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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through October 25, 2012

LIBEL AND PRIVACY

N.M. Dist. **New Mexico Newspaper Wins False Light Case** 07
Newspaper Wins JNOV after Mistrial
Mendoza v. Zollinger and Gallup Independent Company

Ill. App. **Illinois Appellate Court Reaffirms Narrow Scope of Anti-SLAPP Statute** 08
Public Official's Lawsuit is "Retaliatory" But Not Covered by Statute
Ryan v. Fox Television Stations, Inc., et al.

S.D.N.Y. **Federal Court Dismisses Defamation Action Filed By Insurance Executive Against Slate, Eliot Spitzer** 10
As a Matter of "Grammar and Logic" Statements Not About Plaintiff
Gilman v. Spitzer et al.

E.D. La. **Federal Court Retracts Narrow Interpretation of State Anti-SLAPP Statute** 12
Defendant Still Loses Special Motion to Strike
Louisiana Crisis Assistance Center v. Marzano-Lesnevich

N.Y. Sup. **A Loss for the "Randy Rabbi"** 13
Court Finds Article is Substantially True and Newspaper Defendant was Not Grossly Irresponsible
Rabinowich v. NYP Holdings, Inc.

Ill. **Supreme Court Confirms Intrusion Upon Seclusion Tort Is Valid In Illinois** 16
Confirms that Intrusion Is Actionable
Lawlor v. North Am. Corp. of Ill.

E.D. Pa. **Libel and False Light Claims against "Grumpy Accountants" Blog Can Proceed** 17
Blog Posts by Professors "Likely to Be Taken Seriously"
Zagg, Inc. v. Catanach

C.D. Cal. **Albert Einstein's Postmortem Publicity Rights Have Expired Under New Jersey Common Law** 19
Dismisses Lawsuit Against General Motors
Hebrew University of Jerusalem v. General Motors LLC

M.D. Tenn. **Civil Rights Lawsuit against Producers of the Bachelor and Bachelorette Shows Dismissed** 21
First Amendment Defense Wins at Pleading Stage
Claybrooks v. American Broadcasting Companies, Inc.

NEWSGATHERING

Drones: The Final Frontier in Privacy Rights? 23

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MLRC

Bob Latham Is the Winner With Winners And Losers....................28

INTERNATIONAL

Ireland **Irish High Court Quashes Deposition Subpoena for U.S. Litigation**....................30
Requirement for Deposition Not Convincingly Established
Cornec v. Morrice

France **French Court Prohibits Further Publication of Topless Kate Photos by Closer Magazine**....................35
Analysis of French Privacy Law

COMMERCIAL SPEECH

9th Cir. **Ninth Circuit Issues Divergent Commercial Speech Decisions**....................37
Yellow Pages is Protected; Billboard Ad for TV Program Is Not
Dex Media West, Inc. v. City of Seattle; Charles v. City of Los Angeles

ACCESS

Fla. Cir. **Media Coalition Successfully Fights Gag Order, Request to Seal Records, in Zimmerman Murder Trial**.........39
Florida v. Zimmerman

W.D. Pa. **Court Rejects Challenge to Restriction on Photographing Inside Polling Locations**....................40
Newspaper Wanted to Document New Voter ID Procedure
PG Publishing v. Aichele

MLRC 2012 ANNUAL DINNER
November 14, 2012 | Grand Hyatt, New York, NY

Politics, Media & Money:
Campaigning in the New Media and Money Environment

Alex Castellanos
Founding Partner, Purple Strategies; CNN Political Analyst

Edward G. Rendell
Former Governor of Pennsylvania; NBC News Analyst

Moderated by
Andrea Mitchell
NBC News Chief Foreign Affairs Correspondent; Host, "Andrea Mitchell Reports"

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WEDNESDAY, NOVEMBER 14, 2012

Politics, Media & Money:
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Alex Castellanos
Founding Partner, Purple Strategies
CNN Political Analyst

Edward G. Rendell
Former Governor of Pennsylvania
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Moderated by

Andrea Mitchell
NBC News Chief Foreign Affairs Correspondent
Host, "Andrea Mitchell Reports"

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Grand Hyatt New York
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Address: ______________________________

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Phone: ____________________ Fax: ____________________

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____ Table(s) for 10 at $4,200 each

____ Table(s) for 11 at $4,620 each

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Lunch will be served 12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

Proskauer Rose

Eleven Times Square - Conference Room 2700

Visitor entrance is on the NE corner of 41st Street and Eighth Avenue.

Price per person: $35.00

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RSVP by November 5, 2012

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Please list names of individuals attending below (print clearly)

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New Mexico Newspaper Wins False Light Case

By Gregory P. Williams

A New Mexico district court judge has dismissed a false light case filed by a former mayor against the local newspaper and its publisher, holding that New Mexico does not allow a public official to recover for false light invasion of privacy. *Harry Mendoza v. Robert Zollinger and Gallup Independent Company*, N. D-1113-CV-2010-334-II (N.M. County of McKinley, 11th Judicial District Ct.).

The dismissal is the latest twist in a long and colorful case, and comes after a jury had been unable to reach a verdict on the plaintiff's claims.

Background

In 2009 and 2010, the Gallup Independent published 15 editorials regarding Gallup's mayor, Harry Mendoza. The editorials made reference to Mendoza's alleged participation in a 1948 rape of a 16-year-old girl. Mendoza was one of several youths initially taken into custody after the attack. Some of the youths were eventually convicted of the crime but the charges against Mendoza were dropped before trial. The editorials repeatedly referred to Mendoza as a gang rapist or otherwise stated or implied that Mendoza was involved in the attack. Among the statements in the editorials were the following:

> "It's manifesting itself in the persona of Mayor Harry Mendoza, thug, master-manipulator and gang-rapist."
>
> "Tuesday's meeting showed [Mendoza] doesn't care any more about the well-being of the city, than he does about telling the truth about violating the 16-year-old downtown rape victim. Mendoza participated in the act, but never stood trial for the crime."
>
> "He probably never told his parents the real extent of his involvement—holding the girl down while she was repeatedly raped by the others until she passed out in shock."

The editorials brought to a head a long-standing feud between Mendoza and Robert Zollinger, the publisher of the Gallup Independent. In fact, in 2010, a fistfight broke out between the two men in a parking lot. The fight was caught on video and Mendoza eventually pleaded no contest to a misdemeanor public affray charge.

Mendoza filed suit against the Zollinger and the Gallup Independent, seeking recovery for defamation and false light invasion of privacy. Before trial, the judge granted defendants summary judgment on Mendoza's claim for defamation on the basis that he had not provided any evidence of actual damages to his reputation, a requirement under New Mexico law for defamation claims.

The court held that limitations on claims made by public figures for privacy torts are mandated by the protections given to the freedoms of speech and press by both the federal and New Mexico constitutions.

Trial and Post-Trial Motions

The matter went to trial in July, 2012, on Mendoza's false light claim, but ended in an unusual mistrial. The six-person jury initially appeared to have entered a verdict for the defense. The jury found that the newspaper had published false statements about Mendoza, but further determined that the newspaper had not acted with actual malice. However, when the judge polled the jury, it was found that only four of the six jurors had agreed on the actual malice question. Because New Mexico law requires that five of six jurors agree on each question, the judge required that the jury deliberate further. When the jury could not agree on a verdict, a mistrial was entered.

At the end of the plaintiff's case-in-chief at trial, defendants had moved for judgment as a matter of law. Among its arguments was that New Mexico does not recognize a claim for false light invasion of privacy made by a public figure for statements regarding the official's public life or performance of public duties. This motion was apparently the first time that defendants had argued that New Mexico does not recognize this claim. The trial court denied the motion.

(Continued on page 8)

RETURN TO TABLE OF CONTENTS

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(Continued from page 7)

However, when defendants raised the issue again in a post-trial motion, the court reversed its prior decision and dismissed the case. Citing a New Mexico Supreme Court case from 1966, *Blount v. TD Pub. Co.*, 77 N.M. 384, 388, 423 P.2d 421, 424 (1966), the court held that limitations on claims made by public figures for privacy torts are mandated by the protections given to the freedoms of speech and press by both the federal and New Mexico constitutions. The court thus held that New Mexico "does not recognize the tort of public figure false light invasion of privacy."

New Mexico's appellate courts have not specifically addressed whether a public figure may state a claim for false light invasion of privacy. Most of the briefing on this issue relied on decisions from other jurisdictions. It is unknown whether Mendoza will appeal the district court's decision dismissing his claim.

Gregory P. Williams is of counsel at Peifer, Hanson & Mullins, P.A., Albuquerque, NM. Plaintiff was represented at trial by Sam Bregman, Bregman & Loman, PC, Albuquerque, NM. The Gallup Independent was represented by George McFall.

Illinois Appellate Court Reaffirms Narrow Scope of Anti-SLAPP Statute

Public Official's Lawsuit Is "Retaliatory" But Not Covered By Statute

An Illinois appellate court this month affirmed that the state anti-SLAPP statute did not apply to a state court judge's libel and privacy lawsuit against a television station. *Ryan v. Fox Television Stations, Inc., et al.*, No.1-12-0005, 1-12-0007 (Ill. App. Oct. 23, 2012) (Connors, Harris, Quinn, JJ.).

Although the court described the judge's lawsuit as "retaliatory," it was not "meritless" within the meaning of the state anti-SLAPP law. In so concluding, the court reaffirmed the extremely narrow construction imposed on the SLAPP law by the Illinois Supreme Court earlier this year.

Background

At issue in the case is a 2010 investigative news broadcast by WFLD Fox News Chicago. Working together with a non-profit good government association, the television station aired a four part report on the work habits of Cook County judges and the related costs to taxpayers. Among other things, the report caught a judge sun bathing at home during work hours.

With regard to plaintiff, Judge James Ryan, the broadcast stated "We caught him leaving the courthouse early three times. On a rainy October day, he was home by 1:18 p.m. He never returned our calls." This statement was accompanied by video of a car parked in the driveway of a house. The car and driveway, however, belonged to the Judge's neighbor.

WFLD issued a correction and apology stating:

> "Last night's story, by the way, identified Judge Jim Ryan [i.e., plaintiff] as one of the judges leaving work early. We watched [plaintiff] leaving the courthouse and said he went home. But the house and the car we showed actually belonged to a neighbor. Our bad. While we saw the judge leave work early, we really don't know where he went. We do apologize for that mistake."

The next day Judge Ryan filed suit against the station for defamation, seeking $7 million in damages. He later amended his complaint to add claims for false light and intentional infliction of emotional distress based on the broadcast; and intrusion based on video taken of the judge walking in the court's restricted access parking lot. The amended complaint sought $28 million in damages ($7 million for each count).

(Continued on page 9)

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(Continued from page 8)

The station moved to dismiss under the Illinois Citizen Participation Act, 735 ILCS 5/2-619.1 (the "Act). By its terms, the Act created broad immunity for statements "aimed at procuring favorable government action, result, or outcome."

Illinois Anti-SLAPP Statute

Although the Act is broadly written, the Illinois Supreme Court significantly narrowed its construction at the beginning of this year in *Sandholm v. Kuecker*, 2012 IL 111443 ("We simply do not believe that, in enacting the anti-SLAPP statute, the legislature intended to abolish an individual's right to seek redress for defamation or other intentional torts, whenever the tortuous acts are in furtherance of the tortfeasor's rights of petition, speech, association, or participation in government.").

Under *Sandholm*, a lawsuit can only be dismissed under the Act if:

> "(1) the defendants' acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiffs' claims are solely based on, related to, or in response to the defendants' 'acts in furtherance'; and (3) the plaintiffs fail to produce clear and convincing evidence that the defendants' acts were not genuinely aimed at solely procuring favorable government action." Id. ¶ 18.

Retaliatory but Not Meritless Lawsuit

Affirming denial of the motion to strike the lawsuit, the appellate court first found that the news report was precisely the type of speech the Act was designed to protect. Moreover, given the timing of the complaint (filed right after the apology) and the exorbitant damages demand, the lawsuit had a clear "retaliatory intent." Nevertheless it was not dismissible under the Act.

The appellate court reasoned that under *Sandholm,* the defendant has the burden of showing the suit is meritless and could only do so here by providing evidence that the statement about plaintiff was true. The gist of the broadcast, according to the court, was that the Judge neglected his official duties by leaving work during business hours. But defendants failed to provide conclusive evidence to prove that.

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Court Dismisses Defamation Action Filed By Insurance Executive Against Slate, Eliot Spitzer

As a Matter of "Grammar and Logic" Statements Not About Plaintiff

By Katharine Larsen

A federal district judge from the Southern District of New York dismissed a defamation action filed by a former insurance executive against former New York Governor Eliot Spitzer and the publisher of Slate.com. *Gilman v. Spitzer et al.*, No. 1:11-cv-05843-JPO (S.D.N.Y. Oct. 1, 2012) (memorandum opinion and order).

In granting the defendants' motion for judgment on the pleadings, District Judge J. Paul Oetken held that the challenged portions of the publication at issue could not "reasonably be construed as 'of and concerning' the plaintiff as a matter of law" when the relevant passage was considered in context and given a natural reading. Perhaps not surprisingly given that conclusion, the judge also dismissed the counterclaim asserted by Mr. Spitzer and Slate against the plaintiff under the New York anti-SLAPP statute.

The court found that no reasonable person could read the passage in context and come away believing both that the charges against Gilman were dismissed and that Gilman was one of the Marsh employees who engaged in the misconduct described.

The action arose from a piece authored by Mr. Spitzer, and published by Slate.com, that defended Mr. Spitzer's decision as New York Attorney General to commence judicial proceedings against numerous insurance-related companies and their employees in connection with bid-rigging schemes. The piece did not mention plaintiff William Gilman by name, but accurately described the status of the criminal prosecution then pending against the insurance executive before discussing proceedings brought against his former employer, insurance giant Marsh & McLennan, and other Marsh employees.

Mr. Spitzer's August 2010 piece was prepared in response to a *Wall Street Journal* editorial that criticized cases initiated by the Office of the New York Attorney General against AIG and certain of its employees. Therein, Mr. Spitzer articulated his view that the attacks on these cases were part of a larger pattern of denial in the financial industry that served to obstruct effective government policymaking in the wake of the financial crises.

After addressing the successful AIG actions, Mr. Spitzer turned to the Office's investigation of Marsh. The relevant portions of the piece—with added emphasis—read:

> The *Journal*'s editorial also seeks to disparage the cases my office brought against Marsh & McLennan for a range of financial and business crimes. The editorial notes that two of the cases against employees of the company were dismissed after the defendants had been convicted. The judge found that certain evidence that should have been turned over to the defense was not. (The cases were tried after my tenure as attorney general.) **[1] Unfortunately for the credibility of the Journal, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms, or that [2] Marsh's behavior was a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market while Marsh and its employees pocketed the increased fees and kickbacks.** Marsh as a company paid an $850 million fine to resolve the claims and brought in new leadership. At the time of the criminal

(Continued on page 11)

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(Continued from page 10)

> conduct, Jeff Greenberg, Hank Greenberg's son, was the CEO of Marsh. He was forced to resign.

Mr. Gilman asserted that the two bolded portions of this passage were false and defamatory in that they wrongfully portrayed him as being guilty of criminal conduct even though his conviction had been overturned. He further asserted that a reasonable reader would understand these bolded portions to be about him based on the context provided by the underlined portion. (It was undisputed that Mr. Gilman was one of two Marsh employees whose conviction and sentence were vacated by the trial judge after the judge determined that certain exculpatory evidence was not disclosed.)

The court rejected plaintiff's claim that the first bolded statement targeted him, but instead adopted the reading advanced by Mr. Spitzer and Slate. "As a matter of grammar and logic," the court reasoned, "a reader who understood the [underlined] sentences to be about Gilman—and thus understood that his case had been dismissed—could not reasonably infer that *Gilman* was among the 'many employees of Marsh who have been convicted and sentenced to jail terms.'" The court found that this reasoning applied equally to the second bolded statement, *i.e.*, that no reasonable person could read this passage in context and come away believing *both* that the charges against Gilman were dismissed *and* that Gilman was one of the Marsh employees who engaged in the misconduct described.

The court also reaffirmed the well-established principles that statements referring to an organization—here, Marsh—do not implicate its members and that statements about "large and generalized" groups—here Marsh's 50,000-some employees—could not be attributed to any individual in the group for purposes of a defamation claim.

In so doing, the court rejected the plaintiff's alternative argument that the general reference to Marsh employees should be understood as relating only to those who were actually prosecuted: "The law does not permit a defamation plaintiff to impose such an extraneous gloss on the challenged language to artificially narrow the scope of its subject."

After concluding that plaintiff's defamation claim failed as a matter of law, the court deemed it unnecessary to consider defendants' alternative argument that the second bolded statement was also privilege as a fair and true report of an official proceeding.

In considering the defendants' motion, the court also squarely answered one relatively novel procedural question. Federal Rule of Civil Procedure 12(c) states that a motion for judgment on the pleadings is permitted "[a]fter the pleadings are closed." On this basis, plaintiff argued that defendants' motion was premature, having been filed before plaintiff filed an answer to defendants' anti-SLAPP counterclaim (although after defendants filed their answer to the original complaint). The court was not swayed, but held that the "better interpretation" is that a Rule 12(c) motion can be filed "when the *pertinent* pleadings are closed," and the existence of an open counterclaim, particularly a counterclaim for fees under an anti-SLAPP statute, does not preclude the motion.

Last, the defendants had asserted an anti-SLAPP counterclaim, which reflected Mr. Spitzer's observations that efforts to stifle accurate reporting of what transpired during the financial crisis were part of a larger effort to re-write history on the part of those who were behind the financial cataclysm. The court, however, granted Mr. Gilman's motion to dismiss the counterclaim, concluding that Mr. Gilman's lawsuit was not, as required by the anti-SLAPP law, "'materially related to any efforts' on the part of Spitzer or Slate to 'comment on . . . or oppose" Gilman's insurance licensure." In its analysis, the court focused on the "obvious tension" between its conclusion that the challenged statements in the piece could not be reasonably understood as about Mr. Gilman and the requirement, under the anti-SLAPP statute, that the lawsuit relate to defendants' opposition to the plaintiff's license.

The Slate Group, LLC, and Eliot Spitzer were represented by Lee Levine, Jay Ward Brown, and Katharine Larsen of the Washington, D.C., and Philadelphia, Pennsylvania, offices of Levine Sullivan Koch & Schulz, LLP, as well as Eric Lieberman and James McLaughlin of Slate's affiliate, The Washington Post. William Gilman was represented by Jeffrey L. Liddle and James W. Halter of Liddle & Robinson, L.L.P, New York, New York.

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Louisiana Federal Court Retracts Narrow Interpretation of State Anti-SLAPP Statute

Defendant Still Loses Special Motion to Strike

By Mary Ellen Roy and Dan Zimmerman

In the January 2012 MediaLaw Letter, we reported on a decision in *Louisiana Crisis Assistance Center v. Marzano-Lesnevich*, No. 11-2102 (E.D. La. Nov. 23, 2011) (Barbier, J.). In response to a motion to reconsider (which the Court construed as a Rule 59(e) motion to amend or alter the judgment), the Court issued a new decision on July 9, 2012.

The plaintiff provides representation to individuals facing the death penalty. It sued Ms. Marzano-Lesnevich, a former summer intern (and Harvard Law School graduate) who published two essays based on her experiences at LCAC: *In the Fade*, a nonfiction description of the criminal prosecution of an LCAC client for the murder of a six-year old boy, and *Longtermer's Day*, an account of her work for LCAC visiting prisoners at Louisiana's Angola Prison.

Believing that the essays contained confidential client information, LCAC sued in state court, alleging breach of fiduciary duty and breach of contract, and seeking injunctive relief prohibiting Ms. Marzano-Lesnevich from future disclosure of confidential information obtained during her LCAC internship.

Ms. Marzano-Lesnevich removed the case to the Eastern District of Louisiana and filed a special motion to strike pursuant to Louisiana's anti-SLAPP statute, article 971 of the Louisiana Code of Civil Procedure. The motion was "directed exclusively at LCAC's claims for injunctive relief," which, Defendant asserted, would be an impermissible prior restraint on her First Amendment rights.

In its original decision, the federal district court ruled that Louisiana's anti-SLAPP statute did apply in federal court, but ignored state-court decisions allowing the statute to be applied to dismiss discrete claims or causes of actions in a lawsuit. Instead, holding that the statute could be used only to dismiss a lawsuit in its entirety, and that, as required by the statute, LCAC had shown a probability of success on the merits of one of its claims (for breach of contract), the Court denied the defendant's anti-SLAPP motion. The Court did not reach the prior restraint issue.

In its new decision, the Court admitted that "a plain reading of the statutory text" showed that the Court had erred and that the anti-SLAPP statute can be utilized to strike individual causes of action in a lawsuit. The Court corrected its earlier erroneous ruling that a party opposing a special motion to strike need only show a probability of success on the merits as to any one claim in order to defeat the special motion. Instead, a special motion to strike can be granted as to any claim or cause of action for which the defendant fails to show a probability of success on the merits.

This ruling was of no comfort to the defendant, however. The Court also found that a request for injunctive relief was merely a remedy, not a "cause of action," so there can be no special motion to strike a request for injunctive relief. Thus, though the Court corrected its earlier erroneous ruling on the scope of Louisiana's anti-SLAPP statute, the Court still did not have to reach the prior restraint issue.

Shortly after the Court's new ruling, the parties settled the case in what must be seen as a victory for the plaintiff. Ms. Marzano-Lesnevich agreed not to publish or disclose any confidential information about LCAC or its clients without consent, to make no further use or dissemination of the two essays that precipitated the lawsuit, to take down all Internet postings of the essays over which she had control, and to include in all future public performances of any works relating to LCAC and its clients disclaimers that neither the LCAC nor its clients authorize or approve her work

Mary Ellen Roy is a partner and Dan Zimmerman a staff attorney in the New Orleans office of Phelps Dunbar LLP. LCAC was represented by Harry Hardin III, Christopher Cazenave and Mark Cunningham of Jones Walker. Alexandria Marzano-Lesnevich was represented by Loretta (Lori) Mince, Alysson Mills and Jeanette Donnelly of Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P.

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A Loss for the "Randy Rabbi": Court Finds Article Substantially True, Newspaper Defendant Not Grossly Irresponsible

By Katherine M. Bolger and Rachel F. Strom

Last month, a New York State Supreme Court dismissed a lawsuit brought by a Long Island-based Rabbi against NYP Holdings, Inc. ("NYP"), the publisher of the *New York Post*, finding that the Post's article and video, which discussed and showed the Rabbi "cavorting" with two women in a hotel room was, substantially true. *Rabinowich v. NYP Holdings, Inc.*, 110427/2011 (N.Y. Sup., Nov. 29, 2012) (Singh, A.). The court reasoned that in the face of the Rabbi's admission that he was the individual on the video seen trysting with two women, it did not matter whether the women were prostitutes or whether it was the Sabbath. The fact that the then-married Rabbi engaged in "commandment breaking action" rendered the article true. The court then found that even on a motion to dismiss, the NYP was not grossly irresponsible in relying on the Rabbi's ex-wife in publishing her allegations about the Rabbi.

Plaintiff claimed that, as part of his divorce agreement, he and his former wife entered into a court-ordered confidentiality and non-disparagement agreement and Amora breached that agreement by secretly videotaping him with two women in a hotel room and then giving the footage to the *Post*.

The Article and the Video

On July 11, 2011, NYP published an article in the *Post* entitled, "The 'Randy' Rabbi: Prostitution sting in angry ex-wife's suit" (the "Article"). The Article reports that "according to sensational Manhattan court records", the plaintiff Avraham Rabinowich ("Plaintiff"), "a prominent Long Island Jewish leader" who "leads the wealthy, Conservative Bellmore Jewish Center and is vice president of the Long Island Board of Rabbis," was caught with "prostitutes on the Sabbath shortly after services." The Article details how the rabbi's ex-wife Amora "managed to have [Avraham] secretly filmed" "in a hotel room enjoying some hard-core, commandment-breaking action" with a call girl and a private investigator who was disguised as another call girl. Amora then "entered the photographic evidence into the record of the [couple's] bitter custody case." As summarized by the Court, "[t]he story contains a photograph allegedly depicting plaintiff, reclining naked, at least from the waist up, with his head on a pillow, while a woman, the purported prostitute, also naked from the waist up with her arm obscuring any upper body nudity, leans over him with one arm around his chest. Another women, allegedly the private investigator, is standing in the background fully clothed."

Along with the Article, NYP also published a short video on its website that included portions of the video tape of Avraham with the call girl and the private investigator disguised as another call girl (the "Post Video").

Plaintiff's Original Theory – True But Embarrassing

On or about September 13, 2011, Plaintiff filed his original complaint in the action, which asserted claims for tortious interference with contract and intentional infliction of emotional distress against NYP. In essence, Plaintiff claimed that, as part of his divorce agreement, he and his former wife entered into a court-ordered confidentiality and non-disparagement agreement and Amora breached that agreement by secretly videotaping him with two women in a hotel room and then giving the footage to the *Post*. He claimed that the *Post*'s publication of the Article and Post Video caused him grave emotional distress and embarrassment and hurt his career as a Rabbi.

Plaintiff's Amended Complaint – "Something" is False

On October 24, 2011, NYP moved to dismiss the original complaint, arguing that because, by Plaintiff's own admission, the *Post* never caused Amora to breach her

(Continued on page 14)

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(Continued from page 13)

agreement with the Rabbi, Plaintiff's complaint must be dismissed. NYP further argued that the *Post*'s truthful reporting (the Plaintiff never claimed it was false) was protected by the First Amendment. Rather than oppose the motion to dismiss, Plaintiff filed the amended complaint, which asserted four claims against NYP for (1) tortious interference with contract; (2) intentional infliction of emotional distress; (3) defamation and (4) invasion of privacy. As it relates to the claim for defamation, after essentially conceding that it is true that he was caught on video in a "compromising and embarrassing manner" with two women in a hotel room and that all NYP did was report on the existence of the video and broadcast these "video images of the plaintiff", Plaintiff claimed that the Article and Post Video "exposed plaintiff to public scorn, contempt ridicule and disgrace" and that he "incurred humiliation emotional damages loss of income and other damages." While he never claimed, as part of his defamation cause of action, that the Article or Post Video were false, buried at the bottom of his claim for invasion of privacy (the fourth cause of action), Plaintiff alleged – for the first time – that the Article and Post Video "contained information that was either intentionally or substantially false and was not a true factual treatment."

The Motion to Dismiss and the Cross Motion to Amend

On January 19, 2012, NYP moved to dismiss the amended complaint. In its motion, NYP pointed out that even in his amended complaint, Plaintiff did not deny that he hired prostitutes or that he is the man on the video that is at issue in the Article and the Post Video. Instead, he claimed (understandably) that he was embarrassed by the video's publication. Because the *Post* never caused his former wife to breach her contract with Plaintiff, however, NYP argued it was not liable for tortious interference with contract. Similarly, because, the publication of private or false information does not constitute extreme and outrageous conduct as a matter of law, NYP argued Plaintiff's intentional infliction claim failed. Further, NYP argued that Plaintiff's vague allegation of falsity failed to meet the strict requirements of CPLR Rule 3016(a). Finally, NYP argued, because NYP's publication of the Post Video and Article were reasonably related to a newsworthy topic, Plaintiff could not maintain a claim for invasion of privacy.

Plaintiff opposed the motion and served a cross-motion to amend the complaint yet again to now claim that Article and Post Video were false because his "tryst" with the two women did not occur on the Sabbath and he did not think these women were prostitutes. Specifically, as the Court summarized, Plaintiff claimed in an affidavit that accompanied his cross-motion, "that the private investigator engaged by Amora called plaintiff on his cellphone, representing herself to be Anna . . . After several occasions at which plaintiff had met Anna at locations in New York City socially, she invited him to meet her at the bar of at the Pan Am Hotel, in Queens, to attend a party. Plaintiff states that he met her at the bar, and was invited to go upstairs by Anna and another woman, 'Zoe', to whom Anna had just introduced him, to a room that Anna had already rented. In the room, plaintiff states that the two women began to undress him and led him to the bed, where he was filmed 'in a compromising manner' without his knowledge." Plaintiff claims in his affidavit that he "did not resist. I was lonely. I felt socially isolated at this time in my life. I had not had physical relations for years. I did not resist. I exercised poor judgment, but I did not engage in prostitution."

Plaintiff also argued that the Article was not newsworthy because he is a private figure and because under New York Court of Appeals precedent there is no privilege afforded to the publication of information from matrimonial files (and the video of Plaintiff and the two women was entered into the files of his divorce and custody proceedings), the Article and Post Video addressed a matter of private concern.

The Decision

On September 27, 2012, the Honorable Anil C. Singh, of the Supreme Court of the State of New York, granted NYP's motion to dismiss in its entirety and denied Plaintiff's motion to amend his complaint as against NYP. In so holding, the Court dismissed the tortious interference claim because Plaintiff "does not allege that NYP took any actions to procure Amora's breach [of contract]. The amended complaint alleges only that NYP published the videotapes after receiving them from Amora. Such publication is plainly a 'lawful purpose' . . . and is the business in which NYP engages by publishing a tabloid newspaper like the Post."

The Court then dismissed the intentional infliction claim because "the single action of publishing the story does not

(Continued on page 15)

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(Continued from page 14)

constitute sufficiently extreme and outrageous conduct," as required by the tort.

The Court then addressed the defamation claim and found that it failed as a matter of law on a number of independent grounds. First, the Court found that the Plaintiff's "conclusory and imprecise allegation of falsity falls far short of the pleading requirements for defamation, including the requirements stated in CPLR 3016." The Court also found that the Article was substantially true. In this regard, the Court noted that "Plaintiff does not deny . . . that it is he who is depicted in the videotape, or that Amora arranged the sting and attempted to introduce the videotape into evidence in both the divorce and custody proceedings. . . . Plaintiff only denies in his affirmation that he knowingly engaged in prostitution, and that he made arrangements to engage in prostitution on the Jewish Sabbath, as the story quoted Amora to have alleged."

The court concludes that "plaintiff has not denied, and essentially admitted, that he had sexual relations with 'Zoe', who is alleged to be a prostitute in the story, an allegation that plaintiff also has not denied." Thus, the Court found that "the effect on the mind of a reasonable reader, considering the totality of the story, would not be materially different if he or she knew that plaintiff did not know that 'Zoe' was a prostitute, when considered in the context of the other allegations of the story that have not been alleged to be false. Under either version, plaintiff would be similarly exposed to 'public contempt, ridicule, aversion or disgrace' in the mind of a reasonable person. At most, the allegation about prostitution portray plaintiff in a false light, but New York recognizes no common law tort of false light invasion of privacy." (internal citations omitted). Thus, the Court found that the Article was substantially true and Plaintiff's defamation claim failed.

The Court also found, *sue sponte*, that Plaintiff's defamation claim must be dismissed at the outset because NYP did not act in a grossly irresponsible manner, New York's standard for private figure plaintiffs when the article at issue concerns a matter "which is arguably within the sphere of legitimate public concern." *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975). Here, the Court found that "[a] report on an angry spouse attempting to use false accusations and an embarrassing videotape in divorce and custody proceedings to gain advantage in those proceedings can be of public importance because a 'theme of legitimate public concern can reasonably be drawn from their experience.'" (citation omitted). The Court noted that while the New York Appellate Division for the First Department found in *Krauss v. Globe Int'l*, 251 A.D.2d 191 (1st Dep't 1998) that the "publication in a tabloid newspaper of a story stating that the husband of a television celebrity had patronized prostitutes . . . is not of public concern . . . [o]n the heels of *Krauss*, the Court of Appeals decided *Huggins* [*v. Moore*, 94 N.Y.2d 296 (1999)], which involved a story about spousal abuse involving a nonpublic figure, who was the husband of a lesser-known celebrity.

The Court of Appeals held that the matter was of public concern as 'human interest portrayal of events . . . so long as some theme of legitimate public concern can reasonably be drawn from their experience." *Id.* at 303 (internal marks omitted). The Court noted that "[i]n the wake of *Huggins*, the United States Court of Appeals for the Second Circuit observed the continued validity of *Krauss* 'is in doubt.'" (citing *Albert v. Loksen*, 239 F.3d 256, 270 n.11 (2d Cir. 2001)). Thus, the Court found that the Article was a matter of public concern and NYP was not grossly irresponsible "for reporting Amora's allegations."

The Court then found that because the Article addressed a matter of public concern – or was newsworthy – Plaintiff's invasion of privacy claim also failed as a matter of law. The Court noted that Section 51 of New York Civil Rights Law, the only "right of privacy" recognized under New York law, "does not cover . . . 'publication of newsworthy matters of events'" so long as the "article is not an advertisement in disguise" and the "use of plaintiff's name and/or image bears [a] real relationship to the article." (internal citation omitted). Because the "story is newsworthy" and there "can be no genuine dispute" that the "story involves no advertising, and the photograph and videotape plainly relate to the story," the Court found that Plaintiff's claim failed as a matter of law. The Court, therefore, dismissed Plaintiff's complaint in its entirety and refused to grant him leave to serve a second amended complaint on NYP.

Defendant NYP Holdings, Inc. was represented by Slade R. Metcalf, formally of Hogan Lovells US LLP in New York City, and Katherine M. Bolger and Rachel F. Strom now of Levine Sullivan Koch & Schulz LLP in New York City. Plaintiff was represented by Eric Morrison of Morrison & Wagner in New York City.

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Illinois Supreme Court Confirms Intrusion Upon Seclusion Tort Is Valid In Illinois

By Jeff Davis

In *Lawlor v. North Am. Corp. of Ill.*, 2012 Ill. 112530 (Oct. 18, 2012), the Illinois Supreme Court confirmed what all five Illinois appellate districts had already recognized—that the tort of intrusion upon seclusion is actionable in Illinois.

Lawlor involved a sales employee's (the plaintiff's) departure from the defendant company to a competitor. After the plaintiff's departure, the company (believing plaintiff had violated a noncompete agreement) and its agents investigated the plaintiff, including reviewing her private telephone records. The investigators used the plaintiff's personal information, including her Social Security number, and pretended to be the plaintiff to obtain the records without her permission. The plaintiff had originally sued for outstanding commissions owed, but added the intrusion upon seclusion claim once she learned of the investigation.

Although neither party had raised the issue, the Illinois Supreme Court expressly recognized the tort of intrusion upon seclusion. The Court noted that the tort is one of four branches of the tort of invasion of privacy, as found in the Restatement (Second) of Torts, § 652B (1977). The Court cited an illustration found in comment b to Section 652: "the invasion may be … by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by forged court order to permit an inspection of his personal documents. The intrusion itself makes a defendant subject to liability, even though there is no publication or other use of any kind of the … information outlined."

The defendant's liability on the intrusion claim was affirmed. And the *Lawlor* court noted that in recognizing the tort, Illinois "join[s] the vast majority of other jurisdictions that recognize the tort of intrusion upon seclusion."

Jeff Davis is an attorney with Lathrop and Gage LLP in Chicago.

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RETURN TO TABLE OF CONTENTS

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Libel and False Light Claims Against “Grumpy Accountants” Blog Can Proceed

Blog Posts by Professors “Likely to be Taken Seriously”

A Pennsylvania federal court denied a motion to dismiss libel and false light claims over statements made by two business school professors on their “Grumpy Old Accountants” blog. Zagg, Inc. v. Catanach, No.12-4399 (E.D. Pa. Sept. 27, 2012) (Bartle, J.) (applying Utah law). The court rejected the argument that the statements were opinion as a matter of law. Instead, the statements were likely to be taken seriously given their nature and the defendants’ profession.

Background

The plaintiff, Zagg, Inc., is a publicly traded Utah-based consumer electronics company. Defendant Anthony Catanach, Jr. is a professor at the School of Business at Villanova University. Defendant J. Edward Ketz is a professor at the Smeal College of Business at Pennsylvania State University. Together they run the “Grumpy Old Accountants” blog where they post a variety of comments about financial reporting standards, corporate finance and related topics.

At issue is a blog posting entitled “Don't Gag on Zagg” which criticized Zagg’s accounting practices. Among other things, defendants wrote:

> “The numbers are giving off so much smoke that we think management may have blinded both the auditors and investors.”
>
> “At worst, management may be 'cooking the books.'”
>
> “ZAGG's balance sheet is littered with items prompting valuation and disclosure concerns.”
>
> “The company includes accounts receivables from credit card processors in its reported cash balances. You know how we feel about this right? ... Instead of the Company reporting positive cash flow for 2011, it really 'burned' cash.”
>
> “[I]t is ironic and worrying that the ifrogz business segment is losing money right out of the gate.”
>
> “Still not convinced that Zagg management is massaging the numbers? Maybe the following will make the hairs on the back of your neck stand up.”
>
> “This is a financial reporting debacle in the making.”
>
> “It makes us grumpy when a firm overstates its cash by adding in some receivables, as note 1 explains. And why did Zagg do this? In an attempt to fool investors about its cash flows!”

Zagg filed suit against the professors for libel and false light alleging the statements were false and defamatory and contributed to the decrease in its stock price. The professors moved to dismiss on the ground that the statements were all opinion. Among other things, they pointed to a disclaimer on the website stating that the postings were their individual

(Continued on page 18)

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(Continued from page 17)

opinions and not those of their universities. Both sides agreed that Utah law applied.

Fact vs. Opinion

Utah relies on a four factor test to distinguish fact from opinion: 1) the common usage or meaning of the words; 2) whether the statement can be objectively verified ; 3) the full context in which the statement was made; and 4) the broader setting in which the statement appears. *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994) (*citing Ollman v. Evans,* 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc)).

Under the first factor, readers could understand the statements as "not merely nettlesome or embarrassing" but implying accounting misconduct or potential criminality. As for the second factor, the statements are capable of verification based on the plaintiff's financial records and public filings.

The third factor, according to the court, was that defendants read Zagg's public filings and financial statements and were basing their statements on these factual disclosures.

Finally, under the fourth factor, the court looked at the nature of the website. The court recognized that readers might not treat the postings with the same weight as the front page of The Wall Street Journal. But the "defendants are professors at business schools, with apparently no political axe to grind. Readers are likely to take their statements about corporate finance seriously."

The court found this particularly so when blogging about business rather than politics. "Readers expect that public officials will be criticized in newspaper editorials and that these criticisms are opinions. That is just the nature of politics. Here, in contrast, two business school professors are making statements about the dishonesty of a corporation. Public companies are not routinely accused of fraud by business professors, and any such accusations would not be presumed to be opinions."

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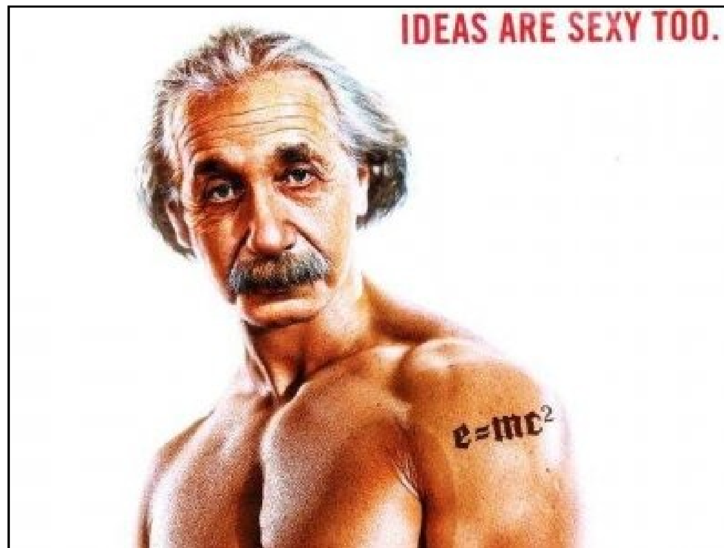
Court Finds Albert Einstein's Postmortem Publicity Rights Expired Under New Jersey Law

Dismisses Lawsuit Against General Motors

By Steve Rummage, Kelli Sager, and Ambika Doran

On October 15, the federal district court for the Central District of California dismissed a lawsuit filed against General Motors by Hebrew University of Jerusalem, which has long claimed to own the postmortem publicity rights of Albert Einstein. *Hebrew University of Jerusalem v. General Motors LLC*, 202 WL 4868003 (C.D. Cal. Oct. 15, 2012). The court became the first to recognize a limit on the common law postmortem right of publicity, concluding that the period could not be longer than 50 years – which meant Einstein's rights expired in 2005, 50 years after his death in 1955.



Background

HUJ's lawsuit against GM stemmed from an advertisement published in *People* magazine's 2009 "Sexiest Man Alive" edition. It depicted Einstein's face digitally pasted onto a muscled physique, accompanied by the words, "Ideas are sexy too." *Id.* at *1. Hebrew University, an Israeli institution, filed suit in Los Angeles, claiming it obtained Einstein's postmortem publicity rights through a provision in Einstein's will and that GM had failed to obtain its permission to use Einstein's image in what HUJ viewed as a "tasteless" advertisement. HUJ's lawsuit included claims for violation of the New Jersey common law right of right-of-publicity, the California common law and statutory right-of-publicity, and the Lanham Act.

The court dismissed the Lanham Act claim on summary judgment earlier this year. It found, however, that New Jersey would recognize postmortem rights of publicity (although there are no decisions from New Jersey state courts on that issue) and that exploitation during one's lifetime is not required for rights of publicity to continue after death. The court reserved for trial the issue of whether Einstein's will actually bequeathed his publicity rights to HUJ. *Id.*

In pretrial motions, GM asserted that regardless whether HUJ at one time owned Einstein's postmortem rights of publicity, the rights had expired by the time the advertisement was published. Einstein died in 1955; the ad was published fifty-four years later. *Id.* HUJ urged the court to find that the duration of the right was indefinite or, in the alternative, that the rights last seventy years after death, analogizing to the duration of rights under federal copyright law. *Id.* But the court sided with GM, finding that the New Jersey Supreme Court would likely follow the majority of other states in finding that the postmortem right of publicity endures for no more than 50 years after death. *Id; see also id.* at *8.

In reaching its decision, the court examined the history and scope of publicity rights, noting that "courts may be properly reluctant to adopt a broad construction of the publicity right because of its less compelling rationales than those of other intellectual property rights." *Id.* at *4. "Surely," the court stated, "the personal interest that is at stake [in the right of publicity] becomes attenuated after the personality dies." *Id.* at *5. Consequently, "[a] maximum 50 –year postmortem duration here would be a reasonable middle ground that is long enough for a deceased celebrity's heirs to take advantage of and reap the benefit of the personal aspects of the right." *Id.*

The court rejected Hebrew University's argument that the

(Continued on page 20)

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(Continued from page 19)

duration should be the same as for copyrights, noting that "the purpose of [the publicity right] and its underlying policies do not warrant a mechanical application of the Copyright Act's term of life plus 70 years." *Id.* at *5. First, the court found, "the focus of copyright is on recorded creative expressions while the focus of the right of publicity is on the identity and 'persona' of a human being." *Id.* at *6 (quotation marks, citation omitted). Second, "the protection of copyright is designed to encourage the future creation of works of art, whereas the interest … protected by the right of publicity is usually the byproduct of a different and earlier endeavor," meaning that copyright provides an incentive that the right of publicity does not. *Id.* Finally, the court pointed out that Congress extended the copyright duration from 50 to 70 years in part to "harmonize U.S. copyright protection with the protection afforded by countries in the European Union," which were "political and economic considerations" not applicable to the right of publicity. *Id.* at *7.

The court found that public policy also favored a limited postmortem right of publicity. *Id.* As the court explained, "[an] open-ended right of publicity, or even a postmortem duration longer than 50 years, raises considerable First Amendment concerns and creates a potentially infinite curb on expression." *Id.* These concerns are even greater in the modern era of mass communications, making it "imprudent to issue any ruling that strengthens (or at least lengthens) one right – that of the right of publicity – to the potentially significant detriment of these other rights." *Id.* Because Einstein's persona has become "thoroughly ingrained in our cultural heritage," the court held that given the passage of more than fifty years, "that persona should be freely available to those who seek to appropriate it as part of their own expression, even in tasteless ads."

The court also dismissed HUJ's claim under California's misappropriation statute, following Ninth Circuit decisions limiting the application of the statute to California domiciliaries. Because Einstein was domiciled in New Jersey at his death, California's right of publicity statute did not apply. *Id.* at *3.

Steve Rummage is a partner and Ambika Doran an associate in the Seattle office of Davis Wright Tremaine LLP. Kelli Sager is a partner in the firm's Los Angeles office. They were counsel to General Motors in this matter.

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Civil Rights Lawsuit against Producers of the Bachelor and Bachelorette Shows Dismissed

First Amendment Defense Wins at Pleading Stage

A Tennessee federal district court this month dismissed a civil rights lawsuit against ABC and the producers of *The Bachelor* and *Bachelorette* shows for failing to cast people of color as the lead in either of the popular reality television shows. In a case of first impression, the court held that casting decisions are protected by the First Amendment from claims of racial discrimination in contracting. *Claybrooks v. American Broadcasting Companies, Inc.*, No. 3:12-cv-00388 (M.D. Tenn. Oct. 15, 2012) (Trauger, J.).

Casting decisions, the court found, are core aspects of the creative process. While the plaintiffs had a laudable goal of promoting acceptance of interracial relationships, the First Amendment barred their effort to force the producers to alter their content to promote that message.

Background

The plaintiffs are two African-American men who unsuccessfully sought to be cast as the lead in the 2012 season of *The Bachelor,* the long-running ABC reality show in which a pool of female suitors compete for the affection of a single man. The spin-off show *The Bachelorette* has the same premise with the gender roles reversed.

Plaintiffs sued ABC and related producers for violating 42 U.S.C. § 1981, a post-Civil War statute that, among other things, prohibits discrimination in the formation of contracts. Plaintiffs noted that in the 24 combined seasons of the shows no person of color had ever been cast as the lead. Plaintiffs alleged the producers intentionally discriminated against non-whites in their casting decisions to avoid the risk of alienating viewers and advertisers by featuring interracial couples.

Plaintiffs sought class action status on behalf of all other non-white applicants; nominal and punitive damages; and injunctive relief requiring the defendants to consider non-whites as finalists for the lead roles in the shows. Defendants moved to dismiss under the First Amendment and, alternatively, that plaintiffs' complaint was void for vagueness and/or without sufficient factual support.

Casting and the First Amendment

The district court dismissed under the First Amendment. The court concluded that "casting decisions are part and parcel of the creative process behind a television program — including the Shows at issue here — thereby meriting First Amendment protection against the application of anti-discrimination statutes to that process." *Citing, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995) (anti-discrimination statute could not be constitutionally applied to alter the expressive content of a private parade).

Plaintiffs' theory, the court found, would threaten the content of various television programs and television networks. The defendants had cited a variety of targeted programming, from the Black Entertainment Channel (targeting African-Americans) to LOGO (targeting gays and lesbians). Indeed, the court agreed that under plaintiffs' rationale any television show without a diverse cast would be subject to court scrutiny.

Plaintiffs argued that the court could distinguish *The Bachelor* and *The Bachelorette* from shows specifically geared toward particular demographic groups. The latter

(Continued on page 22)

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(Continued from page 21)

would not be subject to scrutiny, while the former could be. But the court dismissed this as "inherently unwieldy." Plaintiffs' distinction, if implemented, "would embroil courts in questioning the creative process behind any television program or other dramatic work."

Casting decisions, the court concluded, are inseparable from an entertainment show's creative content. Regulating either would abridge the creators' freedom of speech. "Ultimately, whatever messages *The Bachelor* and *The Bachelorette* communicate or are intended to communicate — whether explicitly, implicitly, intentionally, or otherwise — the First Amendment protects the right of the producers of these Shows to craft and control those messages, based on whatever considerations the producers wish to take into account."

Plaintiffs were represented by Cyrus Mehri, Mehri & Skalet, PLLC, Washington D.C. and George E. Barrett, Barrett Johnston, LLC, Nashville, Tenn. Defendants were represented by Adam Levin and Seth Pierce, Mitchell Silberberg & Knupp LLP, Los Angeles, CA.

Upcoming Events

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/Stanford Digital
Media Conference
May 16-17, 2013, Palo Alto, CA

MLRC London Conference
September 23-24, 2013, London, England

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Drones: The Final Frontier in Privacy Rights?

By Mickey H. Osterreicher

While the use of drones by the military is nothing new, discussion of this technology is becoming more frequent and even became part of the last Presidential debate. Simply stated, an unmanned aerial vehicle (UAV), more commonly called a drone, is an apparatus that flies through the air with no pilot onboard. These machines range from remote-controlled models used by hobbyists and others for recreational purposes to armed military surveillance aircraft flying over hostile territory. They may be guided by manual radio frequency controls or by an autopilot using a sophisticated data link. These devices are capable of performing various tasks including: surveillance, air sample monitoring, meteorology, photography, geologic mapping and many other functions now performed by manned aircraft.

Drones come in all shapes and sizes with wingspans from six inches to 246 feet and weighing from approximately four ounces to over 12 tons. According to the Federal Aviation Administration (FAA) "approximately 50 companies, universities and government organizations are developing and producing some 155 unmanned aircraft designs in the U.S. alone."

Currently, the largest use of drones is by the military, government agencies such as NASA and police departments. Their use by the media appears to be limited but that is expected to change rapidly once the FAA issues new guidelines. Photographers in various fields will experiment with the use of small drones but at the moment any commercial use is against the law. In one such case a photographer who was using his camera-carrying drone to help real estate agents sell luxury homes in California was told he was violating FAA rules. Of course when used to gather news it could be argued that such use is not commercial but rather editorial.

Technological advancements – ranging from the printing press to the telegraph; radio to videotape; and now livestreams and tweets – have always been used to make information more widely available and instantly accessible. Ever since man could fly, all types of vehicles from balloons and blimps to fixed-wing planes and helicopters have been used for surveillance and newsgathering purposes. As drones become more prevalent, reliable, and affordable; and as high definition cameras become smaller with higher resolution, the demand for drone use is expected to increase and eventually surpass more traditional forms of aerial news coverage. A perfect example occurred last year when one news organization used a drone to record storm damage in Alabama and flooding in South Dakota.

The impetus here is both technological and economical. Reports of drone use by news organizations, Google, sports teams and scientists are on the rise – the technological capabilities are clearly here, and will only become more accessible over time. Skyrocketing fuel costs along with increased insurance rates make flying a helicopter or blimp unfeasible. When news organizations are reducing staff, having a pilot or pilots on the payroll is now an unaffordable luxury, especially when compared to the cost effectiveness of a drone.

In 2007 the FAA promulgated a rulemaking process for small unmanned aircraft. In 2009 the Small Unmanned Aircraft System (sUAS) Aviation Rulemaking Committee (ARC) issued its report and recommendations. Rather than go into painstaking detail please refer to FAA Regulations & Policies related to Unmanned Aircraft Systems (UAS).

In February 2012, President Obama signed H.R. 658 titled: FAA Modernization and Reform Act of 2012 into law.

(Continued on page 24)

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(Continued from page 23)

Among other things that bill "Requires the [Transportation] Secretary to develop a plan to accelerate safely the integration by September 30, 2015, of civil unmanned aircraft systems (UASes, or drones) into the national airspace system;" "determine if certain drones may operate safely in the national airspace system before completion of the plan;" and "Prohibits the FAA Administrator from promulgating rules or regulations on model aircraft flown strictly for hobby or recreational purposes and meeting certain other criteria." This may help expedite the development and use of small drones for use by news media as well as individual photographers.

On October 16, the FAA held a public meeting to discuss "the Integration of UAS into NextGen" and present overviews of the Airspace Systems Program and the "Science Mission Directorate Use of UAS."

The Act also requires government agencies and industry leaders to produce a comprehensive plan on how to safely integrate drones into the air traffic system by November 2012, with the expectation that by May 2014 small UAVs (under 55 lbs.) will be cleared for domestic use.

Once drones begin to operate expect to see many legal questions fly as well; including Fourth Amendment rights against unreasonable search and seizure by the government and invasion of privacy by the media, photographers and others.

As drones become more prevalent, reliable, and affordable, and as high definition cameras become smaller with higher resolution, the demand for drone use is expected to increase and eventually surpass more traditional forms of aerial news coverage.

Criticism over drone use and legislation has already taken off. In 2011, the ACLU released a report expressing their concerns over the failure by Congress to adequately debate privacy and civil rights issues before enacting current legislation. The Electronic Privacy Information Center (EPIC) sent an open letter to the FAA requesting that the agency address these questions. Just recently the ACLU sent FOIA requests to five (5) federal agencies (FAA, DOJ, DHS, GSA and USAF) asking about drone use inside the U.S. Supporters of increased drone usage have advocated their position as well, citing their use as leading to "unprecedented gains in border defense, public safety and emergency response."

A March/April 2012 report titled "10 Things You Didn't Know About Drones" noted:

As of October [2011], the [FAA] had reportedly issued 285 active certificates for 85 users, covering 82 drone types. The FAA has refused to say who received the clearances, but it was estimated over a year ago that 35 percent were held by the Pentagon, 11 percent by NASA, and 5 percent by the Department of Homeland Security (DHS). And it's growing. U.S. Customs and Border Protection already operates eight Predator drones. Under pressure from the congressional Unmanned Systems Caucus — yes, there's already a drone lobby, with 50 members — two additional Predators were sent to Texas in the fall, though a DHS official noted: "We didn't ask for them.

Forbes reported that while "the Unmanned Systems Caucus isn't a lobbying group, they're the people one should lobby, the lobbying group is probably the very interesting Association for Unmanned Vehicle Systems International."

Also in light of the many ag-gag bills being enacted around the country, designed to keep prying cameras away from farms and agricultural operations through the application of heightened trespass laws, it will be interesting to see how drone overflights are viewed by the courts. One recent case appears to be the first in which a drone was shot down in South Carolina by a group opposed to being observed from the air.

In August 2012 the Aviation Committee of the International Association of Chiefs of Police issued *Recommended Guidelines for the use of Unmanned Aircraft* in which they noted that "Despite their proven effectiveness, concerns about privacy threaten to overshadow the benefits this technology promises to bring to public safety;" and when it comes to the use of drones by law enforcement they advised that "The community should be provided an opportunity to review and comment on agency procedures as they are being drafted. Where appropriate, recommendations should be considered for adoption in the policy."

For many years the FAA has provided guidelines for the use of manned aircraft which may translate to the drone-journalism framework. The FAA issues Temporary Flight Restrictions ("TFR"), which can restrict flights depending on

(Continued on page 25)

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(Continued from page 24)

specific hazards or conditions. But recent reports suggest that local law enforcement agencies can obtain TFRs upon request, without the FAA specifying "the hazard or condition that requires the imposition of" the restriction. TFRs could be used to unduly restrict drone newsgathering, possibly premised on little more than the whims of law enforcement.

One exception to certain Notice to Airmen (NOTAM) conditions is triggered when "The aircraft is carrying properly accredited news representatives, and, prior to entering the area, a flight plan is filed with the appropriate FAA or ATC facility specified in the Notice to Airmen and the operation is conducted above the altitude used by the disaster relief aircraft, unless otherwise authorized by the official in charge of on scene emergency response activities." (14 CFR 91.137(c)(5))

Caselaw regarding aerial surveillance by the government is fairly well-settled. In *California v. Ciraolo*, 476 US 207 (1986), the Court held that the Fourth Amendment was not violated by naked-eye aerial observation of respondent's backyard. In another Supreme Court case, *Kyllo v. United States*, 533 US 27 (2001) the Court held "[w]here . . . the Government uses a [thermal imaging] device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." In dissent, Justice John Paul Stevens argued that the "observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of [Kyllo's] home but did not invade any constitutionally protected interest in privacy," and were, thus, "information in the public domain."

Viewing the recently decided case of *U.S. v Jones*, 132 S. Ct. 945 (2012), one might conclude that *government* use of warrantless drone surveillance might result in a similar outcome, that being – images and information obtained in this manner violate the Fourth Amendment and constitute an unreasonable search and seizure. Government use of a device (drone) not available to the general public to discover details of a place that otherwise would have been private in nature without physical intrusion may be considered unconstitutional. So long as there is a reasonable and subjective expectation of privacy, the government will still have to show probable cause in obtaining a warrant before conducting such surveillance. But – and there is always a but – what about exigent circumstances? Or will the exclusionary rule apply in a drone case?

The roads taken by the justices in coming to the unanimous decision in *Jones* are varied. Five Justices – Chief Justice Roberts along with Justices Scalia, Kennedy, Thomas, and Sotomayor – focused on the trespassory nature of the government activity (placing and using a GPS device on the property of a person) as analogous to a traditionally defined "search" of property. A concurring opinion by Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, rejected that approach and instead opined as to the "overly intrusive" nature of GPS tracking when viewed by a reasonable person. Justice Alito distinguished proper short-term monitoring from improper long-term surveillance (as was the case in *Jones*). Justice Sotomayor wrote a stand-alone concurrence – agreeing with both camps – that a "trespass" analysis is fitting because when "the Government physically invades personal property to gather information, a search occurs;" but expressing concern that, in an electronic age of rapidly evolving technology, citizens may have a reasonable expectation of privacy in cases where the government is able to obtain personal and private information without a "physical" intrusion or use of a sophisticated device.

Despite unanimity, the opinion left open the possibility that the evolving pervasiveness of technology will lead

(Continued on page 26)

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(Continued from page 25)

toward decreased societal standards regarding privacy expectations.

Extrapolating from the limited opinion in *Jones,* it is reasonable to see how a Fourth Amendment-protected property right might be raised in a drone case similar to one in which a car is driven in public and tracked by a GPS. That scenario could once again hinge on the time period such activity was under drone surveillance. This doctrinal hair-splitting might also be invoked as an affirmative defense in civil invasion of privacy suits. The outcomes and decisions will in all likelihood be very fact-specific and most probably be determined by the intrusiveness of the drones, the length of time they were deployed, the newsworthiness of the story, the level of "public-figure status" of the subject(s) of the drone surveillance and the degree of privacy someone might reasonably expect to have in a given situation.

Drone surveillance may be similarly justified where it could be argued that it does not constitute a "search in the constitutional sense" in that "the Fourth Amendment protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates."(*Jones* citing *Oliver v. United States*, 466 U. S. 170 (1984), that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law). But the government may once again wish to point to *Cardwell v. Lewis* (1974) (rejecting the claim that an external inspection and collection of evidence from the exterior of an impounded vehicle violated the Fourth Amendment) as evidenced by footnote 7 in *Jones*); or alternatively, that such surveillance constitutes a "reasonable search" as being a narrowly tailored incursion on that person's (now shifting) privacy expectations when weighed against a more significant governmental interest in the search.

It is apparent that despite proposed legislation and regulatory guidelines, with the expanded use of unmanned aerial vehicles for law enforcement or news gathering purposes, it will not be long before a drone case involving constitutional or privacy rights lands in court.

In his December 2011 Stanford Law Review article Ryan Calo argues that drones "could be just the visceral jolt society needs to drag privacy law into the twenty-first century." There has always been a number of competing tensions such as those: between the government and the press; privacy rights and public disclosure; as well as advancing technology and evolving societal standards versus emerging case law. Added to this mix is the traditionally fierce competition in the news industry, now exponentially compounded by the unprecedented availability of instantly accessible information via the absolute and world-wide proliferation of mobile devices capable of transmitting and receiving data and images.

Lawsuits and public apprehension over new technology is nothing new. The drone might well be considered a newer version of the Kodak Brownie, which in 1884 caused no end of concern when it allowed anyone to take photographs in public places rather than in the seclusion of the studio. That concern caught the attention of Louis D. Brandeis and Samuel D. Warren, who expressed the fear that the "sensationalistic press" would use this new-fangled device to wreak havoc on the Right to Privacy, which is what they titled their 1890 Harvard Law Review Article. This paper helped further "invasion of privacy" doctrine which they explained as occurring when "political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." They also took sight at newspapers in language that may be just as relevant today.

Recognizing with prescient clarity "that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation," they posed a similar question "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is[?]" But the truth is that the legal question concerning citizens' privacy rights has always been a problem for news gathering organizations. The potential litigation from the use of drone-captured images will be no different. All one need think about is Princess Kate Middleton, Jackie Onassis or Angelina Jolie and the extent that the press has gone to provide photos and video of their every move. Most of those have been accomplished using telephoto lenses and in some case helicopters. Drone technology would once again change that playing field.

(Continued on page 27)

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(Continued from page 26)

Drones may not create a backlash against photographers as much as against news organizations unless the so-called "paparazzo" resort to using small consumer-type drones to invade the privacy of high-profile individuals. As competition increases for celebrity or other high-interest photos that type of drone use may be inevitable, especially as drones become more affordable and the images they produce become of higher quality.

In a recent television report, a drone manufacturer in South Florida expressed the opinion that they "don't want to be on the news one day for having sold a drone to somebody who used it for other than a purpose we deem that is reasonable." Aside from carefully vetting their clients others propose legislation to limit drone surveillance. To that end Congress has proposed the "Preserving Freedom from Unwarranted Surveillance Act of 2012" (S. 3287 and H.R. 5925) which among other things would "Prohibit[] a person or entity acting under the authority of (or funded in whole or in part by) the federal government from using a drone to gather evidence or other information pertaining to criminal conduct or conduct in violation of a statute or regulation except to the extent authorized in a warrant satisfying the requirements of the Fourth Amendment to the Constitution."

Another bill, entitled the "Preserving American Privacy Act of 2012" (H.R. 6199) would "provide for limitations on the domestic use of drones in investigating regulatory and criminal offenses, and for other purposes." The seventeen (17) bills proposed during the 112th Congress involving drones may be found here.

It is apparent that despite proposed legislation and regulatory guidelines, with the expanded use of unmanned aerial vehicles for law enforcement or news gathering purposes, it will not be long before a drone case involving constitutional or privacy rights lands in court.

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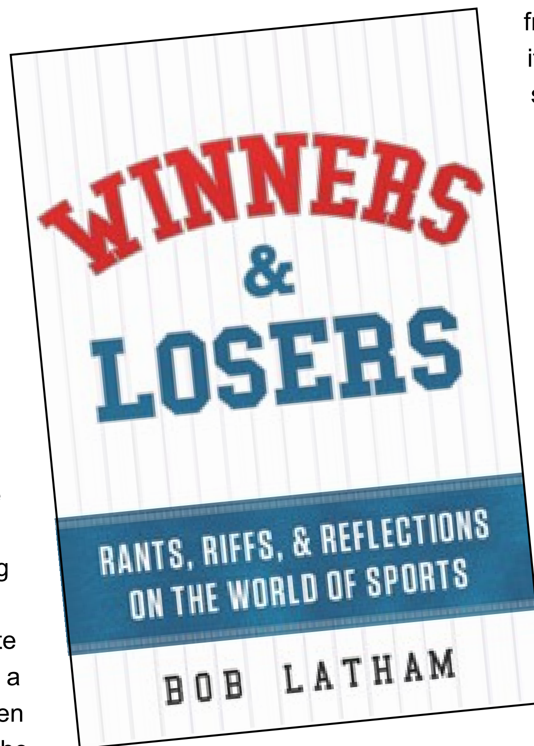
Bob Latham Is the Winner With *Winners And Losers*

By James Stewart

You may be wondering why a sports book is being reviewed in the *MediaLawLetter*. As with all things MLRC , it was Sandy's idea. I found myself at the Jackson Walker drink em up at Reston talking with Sandy and Bob Latham. Then there was something about Bob having written a sports book and Sandy saying she thought it would be a great idea if I did a review for the *MediaLawLetter*.

Well I knew from past experience that this was an order from She Who Must Be Obeyed. Plied with free drink, I agreed, thinking it would be a blast to sort of have some fun with Bob who has been a pal for years. With this in mind I went to the MLRC "Law of Opinion Practice Guide" for some litigation proof expressions. I soon had a list that included: In deciding to offer this book for sale, author Latham is clearly "not traveling with a full set of luggage" ; that the book was a "travesty of pretentious amateurism": that author Latham "was really slobbering over" the jocks that he was writing about.; or that the author was "looney tunes." I was all set to have some good natured fun.



Then I read the book and everything changed. It is excellent.

Make no mistake, Bob is a complete sports nut. The difference is that he is a sports nut with credentials. He has been Chairman of USA Rugby, a member of the International Rugby Board's Executive Council as well as a member of the board of directors of the United States Olympic Committee. I think he also does some power lifting in his spare time. So how does our manly man channel all this sports testosterone? Easy, he moonlights as a columnist for *Sports Travel* Magazine. Note the word "travel." This means, from what I can tell from the book, places like St Andrews, New Zealand, Wimbledon, Italy and the Tour de France along with various Olympic Games,Super Bowls and All Star Games. Not bad.

The full title of the book is *Winners and Losers :Rants, Riffs and Reflections on the World of Sports.* It's divided into 7 chapters with titles including , " Places I Remember," Learning from the Game," " Trouble Ahead, Trouble Behind," "Not Your Everyday People" (the Baby Boomers among us can explain the hidden song titles in those last two to the Twentysomethings) and concludes with "Taking a Look Back." In each chapter are collections of essays on particular events or people related to the chapter title-each about 2-5 pages long.

You could probably read the book from cover to cover but it's really better if picked up from time to time to read several of the essays and reflect on them. Some will leave you laughing out loud and some will leave you in a quiet and reflective mood. If I had to pick my favorite (and it's hard to do) it would be the piece on Muhammad Ali's 70th birthday perfectly entitled simply "The Champ." It captures with vivid detail what an iconic figure Ali was and is despite his failing health. To quote Bob, "Love him, hate him, be turned off by his chosen trade, but Muhammad Ali is the most culturally consequential athlete of the 20th Century."

But the reflections, and I think there are more reflections than riffs and rants here, are not all serious. There's fun to be had but never at anyone's expense. For you closet NASCAR lovers out there,"My NASCAR Experience" will probably be your favorite. The rest of you will be laughing out loud as our writer friend who is always so impeccably turned out at MLRC events dons a flame retardant racing suit and helmet, crawls through the passenger window and is strapped in so tightly that "movement is not an option." He then goes for a few lap spin at almost 200 miles per hour. The description is amusing but right on : " Since the hallmark of NASCAR is that you are in a stock car, the

(Continued on page 29)

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(Continued from page 28)

view from the passenger's seat is not uncommon. What is uncommon is to be heading toward a wall at 170 mph and not slowing down" and "Then there is the sound. While you can appreciate the sound of the engine from the stands, hearing it so close to your seat makes you feel that you are inside the sound itself."

This book is not written in "jock talk." There are no references to "athleticism" (a term invented by the infamous Howard Cosell) and there are no descriptions of one team having " greater physicality " than the other. This is well crafted and thoughtful writing throughout. Bob seamlessly combines humor with serious reflection. When you read "Tiger, Joe and Jack" which begins with a description of Tiger Woods on his return to tournament golf from his "problems" as : " [t]he world's number one golfer and number one estranged husband, the latter having more contenders than the former, freshly back to pro golf from sex rehab" you'll think you're in for some fun. (For the record Bob emphasizes that he does not know what they teach in sex rehab). But then the first thing you know Bob is describing little known s similarities between Tiger and the iconic Yankee Joe DiMaggio and his marriage of a few months to Marilyn Monroe. He then emphasizes the devotion of Jack Nicklaus (the man Tiger wants so desperately to surpass) to his wife Barbara. Or try 'Hot Dog Gate" when he turns the uproar (really) over Jets Quarterback Mark Sanchez eating a hotdog during a televised time out into a serious "teaching moment" for young athletes.

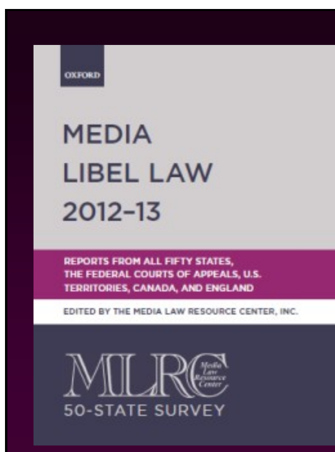
And there's also controversy. No sports book could be complete without it. "Wish I'd Been There" lists Bob's take on the Question: "Out of all the sports events in history which one do you most wish you had attended?" This is the sort of thing that prompts endless discussions (arguments) everywhere from the Harvard Club to Duffy's Saloon. (As someone who grew up in Pittsburgh I am stunned and outraged that anyone who considers himself a sports journalist did not include the "Immaculate Reception" by the Pittsburgh Steelers' Franco Harris against the Oakland Raiders which started the Steeler dynasty. I will take this ridiculous and unsupportable omission up with Mr. Latham at the next MLRC event. I trust he will not make the lame excuse that he did not include it just because no one saw Harris actually catch the ball.)

Space prevents me from discussing more of the essays, but there is lots of fun and plenty of serious reflection for everyone and not just sports fanatics. There's everything from womens gymnastics and other Olympic sports to rugby, tennis, golf, and well you name it. There is however nothing on Hillbilly Hand Fishing which may disappoint some of you.

An editor once told me that the secret to all successful columnists is that they make a personal connection with their readers. I've known Bob for a good while, but having read the book I know him better and so will you. There's a lot of Bob in these pieces. When you read " Sharing the Fandom" and "Resting at Wrigley" you'll agree with me and look forward to reading more from Bob.

The book is published by Greenleaf Book Group Press. Retail release was Tuesday, October 2. It's also available online at a number of online outlets including Amazon.com and Barnes & Noble.

James Stewart is a partner at Thompson Knight LPP in Detroit, MI and is a former President of MLRC's Defense Counsel Section.



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Irish High Court Quashes Deposition Subpoena for U.S. Litigation

Journalist & Expert Privilege: Requirement for Deposition Not Convincingly Established

By Kieran Kelly and Ronan Lupton

The Irish High Court this year held that an *ex parte* application to depose witnesses, made on behalf of a Defendant to proceedings in the District Court of Colorado requiring witness testimony had not been convincingly established on its evidence: *Cornec v. Morrice*, (2012) IEHC 376 (September 18, 2012) (Hogan J.). The Irish High Court was clear that while journalistic privilege strictly does not exist in Ireland, Article 40.6.1. of the Irish Constitution, dealing with freedom of expression afforded journalists, or traditional media, and non-traditional media, in the form of bloggers, similar freedom of expression protections.

The Irish High Court was clear that while journalistic privilege strictly does not exist in Ireland, Article 40.6.1. of the Irish Constitution, dealing with freedom of expression afforded journalists, or traditional media, and non-traditional media, in the form of bloggers, similar freedom of expression protections.

The Court did not deem it necessary or desirable to express a view on the question of foreign law presented before it, namely, the construction of Colorado's press shield law and whether the proposed deponents would have been able to avail it in order to assert a journalistic privilege conferred by statute and complying with the oath and procedural rules of the State of Colorado. The relevant Colorado Statute being Privilege for newsperson (C.R.S. 13-90-119, Colorado Revised Statutes).

Background

Litigation presently pending in the District Court of Denver, Colorado ("the Colorado litigation") concerns a disputed share purchase contract regarding shares of an oil company registered in St. Kitts and Nevis and which is currently operating in Belize. A party applied in Ireland to take evidence of an investigative journalist, and of a former theologian who specialises in the investigation of cults. The application was presented to the Irish High Court under section 1 of the Foreign Tribunals Evidence Act 1856 ("the Act of 1856").

In this case orders were sought to compel two individuals - Nicola Tallant and Mike Garde – (the Respondents) to testify for the purposes of US civil proceedings. Both objected to the orders on various grounds, including the argument that requiring their testimony would reveal both their sources and the information provided by these sources, contrary to their journalistic privilege recognized by Irish law. ("Journalistic privilege" while not strictly speaking available in Ireland, is nevertheless a useful phrase to capture the rights that journalists may have in certain situations.)

In the case of Nicola Tallant, an investigative reporter with the Sunday World newspaper, there was no difficulty for the Court in applying the concept of journalistic privilege.

The position of Mike Garde was rather more ambiguous. As the court put it, he was *"not a journalist in the strict sense of the term"*. Instead, he was a director of Dialogue Ireland - an independent organization working with people who become caught up in cults or fringe religions - and regularly appeared in the media and blogged about such issues . The Court ruled that he should also benefit from a similar protection, holding that:

> "While Mr. Garde is not a journalist in the strict sense of the term, it is clear that his activities involve the chronicling of the activities of religious cults. Part of the problem here is that the traditional distinction between journalists and laypeople has broken down in recent decades, not

(Continued on page 31)

RETURN TO TABLE OF CONTENTS

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(Continued from page 30)

> least with the rise of social media. It is probably not necessary here to discuss questions such as whether the casual participant on an Internet discussion site could invoke Goodwin-style privileges, although the issue may not be altogether far removed from the facts of this case.
>
> Yet Mr. Garde's activities fall squarely within the "education of public opinion" envisaged by Article 40.6.1. A person who blogs on an internet site can just as readily constitute an "organ of public opinion" as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1, namely, the radio, the press and the cinema. Since Mr. Garde's activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected. It does not require much imagination to accept that critical information in relation to the actions of those bodies would dry up if Mr. Garde could be compelled to reveal this information, whether in the course of litigation or otherwise. It is obvious from the very text of Article 40.6.1 that the right to educate (and influence) public opinion is at the very heart of the rightful liberty of expression. That rightful liberty would be compromised – perhaps even completely jeopardised – if disclosure of sources and discussions with sources could readily be compelled through litigation." [Emphasis added]

The application raised many difficult questions of evidence, procedure, conflict of laws and the scope of journalistic privilege.

The background to the Colorado litigation

In the proceedings before the Court in Colorado Ms. Morrice, a British national and a petroleum geologist who, along with Mike Usher, a Belizean seismic surveyor, had long believed that Belize had (then undiscovered) oil reserves. To that end, they set up a series of companies that are now controlled by International Natural Energy LLC ("INE"). A subsidiary of INE, Belize Natural Energy Ltd. ("BNE") was granted a prospecting licence by the Belizean Government in January, 2003 and, to the surprise of industry observers, BNE discovered significant quantities of oil in June, 2005. Oil was then extracted and BNE commenced production and sale in January, 2006. In the words of Mr. Justice Bannister of the East Caribbean Supreme Court (Nevis Circuit) in *SM Life Ventures v. Morrice*, in a judgment delivered on July 16th, 2012, BNE has since "been astonishingly successful". The decision in SM Life Ventures provides background to the subsequent dissension within INE, since it concerns an oppression petition brought in the Nevis courts by the dissident shareholders in the company.

One of the other dissident shareholders was the plaintiff in the Colorado proceedings, Jean Cornec , a mining engineer who had previously worked in Belize identifying its stratigraphy. Mr. Cornec and Ms. Morrice were among the five original promoters of the company and were among a handful of Class A shareholders. It appears that many difficulties arose in 2002 when Ms. Morrice was introduced to Mr. Tony Quinn by another Class A shareholder, Ms. Shelia McCaffrey.

In August, 2008 an agreement was entered into whereby Ms. Morrice agreed to purchase Mr. Cornec's shares in INE for a sum just under US$17.6m. This was financed by an immediate cash payment of $2m and a promissory note for just under $15.6. The loan notes were payable in 12 installments. Ms. Morrice made two principal payments, but had made no further payments since October, 2008. To date, therefore, Mr. Cornec has received a sum in excess of $4.7m.

At the heart of Mr. Cornec's claim is a claim for breach of contract for a liquidated amount just under $13m., together with other related claims. For present purposes, however, what is most critical are the terms of Ms. Morrice's counter-claim. In essence her case is that Mr. Cornec immediately violated the terms of the share purchase agreement in a material respect, thus entitling her to repudiate the agreement.

Critically, the agreement included a non-disparagement clause. Clause 5.4 of the Share Purchase Agreement provided that Mr. Cornec agreed that:-

> "He will not in any way, cause to be made or otherwise disclose any disparaging comment, statement of communication about purchaser [Ms. Morrice] or any director or member of INE or their

(Continued on page 32)

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(Continued from page 31)

> respective affiliates (a "Negative Remark") either verbally or in writing to any person, entity or authority."

The Share Purchase Agreement went on to provide that breach of the Clause is deemed to be a material misrepresentation and Clause 6.1.2 in particular provides that:

> "Purchaser may offset any amounts due from Seller to Purchaser under this Section 6 against payments due under the Note."

Central to Ms. Morrice's counterclaim, therefore, is the contention that, the non-disparagement clause notwithstanding, Mr. Cornec arranged or organized for critical comments to be made in the media and elsewhere aimed at herself, Tony Quinn and INE. Specifically, Ms. Morrice contends that Mr. Cornec's attorney, Ms. Katrina Skinner, traveled to Ireland at his behest in November, 2008 and there met a number of individuals who were broadly antipathetic to Mr. Quinn and, by extension, to Ms. Morrice. Particulars were given in the pleadings as to the nature of these contacts from November, 2008 onwards. It was contended that Ms. Skinner met with Mr. Garde and Ms. Tallant and that as a result of these contacts critical articles were published by Mr. Garde on a website and Ms. Tallant in the Sunday World newspaper.

The power to grant international assistance via the letters rogatory is, of course, a discretionary one. Naturally, in the interests of the international judicial comity, a Court will endeavour to give assistance where at all possible to requests of courts from foreign states.

Mr. Garde, a director of a charity known as "Dialogue Ireland", has a particular interest in new religious movements, especially those where there is reason to suspect that undue psychological pressures or influence have been used over adherents.

Ms. Tallant an investigative reporter with the Sunday World newspaper, the largest selling newspaper in Ireland and has written extensively about Mr. Quinn. Two articles in particular were the subject of some debate in the hearing before the Irish Court. The first of these is from the 1st March, 2009, which contains a lengthy interview with a disaffected former follower of Mr. Quinn, Marie Lalor. Ms. Lalor contends that she was effectively indoctrinated into believing that Mr. Quinn was the reincarnation of Jesus Christ and that one of his closest followers was the reincarnation of Moses. She further contended that Mr. Quinn described memories of a previous life on the (mythical) island of Atlantis.

The second article was published on 6th September, 2009, and is perhaps more directly relevant to the present application. It is headed "Exclusive: 'Messiah' Appointed to Company Board by Gullible Disciples – Guru Tony Strikes Oil".

The application before the Irish High Court was essentially about Ms. Morrice's contention that Mr. Cornec did not honour his side of the bargain and that he repeatedly violated the non-disparagement claim, not least by arranging for Ms. Skinner to come to Ireland in order to meet Mr. Garde and Ms. Tallant and, indeed, others who were hostile to her, Mr. Quinn and INE. To this end, therefore, Ms. Morrice contended that Mr. Garde and Ms. Tallant were relevant witnesses who ought to be deposed and that the Irish High Court should accordingly give effect to the letters rogatory issued by Judge Bronfin of the District Court of Denver on 31st May, 2012, which amongst other things sought the depositions of Ms. Tallant and Mr. Garde.

The evidence sought was, subject to one major qualification, clearly relevant to the Colorado proceedings. While the ultimate meaning and effect of the non-disparagement clause will be a matter for the Denver courts, on any view, it prevents Mr. Cornec and his agents supplying information which is critical of INE and its members to a journalist such as Ms. Tallant or a person in the position of Mr. Garde. There seemed little doubt on the evidence but that, for example, Mr. Cornea's attorney and agent, Ms. Skinner, traveled to Ireland and that there were subsequent contacts (direct and indirect) between Mr. Cornec, Ms Skinner and others with Ms. Tallant and Mr. Garde. Thus, for example, e-mail correspondence, which was exhibited in the proceedings, was strongly suggestive of the fact that assistance was given to Ms. Tallant to enable her to write the story regarding the INE litigation, Ms. Morrice and Mr. Quinn which was published in September, 2009.

All of the evidence suggested that Ms. Tallant and Mr. Garde were highly relevant witnesses to the Denver litigation

(Continued on page 33)

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(Continued from page 32)

so far as the counter-claim on the non-disparagement clause is concerned.

While Mr. Garde and Ms. Tallant were found to be relevant witnesses the Court observed that some of the questions contained in the letters rogatory were directed to inquiries about information supplied by Mr. Garde and Ms. Tallant respectively to Ms. Skinner. However, the supply of information by either Mr. Garde or Ms. Tallant was not material to any possible breach of the non-disparagement clause and the Court proposed, in any event, to disallow the questions stated as irrelevant.

The nature of the application under the Foreign Tribunals Evidence Act 1856

The Act of 1856 is a pre-Irish Constitution statute, which must, where necessary be read in a fashion which would make it conformable to the modern understanding of the requirements of fair procedures as prescribed by Article 40.3. of the Irish Constitution (dealing with Personal Rights). It is absolutely clear that the courts cannot constitutionally make an order *ex parte* finally affecting the rights of the parties.

It was for these reasons that the Court indicated that the *ex parte* procedure did not and could not finally affect the rights of Mr. Garde and Ms. Tallant and the fact that an initial order was made in favor of Ms. Morrice created no presumption in her favor.

The power to grant international assistance via the letters rogatory is, of course, a discretionary one. Naturally, in the interests of the international judicial comity, a Court will endeavour to give assistance where at all possible to requests of courts from foreign states and, as Denham J. put it in *Novell Inc. v. MCB Enterprises* [2001] 1 I.R. 608, it should "*be slow to refuse such an order.*" Nevertheless, before any such order could properly be granted, it would be necessary to establish that (i) the evidence proposed to be taken is relevant to the foreign proceedings; (ii) the application is not oppressive; (iii) the grant of the request would not override any established privilege or protection available to the prospective witness and (iv) the evidence so taken on commission is itself admissible under the law of the requesting state. The application for such judicial assistance must satisfy all four of these conditions. The Court considered each of these conditions in turn.

The Decision

In setting aside the *ex parte* order, the Court considered that the questions posed in the letters rogatory would inevitably probe the identity of the Respondents' sources and the information conveyed to them by those sources as part of a core journalistic activity. The Court held that the Respondents could properly decline to answer those questions if the same questions were posed to them in an Irish court, and the Court accordingly declined to give effect to the letters rogatory so far as Ms. Tallant and Mr. Garde were concerned.

The Court commented that while Ms. Tallant's evidence would be plainly relevant to the Colorado proceedings, such evidence would be essentially confirmatory of evidence already available to Ms. Morrice through the US depositions and discovery process. In other words, Ms. Morrice already knew that Ms. Skinner and Ms. Lalor spoke with Ms. Tallant shortly in advance of the September, 2009 article. It would be unrealistic to suggest that the discussions did not concern the affairs of Ms. Morrice and Mr. Quinn, thus potentially triggering the application of the non-disparagement clause. Given that this avenue was already open to Ms. Morrice – and she has already successfully availed of it – this weakened the case for disclosure on the part of Ms. Tallant as her evidence – while undoubtedly helpful and confirmatory of other evidence – could not be said to be essential.

While Mr. Garde was not a journalist in the strict sense of the term, it was clear that his activities involved the chronicling of the activities of religious cults. Part of the problem is that the traditional distinction between journalists and laypeople has been blurred in recent times, not least with the rise of social media. It is probably not necessary here to discuss questions such as whether the casual participant on an Internet discussion site could invoke journalist-style privileges, although the issue may not be altogether far removed from the facts of this case.

Mr. Garde's activities fell squarely within the *"education of public opinion"* envisaged by Article 40.6.1. of the Irish Constitution. A person who blogs on an internet site can just as readily constitute an *"organ of public opinion"* as those which were more familiar in 1937 and which are mentioned in Article 40.6.1, namely, the radio, the press and the cinema. Since Mr. Garde's activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected. It does not require

(Continued on page 34)

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(Continued from page 33)

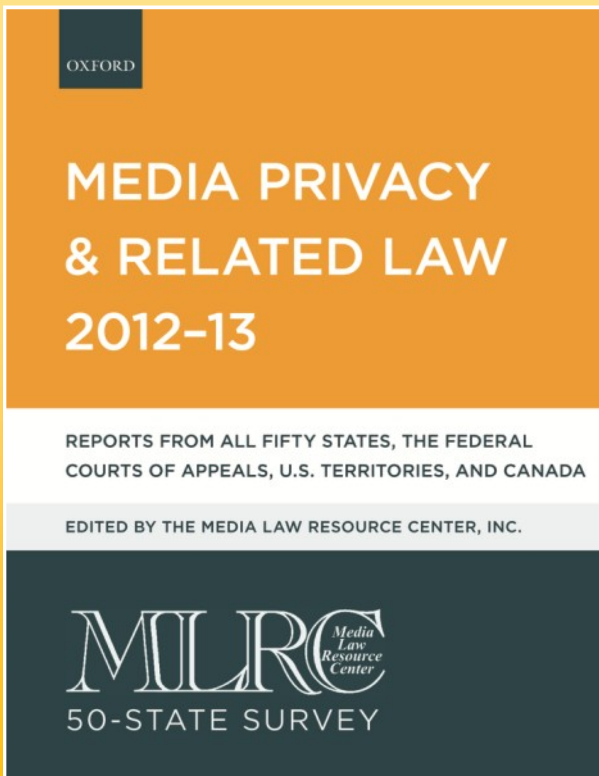
much imagination to accept that critical information in relation to the actions of those bodies would dry up if Mr. Garde could be compelled to reveal this information, whether in the course of litigation or otherwise. It is obvious from the very text of Article 40.6.1 that the right to educate (and influence) public opinion is at the very heart of the rightful liberty of expression. That rightful liberty would be compromised – perhaps even completely jeopardised – if disclosure of sources and discussions with sources could readily be compelled through litigation.

It followed, therefore, that Mr. Garde had a similar interest to that of Ms. Tallant in ensuring that his sources are likewise protected. Of course, just as with Ms. Tallant, he is plainly a relevant witness to the Colorado litigation. Ms. Skinner (and others associated with Mr. Cornec) also seemed to have either met with or corresponded with him. But his evidence would also be substantially confirmatory of material already in possession of Ms. Morrice. There were no strong competing arguments to the contrary which would weigh against the public interest in ensuring that Mr. Garde is not required to disclose his sources or the contents of these discussions.

The Court also recalled that the Colorado proceedings merely involve commercial proceedings, albeit for very significant sums of money. This is not to take from the intrinsic importance of these proceedings, but the public interest in disclosure is not as compelling as would have been the case, for example, where the potential innocence of a third party was at stake in criminal proceedings.

The Court was not persuaded that the case for compelling Ms. Tallant and Mr. Garde to give evidence has been, in the words of the European Court in *Goodwin (Goodwin v. United Kingdom* (1996) 22 EHRR 123*)*, "convincingly established."

Respondents were represented by Brian O'Moore S.C., Ronan Lupton B.L., instructed by Kieran Kelly of Fanning and Kelly Solicitors – for Ms. Tallant. Seamus O'Tuathaill S.C., and John Smith B.L., instructed by Cormac O'Ceallaigh ,Solicitors . Applicants were represented by James O'Callaghan S.C., and Niall Buckley B.L., instructed by Johnsons Solicitors.



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French Court Prohibits Further Publication of Topless Kate Photos by Closer Magazine

By Jean-Frederic Gaultier

For several days in mid-September, the English media was filled with headlines about French celebrity magazine *Closer's* publication of topless pictures of the Duchess and Duke of Cambridge, though emotion mainly concerned those pictures of the Duchess. Many reporters wondered how this could be authorized, whether it could it be prohibited, and whether the photographer should go to jail.

Five days after the publication, in a decision given on September 18, 2012, the Nanterre court (in the vicinity of Paris) answered the two first questions by issuing a preliminary injunction prohibiting *Closer* from further distributing the pictures and ordering it to remit to the plaintiffs the electronic media on which said pictures were kept by the magazine. The couple also announced that they filed a criminal complaint and an investigation is ongoing. The decision of the Nanterre court is a rather standard application of French and European privacy laws. Filing a criminal complaint on the grounds of invasion of privacy is more unusual.

French Privacy Law

Article 9 of the French Civil Code, enacted in 1970, provides that "*Everyone has the right to respect for his private life.*" It echoes Article 8 of the European Convention on Human Rights which provides that "*Everyone has the right to respect for his private and family life, his home and his correspondence.*" Applying these provisions, case law traditionally rules that there is an invasion of privacy when (i) information relating to private life, (ii) is published, (iii) without the consent of the concerned person.

There is no fixed definition of private life. Categorization of an event of private life will depend upon the circumstances. French courts are said to be very protective of private life. Similarly to the European Court of Human Rights, they balance Article 8 against Article 10 of the European Convention of Human Rights, which protects freedom of expression.

Both are considered to be of equal importance, and the court must determine which one should prevail, applying the following test:

- is there an interference in the freedom of expression (i.e. a claim likely to interfere with freedom of expression);
- is such interference authorized by law;
- is it justified in a democratic society.

To satisfy this last criterion, one must demonstrate that the requested interference is justified by an "*imperious social need.*" For such purposes, courts will take into account a certain number of factors, such as:

- Was consent given? Analysing all the circumstances of the case such as: were the reported facts (or published photographs) from a public place? What was the past attitude of the plaintiff vis-à-vis the press? And vis-à-vis the reported facts?
- Are the reported facts trivial?
- Was the publication in the interest of the public?

There is some flexibility in the application of these criteria, not only among European countries, but also among French courts. Some consider that there is invasion of privacy even though a picture was taken in a public place, or was revealing trivial information.

With respect to the interest of the public, which is

(Continued on page 36)

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(Continued from page 35)

frequently considered as the most important factor, it of course does not mean satisfying the public's curiosity, but reporting newsworthy information.

Privacy of the Princess

In the present case, *Closer* argued, among others, that the photographs were trivial, hundreds of pictures of topless celebrities being published every month across Europe; the couple could be seen from the road; publication was newsworthy, the Duchess being an icon for numerous fans who would be interested in learning what bathing suit she wore, and how relaxed and happy the married couple was.

These arguments, though, were swept away by the Court, which recalled that the photographs had been taken with a long lens from far away, the couple was on vacation, in a private house, and in an intimate moment, such that no public interest could justify the intrusion. As a result, subject to a 10,000 euro fine per new publication, the Court prohibited *Closer* from further distributing the photographs, and ordered it to remit to the plaintiffs "*all the digital media in their possession containing the photographs.*"

Closer was also ordered to pay 2,000 euros in legal fees. It has been reported that *Closer* was contemplating lodging an appeal. The plaintiff did not ask for the recall of the magazines that were already in the newsstands.

The principles on which the decision of the Nanterre court is based are rather standard, though it is unusual to order that the "digital media containing the photographs" be remitted to the claimants. The efficiency of this measure is doubtful, the pictures being easily available on the internet, and have been republished by several other press organizations.

More unusual is the filing of a criminal complaint, and the potential consequences it entails with respect to the secrecy of the journalist's sources. Invasion of privacy may qualify as a crime when specific circumstances are met. Article 226-1 of the French Criminal Code provides that "A penalty of one year's imprisonment and a fine of €45,000 is incurred for any wilful violation of the intimacy of the private life of other persons by resorting to any means of: 1° intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker; 2° taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned. Where the offences referred to by the present article were performed in the sight and with the knowledge of the persons concerned without their objection, although they were in a position to do so, their consent is presumed."

In other words, taking the picture of a person in a private place, without the consent of the person, may constitute an act of criminal invasion of privacy. The most publicized recent case concerned the defunct News of the World which had published photographs of Max Mosley in a private moment taken in a private house. Mr Mosley not only sued the newspaper in the UK, but also filed a criminal complaint in France with respect to the distribution of the printed edition of the newspaper in France. The newspaper was found guilty and ordered to pay a fine in the amount of 7,000 euros, in addition to 15,000 euros compensation to Mr Mosley.

In the *Closer* matter, a preliminary investigation is now on going. It has been said that it will aim, among others things, at identifying the photographer who took the pictures. The journalist and other relevant individuals will most certainly be interrogated. The journalist is entitled to refuse to answer and cannot be forced to do so. One may thus fear that a search be carried out in the premises of the newspaper, at the domicile of the journalist, or in any other relevant place. There have been rumours that a search already took place, but that was immediately denied by *Closer*.

Article 2 of the law on the press, enacted on January 4, 2010, provides that: "The secrecy of the sources of journalists is protected in the carrying out of their mission of informing the public. (…) One cannot directly or indirectly breach the secrecy of sources unless justified by an overwhelming imperative of public interest and if the contemplated measures are strictly necessary and proportionate to the legitimate goal which is pursued. (…)."

The Article 2 further adds that, in the framework of criminal investigation, in order to decide whether a breach of the secrecy of sources is necessary, the following must be taken into account: the seriousness of the crime or offence, the importance of the information sought in order to prove the facts, and whether the contemplated measures are necessary in order to establish the truth. French law mirrors the case law of the European Court of Justice with respect to the protection of the secrecy of sources.

French law on this topic being recent, however, there is

(Continued on page 37)

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(Continued from page 36)

very little case law rendered by French courts. Some guidance might be given by a decision given on December 6, 2011 by the Supreme Court upholding a decision of the Court of Appeal in Bordeaux. Journalists of the French newspaper *Le Monde* had reported information relating to an ongoing criminal investigation in a highly publicized case. Suspecting that a judge may have been at the origin of the leak, which would then constitute a violation of professional secrecy, the prosecutor had requested from telephone operators the details of the phone calls made by the journalists of *Le Monde*, in order to check whether they had been in contact with the judge.

Le Monde filed a criminal complaint against the prosecutor on the grounds of a violation of Article 2 above. The Court of appeal in Bordeaux ruled that there was an obvious violation of the secrecy of the journalists' sources, and that there was no overwhelming public interest to violate said secrecy. The court found that violation of professional secrecy by a judge is serious enough because it may undermine ongoing investigation, but that (i) the mere suspicion of the prosecutor was not sufficient, (ii) the underlying criminal case concerned an investigation on "abuse of weakness" which in the circumstances was not considered to be a sufficiently serious crime, and (iii) the measures taken by the prosecutor was neither necessary nor proportionate given that the concerned persons had not even been heard.

In the *Closer* matter, it is doubtful that a court would find that the underlying crime, i.e. violation of Article L.226-1 of the Criminal Code which resulted in the publication of photographs of a topless women, is a sufficiently serious crime justifying a violation of the secrecy of sources.

No decision is expected in the criminal matter until at least 18 months.

Jean-Frederic Gaultier is a partner at Olswang France LLP.

Ninth Circuit Issues Divergent Commercial Speech Decisions

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

On October 15, 2012, the Ninth Circuit Court of Appeals issued two decisions notable for their discussion of what constitutes commercial speech under the First Amendment. The court's decisions to find yellow pages directories fully protected speech, but not a billboard advertising a television program, are nothing if inconsistent.

Dex Media West, Inc. v. City of Seattle, 2012 WL 4857200 (9th Cir. Oct. 15, 2012)

In this case, the Ninth Circuit struck down an ordinance regulating yellow pages directories.

The ordinance, enacted in 2010 by the City of Seattle, required publishers of yellow pages directories to obtain permits and pay a fee for each directory distributed in the city; established an opt-out registry through which residents could decline to receive directories; and required directory publishers to advertise the availability of the registry on the cover of their directories.

Two companies and an industry organization challenged the validity of the ordinance based on the First Amendment and Commerce Clause of the United States Constitution, Washington State Constitution, and statutes. The district court for the Western District of Washington, reasoning that the directories were commercial speech, granted summary judgment to the defendants. The Ninth Circuit reversed, finding that "yellow pages directories qualify for full protection under the First Amendment."

The district court based its decision on the factors set forth in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), looking at the advertising format, references to specific products, and economic motivation for the publication, to find the directories were commercial speech. It then found the directories' commercial speech was not inextricably intertwined with noncommercial speech because the noncommercial portions—i.e., maps, listings, and street guides—need not be combined with advertising. Finally, it found the ordinance satisfied the intermediate scrutiny standard applicable to commercial speech because the government had a substantial interest in waste reduction, residential privacy, and cost recovery, and there was a reasonable fit between the ordinance and the interests.

(Continued on page 38)

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(Continued from page 37)

The Ninth Circuit disagreed. It found that although many ads in the directories were "core" commercial speech, i.e. "speech which does no more than propose a commercial transaction," the ordinance regulated the phone book as a whole, and the telephone listings and community information were noncommercial speech. It then used a two-part test, looking first to whether the "publication as a whole constitutes commercial speech," and second, if they are, to whether "the commercial aspects of the speech are 'inextricably intertwined' with otherwise fully protected speech." Under this test, it found that the directories went "beyond the threshold classification of commercial speech," noting that "economic motive in itself is insufficient to characterize a publication as commercial." The court then found the ordinance failed to satisfy strict scrutiny because it was not the least restrictive means of serving the city's asserted interests.

The court's opinion is notable for its extensive and helpful discussion of the First Amendment. It stated, for example, that

> [t]he First Amendment does not make protection contingent on the perceived value of certain speech. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment protects Hustler Magazine, too. Both newspapers and yellow pages directories contain noncommercial speech; a distinction in treatment on the basis of the perceived difference in worthiness of that noncommercial speech is not permitted.

Charles v. City of Los Angeles,
2012 WL 4857194 (9th Cir. Oct. 15, 2012)

In this opinion, issued the same day as *Dex Media*, the court found that a billboard advertising an entertainment news program was commercial speech and thus subject to the city of Los Angeles's sign permitting requirements.

Appellants sought to install a temporary offsite sign advertising the television program "E! News" without obtaining a permit under the city's ordinance, which contained an exemption for temporary signs that do not "contain[] a political, ideological or other noncommercial message." The sign would have featured the "E! News" logo as well as photographs of the show's hosts. The city deemed the sign "strictly commercial in nature" and notified Appellants that it would violate the ordinance. The district court agreed and granted judgment in its favor.

The Ninth Circuit affirmed, stating the question before it was "whether truthful advertisements for expressive works protected by the First Amendment are inherently noncommercial in nature." Applying the *Bolger* test, the court found that it was not. Specifically, the court found that the sign was an advertisement and undisputedly referred to a particular cultural product, and that Appellants had an economic motivation in encouraging the public to view the program.

The court rejected Appellants' argument that advertisements for noncommercial expressive works go beyond a proposal for a commercial transaction by promoting the "ideas, expression and content contained in the works," finding that "[t]he test for commercial speech is not so lacking in nuance." Although ads for noncommercial works "might" include both a proposal for a commercial transaction and "some amount of noncommercial expression," the government "may … restrict the commercial message regardless of its proximity to noncommercial speech."

The court concluded that "[d]octrines extending noncommercial status from a protected work to advertising for that work are justified only to the extent necessary to safeguard the ability to truthfully promote protected speech." It found that Appellants had failed to show such a justification and squarely rejected the idea that "truthful advertisements for books, films, video games, topless dancing, and all other forms of noncommercial expression [are] beyond the reach of commercial speech regulations."

In so ruling, the *Charles* court took a far more restrictive approach to decide the billboard was not commercial speech, reading *Bolger* literally without fully considering, as the *Dex Media* court did, the purposes behind the First Amendment's protection of noncommercial speech.

Bruce E.H. Johnson is a partner, and Ambika K. Doran is an associate, at Davis Wright Tremaine LLP in Seattle.

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Media Coalition Successfully Fights Gag Order, Request to Seal Records, in George Zimmerman Murder Trial

By Scott D. Ponce and Charles D. Tobin

Citing the arguments made by a coalition of fifteen media organizations, a Florida trial judge has denied the prosecution's requests for a gag order and to seal subpoena proceedings in the murder trial of George Zimmerman, who is charged with second degree murder in the death of teenager Trayvon Martin. *Florida v. Zimmerman,* No. 12-1083 (Fla. Cir. Oct. 29, 2012).

After full briefing and almost two hours of oral argument, Judge Debra S. Nelson on October 29 issued a written order rejecting the State's request that she prohibit the attorneys and law enforcement officers from speaking publicly about the case. Nelson ruled that the State failed to meet its burden of proving that alternatives to a gag order would not be effective in ensuring an impartial jury.

In an earlier hearing, Judge Nelson on October19 denied another prosecution motion asking to seal all proceedings and records involving requests for subpoenas. Under Florida's criminal rules, subpoenas are issued only after a hearing. Nelson ruled from the bench that the State had not met its burden on this issue either.

The court has now denied five requests by prosecutors or defense counsel to seal records, close the courtroom or prohibit public comments in the case.

Zimmerman, the neighborhood watch coordinator for his gated Sanford, Florida community, has pleaded not guilty and claims Martin attacked him. Martin, who was African American, was walking unarmed through Zimmerman's predominantly white neighborhood. Martin's family has said that the young man was taking a short cut home after buying a package of Skittles and an iced tea at a nearby store.

The State claimed that Zimmerman's attorney's unprecedented media and Internet presence would make it impossible to seat an impartial jury. The defense argued that the representatives of the victim's family have aggressively used the media to tell their side of the story, making it imperative that Zimmerman's representatives do the same. The media organizations argued that a fair trial requires impartial jurors, not ignorant ones, and there was no evidence that extrajudicial statements were substantially likely to materially prejudice the trial that has been schedule for June 2013.

Scott D. Ponce, Sanford L. Bohrer and Charles D. Tobin, of Holland & Knight LLP, Miami, FL and Washington, D.C., represent Media Interveners The McClatchy Company, publisher of The Miami Herald and The Bradenton Herald; NBCUniversal Media LLC; Gannett Co., Inc., publisher of USA TODAY, The News-Press, Pensacola News Journal, FLORIDA TODAY, The Tallahassee Democrat, and owner of First Coast News and WTSP-TV; New York Times Company, publisher of The New York Times; Times Publishing Company, publisher of The Tampa Bay Times; The Associated Press; Dow Jones & Company, Inc., publisher of The Wall Street Journal; The E.W. Scripps Company, publisher of Naples Daily News, Stuart News, Ft. Pierce Tribune, and Vero Beach Press Journal, and owner of WPTV-TV and WFTS-TV; CBS News, a division of CBS Broadcasting Inc. and WFOR-TV, owned and operated by CBS Television Stations Inc.; The Hearst Corporation, owner of WESH-TV and WPBF-TV; Morris Publishing Group, LLC, d/b/a The Florida Times-Union; Cable News Network, Inc.; The First Amendment Foundation; and Florida Press Association

Gregg D. Thomas and Rachel E. Fugate, Thomas & LoCicero PL, Tampa, FL, represent Orlando Sentinel Communications Company, publisher of the Orlando Sentinel; Sun-Sentinel Company, publisher of the South Florida Sun-Sentinel.

Mark M. O'Mara, Orlando, FL, and Donald R. West, Don West Law Group, Orlando, FL, represent Defendant George Zimmerman

Bernie de la Rionda and John Guy, Office of the State Attorney, Jacksonville, FL, represent the State of Florida.

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Court Rejects Challenge to Restriction on Photographing Inside Polling Locations

Newspaper Wanted to Document New Voter ID Procedure

A Pennsylvania federal court this month rejected a constitutional challenge to a state election law limiting access to polling places. *PG Publishing Company d/b/a The Pittsburgh Post-Gazette v. Aichele*, No. 12-960, 2012 U.S. Dist. LEXIS 145242 (W.D. Pa., Oct. 9, 2012) (Fischer, J). The Pittsburgh Post-Gazette sought a court order allowing it to photograph voter identification checks inside polling places on November 6th.

Because the statute limiting access to polling places "does not target or single out" newspaper reporters for disfavored treatment, the First and Fourteenth Amendments "do not forbid its enforcement against them," the court determined in granting the government's motion to dismiss.

Background

In 2008, the *Pittsburgh Post-Gazette* brought suit against the Secretary of Pennsylvania and the Allegheny County Elections Commission seeking clarification on the application of Election Law § 3060 to press photographers. Among other things, the statute provides that voters, poll watchers and peace officers shall have access to polling places; while others must keep at least 10 feet away from polling places during voting.

The Allegheny County Department of Law responded that, "Allegheny County's policy is to prohibit photographs, video taping and any other type of recording inside the polling place. That prohibition extends to attempts to record activity in the polling place from outside of the polling place, for example, through an open door or window."

After this response, the paper brought an action in state court on First Amendment, Fourteenth Amendment, and related state constitutional provisions, arguing that Allegheny's interpretation was more restrictive than the statute. The newspaper alleged that the elections board had "attempted to prevent news photographers who were located in places lawfully accessible to them from photographing in the direction of the voting machines." Furthermore, the newspaper alleged that surrounding counties had not imposed similar restrictions on members of the media.

The court granted a preliminary injunction upholding the newspaper's right to have access to any publicly accessible areas in polling places, but also wrote in its order that "no photography shall be taken from inside the polling place or within ten feet of the entrance to the polling place."

In June 2012, the paper brought a First Amendment complaint in federal court challenging the restriction in so far as it barred press photographers from documenting the implementation of Pennsylvania's new voter ID law inside polling places. Pennsylvania's new Act 18 requires identification prior to voting, and the paper wanted to cover the enforcement and implementation of the Act.

After a lengthy discussion of procedural issues on the court's power to hear the complaint, the court considered and rejected the newspaper's constitutional arguments.

Constitutional Claims

Surveying a variety of First Amendment doctrines, the court concluded that the restrictions on access to polling places fell within the state's power of maintaining peace, order at decorum at the polls. Thus the Pennsylvania statute was no subject to strict scrutiny, as "§3060(d) operates as a content-neutral regulation governing the *physical location* of those seeking to observe or influence polling activities." Moreover, the application of the statute to the press does not trigger strict scrutiny, as "[a] State can subject members of the media to 'generally applicable' restrictions 'without creating constitutional problems.'" *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983). Any indirect restriction on the ability of *Post-Gazette* reporters to cover polling activities was "of no constitutional significance," according to the court.

Finally, because the newspaper only challenged the statute as applied to members of the press, the court found "no need for an exhaustive examination of Pennsylvania's reasons for requiring bystanders to remain at least ten feet

(Continued on page 41)

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(Continued from page 40)

from a polling place. The constitutionality of § 3060(d)'s application to members of the general public is not contested."

The newspaper also argued that defendants repeatedly violated the Equal Protection Clause by selectively enforcing §3060 against reporters and photographers working for the *Post-Gazette* in two contexts: (1) by allowing reporters in other counties to photograph at polling sites, and (2) by allowing *Post-Gazette* and other photographers to record public officials and candidates themselves in the process of voting, but not the general public. The paper argued that this selective enforcement violates the Equal Protection Clause.

The court, however, found no constitutional violation based on these factual allegations because they only demonstrated that the statute might be enforced more rigidly in certain counties of Pennsylvania. It did not demonstrate that *Post-Gazette* reporters were selectively denied access in counties of less-rigid application. "The *difference* highlighted by PG relates to the geographical areas covered by newspaper reporters rather than to the respective *treatment* of those reporters by governmental officials. A plaintiff cannot establish a violation of the *Equal Protection Clause* simply by showing that the effects of a statewide regulation or policy vary from one local entity to the next." *San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 53-55 (1973)*. Moreover, there is no showing of purposeful or intentional discrimination.

The court also explained that the same analysis applies to the alleged discrimination of allowing photography of public officials and candidates voting, but not the general public. "That type of 'selectivity' does not raise constitutional concerns." *Oyler v. Boles,* 368 U.S. 448, 456 (1962).... By permitting access to polling places only while elected officials were voting and 'denying access at all *other times*,' election officials in Allegheny County did not deny *Post-Gazette* employees access that was available to *other persons*.... Nobody is denied the '*equal* protection of the laws' when statutory mandates are selectively enforced against *all persons*."

Ellis W. Kunka and Frederick N. Frank of Frank Gale Murcko & Pocrass P.C. in Pittsburgh represented plaintiffs. Defendants were represented by Kemal Alexander Mericli and Mary Lynch Friedline, for the Office of the Attorney General in Pittsburgh, and George M. Janocsko and Andrew F. Szefi of the Allegheny County Law Department in Pittsburgh..

A New Jersey federal district court this month upheld arguably broader restrictions on access to polling places. More than 100 daily and weekly newspapers sought a preliminary injunction against state election rules limiting "solicitations" of voters within 100 feet of polling places. The New Jersey Press Association filed suit, arguing that the statute violated the press's right to interview voters. U.S. District Judge Joel Pisano sided with the state, maintaining that the case was about "keeping polling places and the citizens who vote there undisturbed." MLRC has asked plaintiffs' counsel to provide a detailed report on the litigation for the MediaLawLetter.

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