial of William Balfour, who was recently convicted of murdering the mother, brother, and 7 year old nephew of Oscar-winning actress and singer, Jennifer Hudson. *Illinois v. Balfour*, (Ill. Cir. April 30, 2012).

On the tape, Ms. Hudson's sister pleads with the 911 operator to send help upon discovering her mother's lifeless body. Though the 911 tape had been already been played in open court to the jury, prosecutors objected to its release to the public.

Media Access Motion

The Associated Press, Chicago Tribune, and Chicago Sun-Times made an emergency motion to intervene for access to the 911 tape. Following a hearing on Friday, April 27, 2012, Judge Burns took the motion under advisement over the weekend, and issued a five page decision the following Monday, April 30, in which he granted the release of the tape.

Though the 911 tape had been already been played in open court to the jury, prosecutors objected to its release to the public.

Initially, it was unclear how Judge Burns would rule on the media's motion. Prior to the start of trial, Judge Burns had issued a number of unusual restrictions that were not friendly to the media, including banning all tweets from the courtroom (though e-mail was allowed), and requiring reporters to disclose their social media user names as part of the credentialing process.

Then, during the course of the trial, Judge Burns had chastised a reporter for e-mailing too frequently, and eventually banned all phone use during the proceedings.

In the opinion on access to the tape, Judge Burns changed his tune, recognizing the media's rights and finding that a "presumption of public access applie[d] to the 911 tape."

In evaluating whether the presumption of access had been rebutted by other factors, the court reasoned that "no evidence had been presented . . . to show that the Defendant's due process rights would be prejudiced if the media were granted access to the 911 tape" immediately and further, that "the trial court ha[d] continually admonished the jury not to view or access any media accounts of the trial."

The ruling on the 911 tape also paved the way for the release of the Defendant's interrogation video, which the Court released without the media's intervention.

The Associated Press, Chicago Tribune, and Chicago Sun-Times were represented by Natalie J. Spears and Kristen Rodriguez of SNR Denton US LLP.

MLRC MediaLawLetter

Federal Court Rejects FOIA Request for Bin Laden Photos

Photos Were Properly Classified in Interest of National Security

A FOIA request for the images taken by U.S. forces during the capture, killing and burial of Osama Bin Laden last year was appropriately denied by the CIA, a Washington D.C. district court ruled last month. *Judicial Watch v. U.S. Department of Defense*, (D.D.C. April 26, 2012) (Boasberg, J.). The court held that the photos were properly classified in the interest of national security and were therefore exempt from FOIA disclosure. "A picture may be worth a thousand words," the court noted, but in this case "verbal descriptions of the death and burial of Osama bin Laden will have to suffice."

Background

Just a few days after the May 1, 2011 announcement by President Obama that Osama Bin Laden was captured and killed, Judicial Watch, a conservative watchdog group, made a FOIA request to both the Department of Defense and the CIA for any images taken of Bin Laden. As described in the opinion, photographs were taken and included graphic images of Bin Laden's corpse (with a bullet wound to the head) and his burial at sea. Among other things, the photographs were used by the CIA to authenticate Bin Laden's identity. President Obama had considered releasing the images last year following the raid, and although CIA director Leon Panetta appeared to be in favor of release, the President decided not to publicize the photos. The primary reason behind the decision was the risk that the images could prove inflammatory and provoke violence against the U.S. and its allies.

The DOD responded to Judicial Watch's request claiming that it did not possess images from the raid. The CIA admitted that it possessed 52 images or video recordings of the Bin Laden raid, but that they were exempt under FOIA. Judicial Watch filed suit, claiming the DOD search was inadequate and disputing the CIA's invocation of a national security exemption.

DOD Search

The court agreed that the DOD had conducted an adequate search, in the absence of any evidence of bad faith. Judicial Watch faulted the search, arguing that because Secretary of Defense Robert Gates had advised Obama against releasing the images, he must have possessed copies, and that his office records should have been searched. They also argued that the Joint Worldwide Intelligence Communications Systems (JWICS) may have been used to communicate the images to Secretary of State Hillary Clinton, who also had advised Obama.

The court described Judicial Watch's arguments as speculation. Because Judicial Watch had produced no evidence that the DOD had acted in bad faith, the court held it must defer to its decision. The district court also reasoned that the images were too high profile for the DOD to not know it possessed them, and that Judicial Watch's accusation could only amount to saying the DOD acted in bad faith by denying the request, but that no evidence had been provided to support this theory.

National Security Exemption

The CIA acknowledged it possessed 52 images or videos taken of Bin Laden during the raid and aftermath, but claimed each was subject to FOIA Exemption 1 (national security) and Exemption 3 (exempted from disclosure by statute). The court only addressed the former and held that all the images were properly withheld.

Judicial Watch argued that the CIA had not demonstrated that each image was exempt. For instance, what about relatively less inflammatory images of Bin Laden's body being buried at sea?

To evaluate the national security exemption the court analyzed 1) whether the designation complied with relevant

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classification procedures; and 2) whether the images conformed to the substantive criteria for classification.

Judicial Watch pointed to some defects in the classification procedure. The CIA did not identify who had originally classified the documents, though it stated that higher level officers had reviewed and classified them under a procedure known as 'derivative classification'—classification that matches like documents to originally classified material. However, the court found these defects unimportant because review by a high level officer with the authority to classify documents cured any defect.

Substantively, to meet the requirements for Executive Order 13526 (pertaining to the classification of documents) the documents needed to both fit within a category of classified information and the information in them be reasonably expected to cause exceptionally grave damage to national security (for TOP SECRET designation, as the Bin Laden images were classified). The court found that these conditions had been met; one of the categories of classification is "foreign activities of the United States," under which all 52 images fell.

Finally, the court deferred to the CIA's judgment that

release of the images could cause exceptionally grave harm to national security. Relying on the statements of agency officials with experience in matters of national security, the court pointed to past incidents of media reportage that had incited violence against the United States and Western nations in finding the officials' fears to be reasonable. These included the *Newsweek* report about the desecration of a Qur'an at Guantanamo Bay and the republication of a Danish cartoon of the Prophet Mohammed.

The court rejected the argument that it had not been shown that all 52 images from the Bin Laden raid met this standard. Instead, the court deferred to the judgment of officials, noting their decision need only meet a standard of "reasonableness, good faith, specificity, and plausibility." The court found that this standard had been met, and could be met for any image of Osama Bin Laden following the raid.

"The United States captured and killed the founding father of a terrorist organization that has successfully-and with tragic results-breached our nation's security in the past.... [T]estimony that the release of images of his body could reasonably be expected to pose a risk of grave harm to our future national security is more than mere speculation," the court concluded.

MLRC UPCOMING EVENTS

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

MLRC Annual Dinner & MLRC Forum November 14, 2012 | New York, NY

Defense Counsel Section
Annual Meeting and Lunch
November 15, 2012 | New York, NY

MLRC/Southwestern

Media & Entertainment Law Conference

January 17, 2013 | Los Angeles, CA

MLRC MediaLawLetter

Digital Media In Focus at Fifth Annual "Legal Frontiers" Conference

On May 21 & 22, 2012, the Media Law Resource Center – in conjunction with Stanford Law School's Center for Internet and Society – held its Fifth Annual "Legal Frontiers in Digital Media Conference," showcasing new developments, and forecasts for the future, in digital media law.

This years' conference featured six sessions, spread over two half-days, spanning a wide array of topics confronting media lawyers in the digital age: "Content Monetization: Inside the Mechanics and Business Models," "Copyright On the Move," "Social Responsibility on the Internet: Are New Digital Media Doing Enough to Protect Speech?" "How Social Media Works," "Online Content Un-Distribution: Global Systems for Content Regulation," and "Digital Media Venture Capital 2012."

Content Monetization

The conference was kicked off with the session on Content Monetization, which began with a tutorial by Yahoo! Inc.'s Ron Bell, who gave a detailed presentation on the various models being used by content providers to monetize their businesses online, the kinds of data that some are mining (and how that mining is causing concerns with regulators here and overseas) and how it is being mined and the variations between platforms.

The tutorial was followed by a panel discussion on related legal challenges in this area, moderated by Evernote's Mark Kahn, who was joined by Samuel Fifer, SNR Denton, Corii Liau, Yahoo! Inc., Lance Kavanaugh, Youtube/Google, James Marcovitz, News Corporation (NAI), and Alice McTighe, Pandora.

Among the topics the panel discussed was mobile platform distribution agreements, licensing content, and both the business and legal consideration surrounding data collection and privacy notifications. Ms. Liau commented that the Child Online Privacy Protection Act (COPPA), which requires parental consent to collect information about and market to minors under age 13 – but only if the online company is aware of the user's age – creates strange (Continued on page 37)



Left to right: Clive Gringas, Olswang LLP, Patrick Carome, WilmerHale and Lisa Peets, Covington & Burling LLP

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incentives for companies not to learn the ages of their endusers.

Mr. Marcovitz noted that when it comes to licensing content, one must always think in terms of multiple devices and international markets, and that it is always important to plan for some future digital platform that has not yet been invented; to which Mr. Fifer added that it is better to get specific in agreements and "fight now" and not later when the new platform is "the best thing since sliced bread."

Copyright On the Move

Copyright panel The discussion was led by Google's Fred von Lohmann, who was joined by Corynne McSherry, Electronic Frontier Foundation, Dean Marks, Warner Bros., and Heather Meeker. GreenbergTraurig. That discussion focused on a few recent developments in copyright law, including: the legal and practical fallout from the Second Circuit's recent decision on the DMCA in Viacom International, Inc. v. Youtube, Inc.; the Memorandum of Understanding between content providers and internet service providers which calls for the implementation of a graduated response enforcement mechanism by ISP's against users that appear to be engaged in online piracy;

and the implications for the first-sale doctrine raised by the U.S. Supreme Court's grant of certiorari in *John Wiley & Sons, Inc. v. Kirtsaeng*.

Social Responsibility on the Internet

Rounding out the first half-day of sessions, Tim Alger, Perkins Coie moderated the Social Responsibility panel, which sought to grapple with the ethical (and not always unrelated, business) decisions faced by a new media whose leadership does not necessarily have any background in or experience with the kinds of speech-related standards and concerns that have been important to and defended by

traditional media, and are facing free speech issues of their own in the conduct of online operations.

The panel included James Chadwick, Sheppard Mullin, Erica Johnstone, Without My Consent, Kurt Opsahl, Electronic Frontier Foundation, Ebele Okobi, Yahoo! Inc. and Betsy Masiello, Google. The panel explored such topics as when internet companies should reveal user data in response to subpoenas, the implications of complying with international speech regulations that cannot be reconciled with traditional First Amendment values and can put at risk employees on the ground in non-U.S. jurisdictions, and internet anonymity.

While support for internet anonymity is strong in the online community, Ms. Johnstone, who co-founded Without My Consent, a group that supports victims of online harassment, challenged the panel to consider the example of an ex-spouse who invites online stalking of his former wife. According to Johnstone, there must be a mechanism for such victims to uncover the IP addresses of the perpetrators of such conduct as a pathway to justice.



Mark-Khan, Evernote-Corp.

How Social Media Works

The second half-day of sessions began with a session geared towards explaining the inner workings of social media. The discussion began with a

tutorial by Nick Doty, a U.C. Berkeley PhD student, and expert on backend data collection technology used on social media sites. That was immediately followed by a panel discussion -- moderated by Jay Monahan, Zynga Game Network, who was joined by Susan Cooper, Facebook, Eric Heath, LinkedIn and Regina Thomas, AOL, Inc. – which covered a wide range of privacy and copyright issues in the context of social media.

Mr. Monahan described an initiative at Zynga – which recognized that the legal department cannot be everywhere – to make *all* employees aware of the privacy issues that can be implicated in the new products they are designing, instead of

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top down analysis for privacy issues. (The emphasis on making privacy concerns everyone's issue was even reinforced with a company T-shirt given to employees, reading "Privacy Is No Game.") Ms. Cooper described new procedures at Facebook in the corporate structure, as well as means of presentation to and receiving feedback from users. Regulatory issues (and the specter of more regulatory intervention here and overseas) were universal concerns among the panelists.

Online Content Un-Distribution

The conference's international "Un-distribution" panel looked at online content regulation from a global perspective, comparing legal standards in the United States to those in Europe. Thomas R. Burke, Davis Wright Tremaine, led a lively discussion with Patrick J. Carome, WilmerHale, Clive Gringas, Olswang LLP and Lisa Peets, Covington & Burling LLP, contrasting European standards, including the proposed European privacy regulations that propose a "right to be forgotten" regime, the broad availability of injunctive relief, and the different European views on handling of copyright

concerns, with the U.S.-based safe harbors and immunities for privacy and libel codified in Section 230 and the procedures under the DMCA for copyright. According to Mr. Gringas, in the EU (as opposed to the States) it is not a matter of *if* third-party intermediaries are going to be responsible for user-generated content, *but when and how they will be*.

Digital Media Venture Capital 2012

For the second year in a row, the final panel of the conference focused on digital media from the perspective of venture capital, in order to probe short and medium-term trends in the fast-moving information economy. This year's panel was kicked off by the San Jose Mercury News' Business & Technology columnist, Chris O'Brien, who gave a short presentation on what he described as the "media hurricane" being driven by three "big disrupters:" mobile, big data and game design. That was followed by a panel discussion moderated by conference co-chair, Riaz Karamali, who was joined by three representatives of venture capital firms, David Hornik, August Capital, Saad Khan, CMEA Capital and Jon Soberg, Blumberg Capital.



Left to right, Chris O'Brien, San Jose Mercury News, Jon Soberg, Blumberg Capital, David Hornik, August Capital, Saad Khan, CMEA Capital and Riaz Karamali, Sheppard Mullin.

Thanks to Planners and Sponsors

Instrumental to the success of this conference were its three brilliant and diligent co-chairs, who were responsible for overseeing much of the content planning. In addition to Riaz Karamali, the conference was also co-chaired by Kurt Wimmer, Covington & Burling LLP, and Chair Emeritus, Steve Tapia, who co-chaired this conference for the third straight year. As always, we anticipate that a free audio podcast of most of this conference's panels will be available on iTunes by the end of June.



Special thanks to the sponsor of our reception

