MLRC 2003 REPORT ON
SIGNIFICANT DEVELOPMENTS

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NEW DEVELOPMENTS

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INTRODUCTION

MLRC’s end of the year Bulletin contains our annual review of the significant developments of the past year in the law of libel, privacy and related law as reported in MLRC’s 50-State Surveys of MEDIA LIBEL LAW and MEDIA PRIVACY AND RELATED LAW, supplemented by developments reported in the MEDIA LAW LETTER.

One of the most notable cases this past year was the U.S. Supreme Court’s decision – or rather non-decision – in Kasky v. Nike. In January 2003, the Court agreed to hear Nike’s appeal of a decision by the California Supreme Court that potentially strips corporate speech on matters of public concern of any First Amendment protection. It was hoped that the Court would bring some well-needed doctrinal clarity to this area by honing the definition of what constitutes “commercial speech” as well as clarifying what protection it receives under the First Amendment. Instead, in June the Court, by a 6-3 vote, dismissed certiorari as improvidently granted.

The Supreme Court’s refusal to hear the case leaves intact the growing confusion about the scope of protection for commercial speech – a confusion played out in some of the past year’s decisions in misappropriation, right of publicity and related claims against the media.

The California and Missouri Supreme Courts reached starkly contrary conclusions on the protection afforded celebrities for the use of their name and likeness for fictional characters. In Winter v. DC Comics, 69 P.3d 473, 134 Cal.Rptr.2d 634, 31 Media L. Rep. 1774 (2003), the California Supreme Court, applying a “transformative use” test, held that comic book characters suggestive of musicians Johnny and Edgar Winter were protected as a matter of law, noting that one could “readily ascertain that they are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs' mere likenesses.”

In contrast, the Missouri Supreme Court, on remarkably similar facts, reinstated a claim by a former professional hockey player over a like-named fictional character in the comic book and animated television series Spawn. John Doe, aka Tony Twist v. TCI Cablevision, 110 S.W.3d 363, 31 Media L. Rep. 2025 (Mo. 2003), pet. for cert. filed, 72 USLW 3309 (Oct 22, 2003). The court


2. Kasky v. Nike, 45 P.3d 243, 119 Cal.Rptr.2d 296 (Cal. 2002) (holding that Nike could be liable under California’s unfair business practices and false advertising law for allegedly false statements in its editorial advertisements, press releases and letters defending its labor practices. Although Nike’s speech involved an obvious matter of public concern – the controversy about working conditions at its manufacturing plants in South East Asia, an issue covered in hundreds of news reports – the California Supreme Court held that Nike’s speech could be actionable if the intended audience was potential or actual consumers and its speech was likely to influence consumers in their commercial decisions. Moreover, the court held that even if Nike’s speech was mixed commercial and non-commercial speech, over all its statements on matters of public concern are “not removed from the category of commercial speech because it is intermingled with commercial speech.”

specifically rejecting California’s “transformative use” test because it would, according to the court, permit expressive fictionalized characterizations of a person’s celebrity status even where the sole purpose was commercial. *Id.* at 374.

The Eleventh Circuit punted in a misappropriation case involving the use of non-celebrities’ names and likenesses in a movie dramatization of a real event. *Tyne vs. Time Warner Entertainment Co.*, 336 F.3d 1286, 31 Media L. Rep. 1929 (11th Cir. 2003). Last year a Florida district court granted summary judgment to the producers of the movie *The Perfect Storm*, holding that such use was expressive and protected by the First Amendment. The Eleventh Circuit, however, found Florida’s misappropriation statute ambiguous, and asked the Florida Supreme Court to decide whether the producers could be liable under the facts of the case – giving that court the opportunity to adopt a fact intensive rule along the lines of *Tony Twist v. TCI Cablevision*.

Interestingly, another Florida federal district court did not hesitate to dismiss a misappropriation claim against the producers of the *Girls Gone Wild* videotape series – in which female Mardi Gras and spring break revelers are filmed baring their breasts – on the ground that the series is expressive and protected by the First Amendment. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

The Sixth Circuit delivered a well reasoned decision, in *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003), affirming dismissal of Lanham Act and right of publicity claims brought against the publisher of artistic prints of golfer Tiger Woods. But another Sixth Circuit panel reinstated those same claims against a record company and rap music duo for using civil rights icon Rosa Park’s name as a song title. *Parks v. LaFace Records*, 329 F.3d 437, 31 Media L. Rep. 1897 (6th Cir. 2003). The court found that there was no obvious artistic relationship between the title and the content of the song, at least as a matter of law.

Several other high profile suits brought public attention to the clash between free expression and ownership rights. Fox News sued to stop publication of Al Franken’s book, *Lies and the Liars Who Tell Them, A Fair and Balanced Look at the Right*, on the theory that the cover infringed Fox’s trademarked news slogan and implied it endorsed the book – a claim quickly dismissed as “without factual or legal merit.” Director Spike Lee sued to stop TNT from rebranding itself as “Spike TV.” And tennis player Anna Kournakova sued Penthouse magazine after its publication of photographs of her “caught nude on the beach” turned out to be another women.

In Part II of this issue, forthcoming separately in early 2004, MLRC will publish a series of articles looking at the Lanham Act and the limitations the First Amendment places on federal claims over the use of names and identities.

While there were no major doctrinal developments in libel law, there were several interesting decisions on jurisdiction in the Internet context. The Fifth Circuit in Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002), added to the trend of decisions holding that publication on the Internet is insufficient by itself to establish minimum contacts for jurisdiction in Internet libel cases. A Virginia federal court reached the same conclusion in Falwell v. Cohn, 2003 WL 751130 (W.D.Va. 2003). Although in the non-media context, several decisions upheld the exercise of personal jurisdiction over non-residents on the grounds that their speech on the web “targeted” the forum state. See Wagner v. Miskin, 660 N.W.2d 593 (ND 2003); Northwest Healthcare Alliance Inc. v. Healthgrades.Com, Inc., 50 Fed.Appx. 339, 2002 WL 31246123 (9th Cir. 2002) (unpublished), cert. denied, 123 S.Ct. 190 (2003).

The Second Circuit Court of Appeals confirmed the reasonable rule that the single publication rule applies to material on the Internet. Van Buskirk v. New York Times Co., 325 F.3d 87, 89-90, 31 Media L. Rep. 1609 (2d Cir. 2003). But in a cautionary case for web publishers, a New York appellate court held that moving an article to an updated website constitutes a new publication for statute of limitations purposes. Firth v. New York, 761 N.Y.S.2d 361 (3d Dep’t. 2003). The appellate court held that moving an alleged defamatory report to a new website at a new Internet address was “akin to the repackaging of a book from hard cover to paperback.” Id. at 36.

Finally, the Seventh Circuit, in a decision written by Judge Richard Posner, flatly rejected a First Amendment-based federal reporter’s privilege in McKevitt v. Pallasch, 339 F.3d 530, 31 Media L. Rep. 2141 (7th Cir. 2003). Despite the absence of a full briefing on the issue, Judge Posner concluded that there is no “federal common law reporter’s privilege rooted in the First Amendment,” explaining that such a privilege was rejected by the U.S. Supreme Court in Branzburg “even in the context of a confidential source.” Moreover, those decision finding a privilege for non-confidential information were “skating on thin ice.” At least one other federal court has since followed Posner’s reasoning,4 suggesting that the media bar may have to undertake a serious legal and intellectual defense of a First Amendment-based reporters privilege.

Reports on these and other cases of interest follow.

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A. FINDINGS OF THE MLRC 50 STATE SURVEY 2003-2004: MEDIA LIBEL LAW

1. Defamatory Meaning

Examples of Defamatory and Nondefamatory Speech

Defamatory

Among the words and phrases held capable of defamatory meaning in media libel cases this past year were: that a charitable organization “is suspected of links to terrorism,” Global Relief Foundation, Inc., v. New York Times Co., 2002 WL 31045394, 30 Media L. Rep. 2485 (N.D. Ill., Sept. 11, 2002); that a veterinarian was suspected of doping or helping to kill horses, Mitchell v. Griffin Television, L.L.C., 2002 OK CIV APP 115, 60 P.3d 1058, cert. denied, 123 S. Ct. 1931 (2003); that a candidate for public office was “exposed as a liar” and was a “proven prevaricator,” Anderson v. Augusta Chronicle, 585 S.E.2d 506 31 Media L. Rep. 1393 (S.C. App. 2003); that an underage student was caught drinking, Draudt v. Wooster City Sch. Dist. Bd. of Educ., 246 F.Supp 820 (N.D. Ohio 2003); that plaintiff lied about being a licensed securities broker, Muzikowski v. Paramount Pictures Corp., 322 F.3d 918 (7th Cir. 2003); that a reporter’s article was “absolutely false,” Finke v. Walt Disney, 2 Cal. Rptr.3d 436 (Cal. App. 2 2003), review granted, 79 P.3d 541 (Ca. 2003); and that a cosmetic surgery patient was a “kook,” Smith v. Garber, 2003 WL 21960720 (E.D.Pa., Jun 25, 2003).

A Texas appellate court reversed summary judgment and reinstated a libel claim against the television show Hardcopy over a segment on sweepstakes scams. Allied Marketing Group, Inc. v. Paramount Pictures Corp.,  111 S.W.3d 168, 31 Media L. Rep. 1762  (Tex. App. – Eastland 2003, pet. filed). Defendants used what they thought was the fictional name “Sweepstakes Clearing House” to demonstrate a door-to-door sweepstakes scam. The court held that such use could lead reasonable viewers to conclude that plaintiff’s identically named company “was a sham company that ‘con men’ created for the purposes of engaging in sweepstakes scams.” Id. at 176.

In Muzikowski, supra, the Seventh Circuit reinstated a claim against the producers of a fictional movie reasoning that “[s]imply because the story is labeled ‘fiction’ and, therefore, does not purport to describe any real person does not mean that it may not be defamatory per se.” 322 F.3d at 925. In contrast, an Illinois federal district court dismissed a defamation claim against the producers of The PJs, a cartoon show that included a character similar to plaintiff but who also commits crimes. Dismissing the court stated: “The PJs is a cartoon. The characters are fictitious, and their antics are supposed to be funny, not serious. It would simply be impossible to conclude that plaintiff was defamed by having a cartoon character who is based on his likeness engage in the types of activities described in the complaint.” Collier v. Murphy, 2003 WL 1606637, *5 (N.D. Ill. Mar. 26, 2003).

On a publisher’s motion for summary judgment, a district court held that the term “fixer” had dual meanings, one unquestionably defamatory; the other, unquestionably not, and found sufficient evidence that the publisher intended the defamatory meaning to defeat summary judgment. Sprague v. American Bar Association, 2003  WL 22110574 (E.D.Pa. Jul 21, 2003).
A New York state trial court held that several New York Post articles reporting that NBA star Latrell Sprewell “took a swing” at a guest on his boat and “busted his hand” during a “booze-fest” were capable of the defamatory connotation that Sprewell committed a crime of violence. *Sprewell v. N.Y.P. Holdings, Inc.* 2003 WL 22515441 (N.Y.Sup., Jun 30, 2003). Moreover other statements in the articles that claimed Sprewell delayed reporting the injury to his team were capable of harming his professional reputation.

A New York appellate court reinstated a libel claim against an Albanian language newspaper that linked plaintiff to the former Communist regime in that country. *Gjonlekaaj v. Bota Sot*, 2003 WL 22136801 (NY App. 2d Dep’t 2003). Among other things, the article stated that plaintiff was a “representative of the Marxist ideology” that “destroyed the Albanian spirit during a half century of red terror.” Reversing summary judgment for defendant, the court reasoned that such statements could be defamatory within the Albanian-American community.

**Non-media**

In *Newman v. Hansen & Hempel Co.*, 2002 WL 31455990 (N.D. Ill., Nov. 1, 2002), the court held that the statement that plaintiff was an “alcoholic” was defamatory since it was susceptible of being verified as true or false; though that statements that she was also “incompetent” and “stupid” were merely statements of opinion. Another decision from the same court granted defendant summary judgment for referring to plaintiff more colloquially as “a drunk,” reasoning that the remark did not necessarily imply that plaintiff “was drunk all of the time, including at work.” *McKay v. Town and Country Cadillac, Inc.*, 2002 WL 1611578 (N.D. Ill., July 17, 2002). In addition, the court found that defendant’s comment to plaintiff’s co-workers that “No way am I letting that drunk drive my car” was not defamatory per se since it did not accuse plaintiff of having committed a crime but “merely implies that the plaintiff will someday drive while intoxicated.” *Id.* at * 11.

The statement that a doctor was “dying of breast cancer” was held to be defamatory by the Massachusetts Supreme Judicial Court in *Ravinkar v. Bogojavlensky*, 438 Mass. 627, 782 N.E.2d 508, 511 (2003), because patients would reasonably assume that any professional relationship with plaintiff would be brief and her ability to provide care would be impaired. The court distinguished the contrary holding by a New York’s highest court in *Golub v. Enquirer*, 659 N.Y.S.2d 836, 25 Media L. Rep. 1863 (NY 1997) (statement that publicist had “cancer” was not defamatory as a “loathsome disease” nor harmful to publicist’s profession) by artfully noting that the article in *Golub* added that the publicist “was determined to fight” his illness.

In *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404, 405 (Iowa), cert. denied, 124 S.Ct. 450 (2003), a church member sued a church and a church official for defamation after the church official sent a letter to members of the congregation and the community that attributed the “spirit of Satan” to the plaintiff. The Iowa Supreme Court held that plaintiff’s claim should not have been summarily dismissed based on the Establishment Clause of the federal and state constitutions because the phrase “spirit of Satan” has a secular meaning and thus the fact finder could determine whether plaintiff was defamed without resort to religious doctrine. *Id.* at 407-08.
The Connecticut appellate court reinstated a libel claim by an Italian-American social club over accusations that it was connected to the Mafia. *Lega Siciliano Social Club, Inc. v. St. Germaine*, 825 A.2d 827 (2003). The trial court held the accusation did not impute a criminal offense nor did it harm the profession of the club and was thus not actionable absent proof of special damages. Reversing, the court accepted “that the Mafia generally is known to be involved in criminal activities such as bribery, illegal gambling, manufacturing of narcotics and other acts” and the accusation was therefore defamatory. *Id.* at 854.

**Nondefamatory**

The First Circuit held that the statement that a former member of the armed forces received “sniper training” is not defamatory because it would not expose him to contempt, hatred, scorn, ridicule or tend to impair his standing in the community. *Yohe v. Nugent*, 321 F.3d 35, 41 (1st Cir. 2003).

The Second Circuit affirmed dismissal of a libel suit against the *New York Times* in *Van Buskirk v. New York Times Co.*, 325 F.3d 87, 31 Media L. Rep. 1609 (2d Cir. 2003). At issue was an op-ed article that identified plaintiff as a source for CNN’s “untrue” Operation Tailwind report that accused the U.S. government of conducting a secret operation during the Vietnam War to kill American defectors. The court affirmed that the op-ed was incapable of meaning that plaintiff committed “war crimes.”


The Tenth Circuit held that reports that stocks were sold at a discounted rate, that the market price of stocks was too high, and that plaintiff corporation was losing money were not libelous per se. *Computerized Thermal Imagining, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1297-98 (10th Cir. 2002). Reviewing Utah libel law, the court held such statements were not actionable absent pleading and proof of special damages – and affirming that general allegation of drop in market capitalization was insufficient to provide such proof. *Id.* at 1298-99.

The Montana Supreme Court held that a police chief’s references to a resident as a “gang banger,” without any specific accusation of criminal activity, was not slanderous per se. *Anderson v. City of Troy*, 317 Mont. 39, 68 P.3d 805 (2003). The expression was similar to words like “crook,
a creep, a gangster, a hoodlum, or any one of a thousand other vague terms” that “only convey the vague [nondefamatory] message that someone is a bad person.” Id. at 808.

The Montana federal district court held that in the context of a series of humorous photo captions, the statement “Evel Knievel proves that you're never too old to be a pimp” was not actionable since no reasonable viewer would ascribe a defamatory meaning to the caption. Knievel v. ESPN, 223 F.Supp.2d 1173 (D. Mont. 2002).

An Illinois court held that newspaper report that plaintiff “kidnapped” her daughter was not actionable since the term could be innocently construed to refer to a custody dispute rather than a criminal felony. Harrison v. Chicago Sun-Times, 2003 WL 21497271 (Ill.App. June 30, 2003).

Other statements held not defamatory included: that plaintiff “slept with foreign government officials,” Bement v. N.Y.P. Holdings, Inc. 760 N.Y.S.2d 133, 31 Media L. Rep. 1722 (1st Dept. 2003); law firm advertisement seeking potential clients who had suffered a “bad result” at a laser eye surgeon, Dello Russo v. Nagel, 358 N.J. Super 254, 817 A.2d 426 (App. Div. 2003); that an academic was “ethnocentric,” Fikes v. Furst, 133 N.M. 146, 61 P.3d 855 (Ct. App. 2003); press release allegedly insinuating the Minnesota Twins might relocate, Fox Sports Net North, LLC v. Minnesota Twins Partnership, 319 F.3d 329, 336-37 (8th Cir. 2003); statement to newspaper that plaintiff was fired as a result of “big issues,” Brass v. City of Manly, 2003 WL 1907158, at *11 (N.D. Iowa Apr. 17, 2003).

**Of and Concerning**

The Seventh Circuit reinstated a defamation claim brought by a little league coach who complained of a fictional portrayal in the motion picture Hardball. Muzikowski v. Paramount Pictures Corp., 322 F.3d 918 (7th Cir. 2003). No character in the movie was named Muzikowski, and the movie credits contained the standard disclaimer (”While this motion picture is in part inspired by actual events, persons and organizations, this is a fictitious story and no actual persons, events or organizations have been portrayed”). Applying the Illinois innocent construction rule, the district court found the complained-of statements were not “of and concerning” plaintiff. Reversing, the Seventh Circuit held that “simply because the story is labeled “fiction” and, therefore, does not purport to describe any real person, does not mean that it may not be defamatory per se.” In so holding, the court applied federal pleading standards, rather than the “heightened pleading requirement” of Illinois law that applies when plaintiff is not named in the publication.

A newspaper report that “that a ‘difference of opinion’ exists about how much of the money donated by millions of Americans to a whole ‘host of’ Islamic charities ‘goes to help needy people and how much funds terrorism’” may not be specifically referring to plaintiff’s charity and could be taken to be referring to someone other than the plaintiff. Global Relief Foundation, Inc., v. New York Times Co., 2003 WL 403135, 31 Media L. Rep. 1468 (N.D.III., Feb. 20, 2003).

In Horsley v. Feldt, 304 F.3d 1125, 1137 (11th Cir. 2002), the Eleventh Circuit held that a reference to plaintiff’s website was sufficient to satisfy the “of and concerning” requirement where plaintiff’s identity was readily accessible on the website.
A Texas appellate court reversed summary judgment and reinstated a libel claim against the television show *Hardcopy* over a segment on sweepstakes scams. *Allied Marketing Group, Inc. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 31 Media L. Rep. 1762 (Tex. App. – Eastland 2003, pet. filed). Defendants used what they thought was the fictional name “Sweepstakes Clearing House” to demonstrate a door-to-door sweepstakes scam. The court found that those references were “of and concerning” plaintiff’s company “Sweepstakes Clearinghouse” even if defendants did not intend to refer to plaintiff and were not aware of plaintiff’s existence.

A *60 Minutes* segment entitled *Jackpot Justice* that reported on large jury damage awards in Jefferson County, Mississippi, was not “of and concerning” a group of 35 former county jurors. *Gales v. CBS Broadcasting, Inc.*, 269 F. Supp. 2d 772, 31 Media L. Rep. 2367 (D. Miss. 2003). The court noted that the complained of statements referred to “the jurors” and “the jury” generally and never to any particular jury. *Id.* at 782.

A Minnesota court granted summary judgment to a local newspaper on “of and concerning” grounds in an interesting extrinsic facts scenario. *Bieloch v. Brainerd Daily Dispatch*, 2002 WL 31993258, 31 Media L. Rep. 1155 (Minn. Dist. Ct. Oct 04, 2002). At issue was an article reporting on a local resident’s appearance on the *Oprah Winfrey* show. The resident Jayne Hanson discussed the suicide of her daughter, which she said was a consequence of having been raped several years before. The article and television show did not identify the alleged rapist by name. But on other occasions Hanson had publically accused plaintiff of being the rapist. In opposition to defendant’s motion for summary judgment, plaintiff submitted affidavits from local residents who stated they understood the article to be about plaintiff based on their knowledge of the background facts. The court held there was insufficient evidence the article was “of and concerning” plaintiff where the newspaper did not know of the extrinsic evidence.

**Defamation by Implication or Innuendo**

The Alabama Supreme Court held that to be liable for defamation by implication, a public figure plaintiff must prove that the defendant intended or endorsed the implication. *Finebaum v. Coulter*, 854 So.2d 1120, 31 Media L. Rep. 1560 (Ala. 2003). Plaintiff, a sports journalist, sued defendant, a sports radio talk show host, for comparing an interview plaintiff conducted to “oral sex.” Plaintiff alleged the comparison implied he was homosexual. Granting summary judgment to defendant, the court noted that “not only must the plaintiff establish that the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply or were reckless toward the implications.” *Id.* at 1125.

In *Franklin Prescriptions, Inc. v. The New York Times Co.*, 267 F.Supp.2d 425 (E.D. Pa. 2003), the court held that there is no requirement that plaintiff prove that a defamatory implication was intended – at least in private figure suits. At issue was a newspaper’s use of a picture of plaintiff’s website to illustrate an article discussing the dangers of illegal online pharmacies. The juxtaposition of the picture with the content of the article “could lead a reasonable person to believe that Franklin engages in the exact type of conduct described in the Article.” *Id.* at 435.
In an apparent case of first impression under Washington law, an appellate court recognized a claim against a reporter and broadcaster for libel by omission. *Mohr v. Grant*, 68 P.3d 1159, 1162, 31 Media L. Rep. 1879 (Wash. App. 2003). The court held that in private figure suits against the media a literally true report that omits material facts can create a defamatory implication. At issue was a series of news reports on KXLY-TV about the criminal prosecution of a mentally retarded man, Glen Burson, for trespassing and harassing a store owner. The sympathetic reports, based on interviews with Burson, his family and his criminal defense lawyers, reported he entered the store offering to wash windows in exchange for candy, that he was roughly escorted out by the owner, and then arrested and prosecuted. The reports, however, omitted that Burson had threatened to kill the store owner and had a documented history of threatening the store owner with violence, information available in Burson’s public court file.

In *Mach v. Allison*, 656 N.W.2d 766, 31 Media L. Rep. 2526 (Wis. App. 2003), the court found that a juxtaposition of video and voiceover could support a claim for defamation by implication. At issue was a television news report about a dog trainer and a dog placed with him for training that subsequently died after he attacked the trainer. The court found that by using video of plaintiff training other dogs in a confrontational manner, reasonable viewers could conclude he beat the deceased dog.

In *Horsley v. Feldt*, 304 F.3d 1125, 30 Media L. Rep. 2389 (11th Cir. 2002), the court held that the statement by a Planned Parenthood official to the media, that a murdered abortion doctor had been listed on plaintiff’s anti-abortion website and that the doctor’s “name was already crossed out” could imply that plaintiff “had knowledge that the murder was going to happen.” Id. at 1137.

**Libel Proof Plaintiff**

A Kansas federal district court dismissed a claim by a convicted murderer against a newspaper reporter on the ground that the plaintiff was libel proof. *Lamb v. Rizzo*, 242 F.Supp.2d 1032, 31 Media L. Rep. 2513 (D. Kan. 2003). Although no Kansas state court had previously recognized the doctrine, the federal court held the state supreme court would adopt it under the facts of this case.

**Publication**

The publication element was not satisfied where the defendant simply allowed copies of a newsletter “to be placed on the counter of his place of business” for customers to take freely but had “no part in the writing, publishing, editing or actively disseminating” the newsletters. *Piper v. Mize*, 2003 WL 21338696, 31 Media L. Rep. 1833, (Tenn. Ct. App. Jun 10, 2003).

Whether a cause of action can be based on plaintiff’s own publication of a defamatory statement by, for example, telling a prospective employer the stated reason for a prior termination, continues to be litigated. The Second Circuit certified this question to the Connecticut Supreme Court in *Cweklinsky v. Mobil Chemical Co.*, 297 F.3d 154 (2d Cir. 2002). After finding that an intra-corporate publication could not support an award for damages for loss of earning capacity, the
court found that the jury must have relied on plaintiff’s own re-publication as the basis for awarding substantial damages. The lead question asks: Does Connecticut recognize a cause of action for defamation based on a plaintiff employee's or former employee's compelled self-publication of a defendant employer’s or former employer’s defamatory statements made by the employer or former employer only to the employee or former employee?


Group Libel

In Friends of Falun Gong v. Pacific Cultural Enter., Inc., 2003 WL 22346324 (E.D.N.Y. Sept. 23, 2003), the court dismissed claims by 67 adherents of the Falun Gong spiritual movement against two Chinese language newspapers. The court held that the group libel doctrine barred their claim where the complained of articles were not “of and concerning” any individual plaintiff, but rather criticized the movement generally.

2. Opinion

Decisions involving the defense of opinion in the wake of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), continue to provide interesting analyses as courts attempt to distinguish between fact and opinion.

Several cases concerned statements made in newspaper editorials, columns and reviews and the decisions discuss whether and to what extent this context makes the statements non-actionable opinion.

The Nevada Supreme Court affirmed summary judgment in favor of a newspaper publisher in a defamation action based on a restaurant review. Pegasus v. Reno Newspapers Inc., 57 P.3d 82, 31 Media L. Rep. 1353 (Nev. 2002), cert. denied, 124 S.Ct. 82 (2003). At issue was a Reno Gazette-Journal review of a restaurant that stated the food “came out of some sort of package.” While the court observed that a restaurant review was not automatically protected opinion, read as a whole the alleged defamatory statements were expressions of opinion – the article conveyed the reviewer’s “opinion that the food was pre-packed rather than an implied statement that she had observed the food coming from a package.” 57 P.3d at 89.

An online book reviewer’s comments that plaintiff’s books were like “the dust under my couch,” that questioned plaintiff’s “spelling” and “grammar,” and referred to certain books as “shallow” and “disappointing” were all expressions of pure opinion protected by the First Amendment. Hammer v. Trendl, 2003 WL 21466686 at *3 (E.D.N.Y. Jan. 18, 2003).
A newspaper editorial criticizing a juvenile court judge, stating among other things that he “snubbed or flubbed the rules,” was protected opinion. *Sikora v. Plain Dealer Publ’g Co.*, 2003 WL 21419279 (Ohio App. June 19, 2003). The court noted that “the article appears in the ‘Forum’ section of the newspaper, a section dedicated to the expression of opinion by members of the newspaper’s editorial staff and as well as members of the public. Thus, the context of the article puts the reader on notice that what is being read is the opinion of the writer.” *Id.* at *4.

Similarly, a newspaper editorial stating that a candidate for state representative had “zero credentials” was protected opinion. *Verich v. The Vindicator Printing Co., Inc.*, 786 N.E.2d 945 (Ohio App. 2003). The statement appeared in the editorial section of the newspaper entitled “Viewpoint,” and “there is a presumption that language contained in the editorial section of a newspaper is the opinion of the writer.” *Id.* at 948.

A newspaper columnist’s criticisms of a prosecutor such as “no wonder prosecutor Rosenbaum took such pains to keep the contents of the tape hidden from the defense” and “the fairness of the ruling should be apparent to everyone, but everyone doesn’t include Rosenbaum” were all non-actionable. *Rosenbaum v. The Chronicle Telegram*, 2002 WL 3189010*8, 31 Media L. Rep. 1827 (Ohio App. Dec. 31, 2002) (“It is well understood that editorial writers and commentators frequently resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction.”).

Calling plaintiff a “liar” in response to his charges of misconduct was deemed a statement of opinion in *Gill v. Delaware Park, LLC*, 2003 WL 228889322 (D. Del. Dec. 2, 2003). Plaintiff’s accusation and defendant’s response were published in a newspaper article and in that context the average reader would conclude the term was used merely as an epithet.

However, in *Anderson v. Augusta Chronicle*, 585 S.E.2d 506, 31 Media L. Rep. 1393 (S.C. App. 2003), an editorial entitled “Let the Liar Run” that accused a political candidate of lying about service in the National Guard was not protected, despite the context, because it reasonably implied defamatory facts about plaintiff. Indeed, the editorial context factored into the court’s actual malice analysis; it noted that since an editorial is not “hot news” the newspaper had “ample opportunity” to verify its allegations. *Id.* at 520. *See also Farmer v. Lake Park Post*, 2003 WL 22765350 (Ga. Ct. App. Nov. 24, 2003) (statements in columns and editorials that sheriff murdered a suspect were defamatory statements of fact).

A Virginia court held that a prosecutor stated a claim against a newspaper for libel for publishing a letter to the editor that accused prosecuting him “for something he had nothing to do with” because he had a relationship with her sister. *Ziglar v. Media Six, Inc.*, No. CL02-132, 2003 WL 549977, at *3 (Va. Cir. Ct. Feb. 18, 2003). The court held the statement was not opinion since it could be proved false.

In other cases of note, in *Yohe v. Nugent*, 321 F.3d 35, 41 (1st Cir. 2003), the First Circuit held that a police chief’s statement to a newspaper that “it was his belief” that an individual was suicidal was a statement of opinion where it was clear that this conclusion was derived from witness statements and not from undisclosed facts.
In *Lieberman v. Fieger*, 338 F.3d 1076 (9th Cir. 2003), the Ninth Circuit held that statements by a lawyer on Court TV that an adverse party was “Looney Tunes,” “crazy,” “nuts,” “mentally unbalanced,” and “a terrible witness” were all non-actionable hyperbole and opinion. Looking at the “totality of the circumstances,” the court held a reasonable viewer would know that the parties “were locked in a legal dispute, that Lieberman had issued a press release about some aspect of it, and that Fieger was hotly disputing the claims.”

In *Horsley v. Feldt*, 304 F.3d 1125, 1137 (11th Cir. 2002), the Eleventh Circuit affirmed in part, and reversed and remanded in part, the district court’s judgment on the pleadings in favor of non-media defendants Planned Parenthood Federation and its president, Gloria Feldt, over her statements at a press conference and to various media about plaintiff, an anti-abortion activist. The court held that the descriptions of plaintiff’s website as “a list of abortion doctors marked for death” and an “Internet target list” were non-actionable hyperbole in the context of the heated public debate over abortion. But the court reinstated the claim over defendant’s statement to CNN that plaintiff had “already crossed out” the name of a murdered abortion doctor since it could imply plaintiff had advance knowledge of the murder.

A court granted summary judgment to the parents of Jon Benet Ramsey for their statements in a book and on television identifying plaintiff as a suspect in the murder of their daughter. *Wolf v. Ramsey*, 253 F. Supp. 2d 1323 (N.D. Ga. 2003). According to the court, the reasonable inference of their statements was “not that plaintiff actually killed their daughter, but that there is reason to suspect that he might have.” *Id*. 1352. Plaintiff argued that the defendants could not actually believe that he was a viable suspect, because they were the real killers. The court agreed that this would overcome the opinion defense, but plaintiff would have the burden of proving this. After considering at length various theories of the crime, the court concluded plaintiff submitted insufficient evidence to prove the Ramseys committed the murder.

A television investigative reporter’s statement, used in 30 second promotional announcement, that “the evidence seems to indicate that [plaintiff is] cheating the city” was “not made in any specific factual context” and therefore was a non-actionable opinion. *Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 699, 30 Media L. Rep. 2268 (Ill. App. 2002).

The statement by a civil rights group that plaintiff police officer “killed” an “unarmed” suspect “by a marine-style choke hold,” was an expression of opinion in the context of a letter urging national performers and organizations to boycott the City of Cincinnati due to alleged police mistreatment of black citizens. *Jorg v. Cincinnati Black United Front*, 792 N.E.2d 781 (Ohio App. 2003).

On a motion by a telecommunications company to enjoin a lobbying campaign against it, the court held that statements that a pending bill would “double your phone rates” and that “consumer phone rates in Illinois will skyrocket” were statements of opinion and “nothing more than predictions.” *Ameritech v. Voices for Choices, Inc.*, 2003 WL 21078026 (N.D.Ill., May 12, 2003). The court also noted that there was no basis in law to enjoin alleged defamatory statements and that “silencing one side of a public debate is a drastic measure that would severely harm the public interest in freedom of speech and the legislative process.” *Id*. at *3.
In an interesting non-media case involving two academics, the New Mexico Court of Appeals determined that statements made by a professor that another professor was “pursuing a half-assed fantasy,” and that he was “paranoid and delusional” as well as “beset with devils,” “anti-Semitic,” and had “little grasp on reality” were non-actionable statements of opinion. *Fikes v. Furst*, 133 N.M. 146, 61 P.3d 855 (Ct. App. 2003). On the other hand, statements by the defendant that plaintiff was “disowned” by the institution that granted a doctoral degree is defamatory because of the “importance of one’s affiliation with one’s academic institution and the ability to obtain recommendations from that institution in order to secure employment” and can be considered factual. *Id.* at 156, 61 P.3d at 865.

3. **Truth/Falsity**

**Substantial Truth**

The 2003-2004 *MEDIA LIBEL SURVEY* also reports on cases recognizing substantial truth as a defense to reporting allegations – a common scenario giving rise to libel claims.

An Illinois federal district court granted summary judgment to a group of newspapers and broadcasters sued by an Islamic charity over reports that the federal government was investigating the charity for possible links to terrorist organizations and was considering freezing its assets. *Global Relief Foundation, Inc., v. New York Times Co.*, 2003 WL 403135, 31 Media L. Rep. 1468 (N.D. Ill., Feb. 20, 2003). The court held that substantial truth was established where the government was investigating the charity and defendants need not prove that plaintiff was actually linked to terrorist organizations.

In *Hussain v. Palmer Communications Inc.*, 60 Fed. Appx. 747, 31 Media L. Rep. 1585 (10th Cir. 2003) (unpublished), the court affirmed summary judgment to a broadcaster that aired plaintiff’s picture in connection with news stories that law enforcement authorities were seeking him as a possible suspect in the Oklahoma City bombing, finding the report substantially true.

Another common scenario leading to claims are reports of legal proceedings and terminology. On a rare interlocutory appeal from denial of summary judgment, an Illinois appellate court granted media defendants a significant victory in *Harrison v. Chicago Sun-Times*, 793 N.E.2d 760 (Ill.App. 2003). The plaintiff claimed that the *Sun-Times* defamed her by stating she had “kidnapped” her daughter. The court found the statement was substantially true where plaintiff had taken custody of her daughter in violation of the Hague Convention treaty on child custody.

In an unusual defamation suit by a reporter against the media, a Florida appellate court reversed a $400,000 award to plaintiff, finding the complained of statements substantially true. *Cape Publications, Inc. v. Reakes*, 840 So.2d 277 (Fla. App. 2003). In an incident that received considerable attention in the journalism community, plaintiff was fired for entering the apartment of a criminal suspect and taking a document. The *Columbia Journalism Review*, for example, criticized defendants for not supporting the reporter’s newsgathering efforts. In response a Gannet official commented that the “story has become so twisted that editors appear wrong for believing that newspaper people should not break the law, and the reporters appear to be heroes for admittedly having done so.” Reversing the jury verdict, the court held the comment that plaintiff “broke the law” was substantially true where she admitted to entering an apartment without permission.

Without analysis of the meaning of “substantial truth,” the Third Circuit affirmed dismissal of a professional baseball player’s suit for defamation and related claims based on a comparison of his criminal prosecution for domestic violence to that of O.J. Simpson. *Montefusco v. ESPN Inc.*, 47 Fed. Appx. 124, 30 Media L. Rep. 2311 (3d Cir. Sept. 20, 2002) (unpublished) (“all of the statements related to the criminal charges were factually accurate, as was the comparison of Montefusco's case to Simpson’s”).

In *Mach v. Allison*, 656 N.W.2d 766, 31 Media L. Rep. 2526 (Wis. App. 2003), a dog trainer sued a broadcaster over a news report that allegedly implied the trainer killed the dog after it attacked him. The court held the allegedly defamatory implication that plaintiff killed the dog was substantially true where an autopsy report found that defendant’s actions “contributed to the dog’s death.” *Id.* at 773-74.

In *Lambert v. Harrell*, 583 S.E.2d 428 (N.C. Ct. App. 2003) (unpublished decision), the court affirmed summary judgment for defendants for their broadcast on a local public access channel that the plaintiff was wanted by the police. The broadcast ran for four days, even though the arrest order was vacated after the first day. In affirming summary judgment, the court held it was completely true until defendants received formal notice that the arrest order was vacated.

The Idaho Supreme Court affirmed dismissal of a lawyer’s libel suit against a newspaper for its report on the lawyer’s representation of white supremacists. *Steele v. Spokesman-Review*, 61 P.3d 606, 31 Media L. Rep. 1412 (Idaho 2002). The statement that plaintiff relocated to Idaho “about the same time” as did the founders of an extremist group was substantially true even where two years separated the relocations.


Another Texas appellate court, however, denied summary judgment to a broadcaster and newspaper in a suit over their report that plaintiff was a defendant in an ongoing trial for medical malpractice when in fact he had been dismissed from the case several months before trial. *Scripps Texas Newspapers, L.P. v. Belalcazar*, 99 S.W.3d 829 (Tex. App. – Corpus Christi 2003, pet. filed).
See also Entravision Communications Corp. v. Belalcazar, 99 S.W.3d 393 (Tex. App. – Corpus Christi 2003, pet. filed) (companion case against television station airing similar report).

**Inaccurate or Distorted Quotes**

In Anderson v. Augusta Chronicle, 585 S.E.2d 506, 31 Media L. Rep. 1393 (S.C. App. 2003), the court held that on an appeal of a directed verdict for defendants it would have to accept as true plaintiff’s assertion that a quotation attributed to him in a newspaper article was fabricated. At issue was a quote attributed to plaintiff stating that he had served in the National Guard. Plaintiff had not served in the National Guard and the newspaper took him to task for lying about his record. Since plaintiff denied making the statement, the court concluded that the issue of whether the quote was published with actual malice should have been decided by the jury.

On the other hand where a newspaper erroneously attributed a potentially defamatory statement at a school board meeting to plaintiff, the court found there was no issue of actual malice where the reporters testified they honestly believed plaintiff was the speaker. Featherstone v. CM Media, Inc., 2002 WL 31750286, 31 Media L. Rep. 2336 (Ohio App. Dec. 10, 2002).

4. Fault

**Public Figure Status**

At press time, the D.C. Circuit issued a lengthy decision affirming the public figure status of one of the first female combat fighter pilots. Lohrenz v. Donnelly, 2003 WL 22927418 (D.C.Cir., Dec. 12, 2003), affirming, 223 F. Supp. 2d 25 (D.D.C. 2002). Plaintiff had sued a public policy group and its director for publishing reports that she was unqualified and the beneficiary of a double standard to promote women in the Navy. The district court held that plaintiff was “a limited-purpose public figure, albeit possibly involuntarily.” 223 F.Supp.2d 25, 45 (D.D.C.,2002) citing Dameron v. Washington Magazine, 779 F.2d 736, 741-42 (D.C. Cir. 1985), cert. denied, 476 U.S. 1141 (1986). The D.C. Circuit found no need to explore the rare involuntary public figure category, instead holding that plaintiff was clearly a voluntary limited-purpose public figure by choosing to become a fighter pilot knowing of the preexisting public controversy over the appropriateness of women in combat.

The Nevada Supreme Court held that a restaurant, as a place of public accommodation, was a limited public figure for purposes of a defamation suit over a restaurant review. Pegasus v. Reno Newspapers Inc., 57 P.3d 82, 31 Media L. Rep. 1353 (Nev. 2002), cert. denied, 124 S.Ct. 82 (2003).

A Texas court held that a controversial restaurateur who had received extensive publicity over a 15-year period for his business disputes (including previous litigation) and his personal life (including a divorce and an episode in which he was shot by his ex-wife) was a public figure for purposes of discussion of his business and his personal life, including his advertising strategy of portraying himself as a family man with family values. New Times, Inc. v. Wamstad, 106 S.W.3d 916 (Tex. App. – Dallas 2003, no pet. h.).
A divided Minnesota Supreme Court issued an interesting opinion holding that a hotel owner was a public figure for purposes of his libel suit against the media, but not for his claim against the on-air source of the alleged defamatory statement. *Chafoulias v. Peterson*, 668 N.W.2d 642, 31 Media L. Rep. 2377 (Minn. 2003). A *Primetime Live* segment examined charges that plaintiff’s hotel repeatedly failed to prevent harassment and abuse of female employees by Arab guests. The basis for the defamation claim was a statement by a lawyer representing former employees in a sexual harassment lawsuit against the hotel that “Chafoulias has known for years that these women were being attacked, harassed, raped.” The allegations had received considerable local attention and the court affirmed that plaintiff was a public figure in his suit against ABC. But the court held that plaintiff was a private figure in his claim against the source because she instigated the media coverage that generated the public controversy.

In *Perks v. Town of Huntington*, 251 F. Supp. 2d 1143 (E.D.N.Y. 2003), the court found that plaintiff was public figure as to some complained of statements and a private figure as to others. Plaintiff, a town employee, sued a councilwoman for sexual harassment and defamation. The court found plaintiff was a private figure as to an allegedly false police report filed by the councilwoman. But plaintiff’s voluntary and repeated contacts with the media about his lawsuit, including press conferences and interviews, made him a public figure with respect to his defamation claim against the councilwoman over her subsequent “open letter” published in a local newspaper.

A real estate developer who received considerable media attention in the 1970's and 1980's was deemed to be a public figure for news reports on his business published in 1994 based on “the totality of his past conduct and business practices.” *White v. Berkshire Hathaway*, 759 N.Y.S.2d 638 (N.Y. Sup. 2003). “It matters not that many of the articles temporarily preceded the complained of writings for a public figure, once established, remains a public figure for later comment on that controversy or subject matter.” *Id.* at 608.


In a non-media action, a private high school football coach / athletic director was held to be public figure in his suit based on allegations of athletic association rule violations that received media attention. *Flatt v. Tennessee Secondary Schools Athletic Ass’n*, 2003 WL 61251 (Tenn. Ct. App., Middle Section, Jan. 9, 2003).
A local political activist was held to be a public figure for purposes of his suit over a police official’s statements that he had a cocaine habit and was a troublemaker. *Sparks v. Peaster*, 581 S.E.2d 579 (2003).

A candidate for city council campaigning to raise awareness about old buildings was deemed to be a public figure in a defamation suit against a protester who stated to the media that drug dealers were operating out of plaintiffs buildings. *Brase v. Mosley*, 2002 WL 31525366 (Iowa App. Nov 15, 2002).

**Public Official Status**

The Fourth Circuit reversed the decision of a federal magistrate judge in North Carolina granting summary judgment to defendants on a defamation claim after holding (for the first time in the Fourth Circuit and North Carolina) that a public school principal and teacher were public officials. *Hugger v. Rutherford Institute*, 63 Fed. Appx. 683, 2003 WL 2008242 (4th Cir. 2003) (unpublished decision). The court confusingly reasoned that the lower court committed reversible error by considering the “constitutional” issue of plaintiffs’ status before determining whether they had proffered sufficient evidence to establish a claim of defamation under North Carolina law, noting that “courts should avoid deciding constitutional questions unless they are essential to the disposition of a case.” *Id.* at 691.

The Supreme Judicial Court of Massachusetts held that the plaintiff, who was one of 104 elected town meeting representatives whose only responsibility was to meet once a year to vote on policies and budgets proposed by town selectmen, was a public official *Lane v. MPG Newspapers*, 438 Mass. 476, 482-484, 781 N.E.2d 800, 805-807 (2003). The Court noted that it could conceive of no circumstance where any elected government official of any kind would not be a “public official” for defamation purposes, at least where the defendant's speech relates to the official’s conduct or qualifications for office. *Id.*

The Tenth Circuit affirmed that a retired Associate Deputy Director of the FBI was still a public official for purposes of a defamation against an author who criticized his conduct during his tenure at the FBI. *Revell v. Hoffman*, 309 F.3d 1228, 31 Media L. Rep. 1124 (10th Cir. 2002), *cert. denied*, 124 S.Ct. 83 (2003).


An entry level jail officer was held not to be a public official in *Donnelly v. Trentadue*, 2002 WL 32026153 (W.D. Okla. 2002). Unlike police officers who are generally treated as public officials, the court found the entry level officer “is not visible to the general public and possesses

**Application of Actual Malice Rule**

In *Farmer v. Lake Park Post*, 2003 WL 22765350 (Ga. Ct. App. Nov. 24, 2003), the court affirmed a $225,000 jury award to a deputy sheriff over a series of editorials and columns in a local newspaper that accused the deputy sheriff of “lynching” a criminal suspect who died after he resisted being arrested. The court held there was clear and convincing evidence of actual malice where the accusation of murder was contradicted by the coroner’s investigation, eyewitness testimony and a videotape of the incident. According to the court, “When an article is not in the category of ‘hot news,’ that is, information that must be printed immediately or it will lose its newsworthy value, actual malice may be inferred when the investigation for a story was grossly inadequate in the circumstances.” *Id.* at *6.

In *Anderson v. Augusta Chronicle*, 585 S.E.2d 506, 31 Media L. Rep. 1393 (S.C. App. 2003), the South Carolina Court of Appeals reversed a directed verdict for the newspaper defendant in a public-figure libel action arising from an editorial that accused the plaintiff of lying about serving in the National Guard. The court found that there was evidence of more than “sloppy journalism” and that the newspaper had obvious reason to doubt the veracity of the source on which its accusation was based – a previous news article by the same paper – because the plaintiff had denied the prior report, the plaintiff had provided documentary evidence to the newspaper to support his denial, and because (in the Court’s view) the newspaper’s position was “highly improbable.” The fact that the statement was made in an editorial and not “hot news” was also a factor contributing to the finding on actual malice since the newspaper had “ample opportunity” to verify its allegations. *Id.* at 520. Finally, a clarification that largely affirmed the original statement could also support the finding of actual malice.

The Oklahoma Court of Appeals affirmed a jury verdict of liability on defamation and false light claims in *Mitchell v. Griffin Television, L.L.C.*, 60 P.3d 1058 (Okla. Civ. App 2002), *cert. denied*, 123 S.Ct. 1931 (U.S. 2003). The jury found in favor of a plaintiff veterinarian in a lawsuit over a series of news reports that allegedly implied he doped or killed race and show horses. While deemed to be a private figure, the court held there was sufficient evidence of actual malice to support an award of punitive damages where the reporter misread a complaint. Finding that the complaint did not support the charges, the reporter’s admission that he was familiar with it was found to be clear and convincing evidence of reckless disregard.

In *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 330 F.3d 1110 (9th Cir.), *cert. denied*, 124 S.Ct. 468 (2003), the Ninth Circuit reinstated a claim for product disparagement against Consumers Union, publisher of *Consumer Reports* magazine, based on a negative review of the Suzuki Samurai sports utility vehicle. The court’s 2003 decision withdrew a prior 2002
opinion and replaced it with an amended opinion maintaining the same reasoning and holding but containing a denial of defendant’s petition for rehearing en banc. In a 1988 magazine article, and in a subsequent anniversary issue and pledge drive, Consumer Reports described the Samurai SUV as “Not Acceptable” due to a propensity to roll over. The court held there was sufficient evidence of actual malice to defeat summary judgment based on evidence that Consumer Union engaged in “rigged testing,” failed to adequately investigate flaws in its testing, and, because it was in debt at the time of testing, it had a “financial motive” to publish “a blockbuster story to raise CU’s profile and increase fundraising revenues.” In a stinging dissent from a denial of rehearing en banc (on a 13-11 vote), Judge Kozinski found no direct evidence that the testing methods were flawed. “If Suzuki can get to trial on evidence this flimsy,” he wrote, “no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics.” 330 F.3d at 1121. And he concluded, “I would long hesitate before letting anyone I care about drive or ride in one of these vehicles.” Id. at 1123. Judge Ferguson, in a separate dissenting opinion, argued that while the evidence suggested that CU had “the intractable, ‘bulldog’ mentality of a consumer advocacy organization,” no clear and convincing evidence of actual malice existed. Id. at 1144.

Conflicting testimony between a reporter and an editor on the question of whether a doctor was an individual party defendant to a malpractice suit was ever raised during the editorial process was sufficient evidence of actual malice to defeat summary judgment. Scripps Texas Newspapers, L.P. v. Belalcazar, 99 S.W.3d 829 (Tex. App. – Corpus Christi 2003, pet. filed).

In a non-media case that may have implications in media contexts, one court held that repeating an allegation of wrongdoing even after the plaintiff had been investigated and cleared of wrongdoing (in this case, not by law enforcement, but rather an independent audit process) can serve as evidence of actual malice. Alaniz v. Hoyt, 105 S.W.3d 330 (Tex. App. – Corpus Christi 2003, no pet. h.).

In Sprague v. American Bar Association, 2003 WL 22110574 (E.D.Pa. Jul 21, 2003) the court considered “how to apply the actual malice standard to a publication that contains a word of dual meaning, where one meaning is unquestionably defamatory, and the other is unquestionably not.” Id. at *3. At issue was the term “fixer” which the court found could imply both the use of legal and illegal influence. Although there was no direct evidence the defendants intended the defamatory meaning, the court found “circumstantial evidence” in the summary judgment record of defendants’ reckless disregard for the ambiguity of the word, and held that was sufficient to defeat the publisher’s summary judgment motion.

In Piper v. Mize, 2003 WL 21338696, 31 Media L. Rep. 1833 (Tenn. Ct. App. Jun 10, 2003), the court noted that proof of actual malice falls “considerably short of being ‘clear and convincing evidence’” where plaintiff only established that defendant did not subjectively believe the rumors forming the basis of a newsletter’s statements, did not investigate the validity of the rumors, and was a political opponent of plaintiff’s husband.
Private Figure Standard

In *Franklin Prescriptions, Inc. v. The New York Times Co.*, 267 F.Supp.2d 425 (E.D. Pa. 2003), the court held that the plaintiff pharmacy was not a public figure for purposes of its defamation suit against the New York Times. Although the complained of article was a lengthy survey of issues relating to the increased availability of prescription drugs over the Internet, the court narrowly construed the “controversy” at issue to the portion of the article discussing illegal online pharmacies. Since the plaintiff was not (and had not gained publicity as) an illegal online pharmacy, it was not a public figure. *Id.* at 437.

An entertainment-business newspaper reporter was held to be a private figure for purposes of her defamation claim against the Walt Disney company. *Finke v. Walt Disney*, 2 Cal. Rptr.3d 436 (Cal. App. 2 2003). In an interesting discussion of the public figure status of news reporters, the court found that despite plaintiff’s self-description as “one of the country’s leading entertainment business journalists,” she was not an all-purpose or limited public figure because she was not well-known to the general public, had not appeared on television, her stories were assigned to her by editors and she did not have independent media access to the public. Note: at press time, the California Supreme Court granted review in the case superceding this decision. 79 P.3d 541 (2003). Also compare *Williams v. Kenney*, No. 202-02 (N.J. Super. Apr. 24, 2003) (holding newspaper reporter bringing a libel action to be a public figure under New Jersey law).

The West Virginia Supreme Court reinstated a libel claim by a high school athlete over a newspaper report that he “exposed” himself in public during a victory celebration. *Wilson v. The Daily Gazette*, 588 S.E.2d 197 (W.Va 2003). The trial court found that plaintiff was a public figure because he received significant attention as a star athlete. Reversing, the West Virginia Supreme Court held that plaintiff had not been involved in any public controversy relating to the news articles simply by virtue of being an amateur athlete.

A California appellate court held that plaintiff’s status as a private figure was law of the case on retrial and not subject to reexamination on appeal of the second trial. *Ross v. Santa Barbara News-Press*, 2003 WL 2220512 (Cal. App. 2 Dist. Sep 26, 2003) (unpublished). In addition, the court affirmed a $2.25 million dollar jury award to plaintiff. At issue were two lengthy articles that profiled plaintiff, a prominent real estate investor, and his attempt to increase his ownership of a California savings and loan. Plaintiff alleged the articles implied he had been investigated for the same investor fraud that his former business partner had been jailed for. The court affirmed the award on the ground that newspaper articles were not fair summaries of prior investigations of plaintiff.

Public Concern

In *Alpine Industries Computers Inc., v. Cowles Pub. Co.*, 57 P.3d 1178, 1190 (Wash. 2002), the court noted for apparently the first time in Washington law that a private figure plaintiff suing over a matter of public concern must prove actual malice. The court found that newspaper reports that a store sold counterfeit software was a matter of public concern.
In an interesting non-media case, a divided Tenth Circuit affirmed a $9 million defamation verdict in *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003). The court held that the defendant’s statements made at a press conference and during a radio show summarizing a federal civil rights lawsuit were not on a matter of public concern so as to require a private figure plaintiff to prove actual malice. The court found that defendants allegation of religious discrimination was not a matter of public concern because the parties dispute was “private” and the defendants should have known that the allegations against the plaintiffs were false. The dissent “disagre[ed] with the suggestion that application of Colorado's public-concern doctrine depends on the truthfulness of the allegedly defamatory statements.” *Id.* at 1075.

In an interesting non-defamation case, *Arndt v. Koby*, 309 F.3d 1247 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1936 (U.S. 2003), the Tenth Circuit also narrowly defined the public concern doctrine. The court affirmed summary judgment for the defendant, Boulder’s police chief, who had allegedly made eight false statements concerning the plaintiff police officer in regard to the JonBenet Ramsey murder investigation. The plaintiff was one of several police officers who had been criticized in the media for her alleged mishandling of the investigation. The plaintiff filed a complaint alleging a First Amendment violation due to a Boulder police department gag order prohibiting employees from talking about the Ramsey investigation. The court concluded that the plaintiff’s speech only addressed personal concerns, not matters of public concern. The court reasoned that (1) “the performance and integrity of a public official” is not necessarily a matter of public concern; (2) intense media interest by itself does not convert speech into speech of a public concern; and (3) the plaintiff’s desire to respond to the media criticism does not necessarily make her speech a matter of public concern. *Id.* at 1254.

**Gross Irresponsibility**

A New York appellate court affirmed summary judgment to a Chinese language newspaper that published an article reporting on an attorney disciplinary proceeding. *Wong v. World Journal*, 767 N.Y.S.2d 227 (N.Y. App. 2d Dept. 2003). Without discussion, the court noted there was insufficient evidence of gross irresponsibility.

A Pennsylvania court considered New York’s gross responsibility standard for private figure cases involving matters of public concern in *Franklin Prescriptions, Inc. v. The New York Times Co.*, 267 F.Supp.2d 425 (E.D. Pa. 2003). At issue was the *New York Times’* use of a picture of plaintiff’s website to illustrate a story on the dangers of online prescription sales. Although the court found that Pennsylvania law applied, in dicta it noted that even if New York law applied there was sufficient evidence of gross irresponsibility to deny summary judgment where plaintiff’s website clearly stated that it “does not operate an online pharmacy.” *Id.* at 433.

5. **Liability for Republication**

**Communications Decency Act § 230**

The Ninth Circuit held that § 230 immunized an Internet matchmaking site from liability for a false personal ad posted by a third party user. *Carafano v. Metrosplash.Com. Inc.*, 339 F.3d 1119
At issue was a claim over a false profile posted to the site www.matchmaker.com that purported to be from plaintiff, the actress who portrayed “Leeta the D’abo girl” on Star Trek: Deep Space Nine. The profiles on the site were created by users inputting their personal information into an online questionnaire created by defendant. The district court granted summary judgment to the website because of insufficient evidence of actual malice. Addressing the question of immunity under the statute, however, the district court found that while the defendant qualified as an “interactive computer service provider” it could be liable as a content provider because it “contributes to the content of the profiles by asking specific questions with multiple choice answers and specific essay questions. It is responsible, in part, ‘for the creation or development of information’ contained in the profiles.” 207 F. Supp. 2d at 1067. Affirming summary judgment, the Ninth Circuit held that defendant was likewise immune under § 230. Noting that reviewing courts “have treated §230 immunity as quite robust,” the court reasoned that while the online “questionnaire facilitated the expression of information by individual users.... the selection of the content was left exclusively to the user.” 339 F.3d at 1124.

In Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit held that an online newsletter qualified as an “interactive computer service” under § 230, and that the selection for publication and editing of an e-mail did not constitute partial “creation or development” of that information to permit liability under that section. In Batzel, the plaintiff sued a listserv moderator and website operator for publishing an e-mail message from defendant Smith which stated that plaintiff “bragged ... about being the grand daughter [sic] of ‘one of Adolph Hitler’s right-hand men’ ... Heinrich Himmler” and that she was the possessor of paintings stolen from Jews by the Nazis in World War II. The Ninth Circuit vacated the district court’s denial of the listserv moderator’s motion to strike under California’s anti-SLAPP statute and remanded for further consideration of the factual circumstances surrounding the publication of the e-mail on the listserv.

In Grace v. Neeley, No. BC288836 (Cal. Super. L.A. County, Apr. 28, 2003), the court dismissed on § 230 grounds a libel claim against Internet auction site eBay for a third party’s negative review posted on the site.

The Third Circuit addressed § 230 for the first time in a defamation case in Green v. America Online, 318 F.3d 465 (3d Cir. 2003). The court affirmed summary judgment in favor of America Online, finding it was statutorily immune from liability for defamation arising from third party content. Plaintiff, an AOL subscriber with the screen name “Lawyerkill,” claimed that two John Doe AOL subscribers with similar screen names hacked into his computer and defamed him in an AOL chat room. See also Smith v. Intercosmos Media Group, Inc., 2002 WL 31844907 (E.D. La. Dec 17, 2002) (dismissing claim against an ISP for failing to remove or block alleged defamatory domain names and URL’s registered by third parties).

6. Privileges

Fair Report

The First Circuit suggested that the fair report privilege may have constitutional underpinnings. Mangual v. Rotger-Sabat, 317 F.3d 45, 68 (1st Cir. 2003). Evaluating a statutory
“Report of Official Acts” defense to Puerto Rico’s criminal libel statute, 33 P.R. Laws Ann. §4103, the court noted that “it is inconsistent with First Amendment standards to require that a true statement about official acts must also be fair.” 317 F.3d at 68. Rather, the defense must also protect reports about official acts that contain minor inaccuracies or are unfair.

In another First Circuit decision, the court gave a broad construction to the fair report privilege under Massachusetts law, finding that the privilege applied to a reporter’s interview with a police chief. Yohe v. Nugent, 321 F.3d 35 (1st Cir. 2003).

Media defendants notched a significant victory in Harrison v. Chicago Sun-Times, 2003 WL 21497271 (Ill. App. June 30, 2003). The plaintiff there claimed that the Sun-Times defamed her by stating she had “kidnapped” her daughter. The Illinois Appellate Court found the statement was substantially true and subject to the fair report privilege. Furthermore, under the innocent construction rule, the allegedly defamatory front page “leader” (reading “Kidnapped girl must go home”) had to be read together with the accompanying article (which appeared on page 16 and clarified that, in a custody dispute, a federal court ruled that plaintiff had “violated an international treaty on abduction”).


In Salvo v. Ottoway Newspapers, Inc., 782 N.E.2d 535, 540 (Mass. App. 2003), the court noted that “newspaper articles need not and cannot be written with the prolixity or specialized terminology of legal documentation” and held that the terms “swap” of “some land” was a fair report of exchange of corrective deeds in order to fix a property boundary.

In Karedes v. The Village of Endicott, 254 F. Supp.2d 276, 31 Media L. Rep. 1970 (N.D.N.Y. 2003), the court dismissed a libel claim against a newspaper, finding its articles regarding the investigation of a village-owned golf course were fair summaries of an official audit of the club.

In Colt v. Freedom Communications, Inc., 2003 WL 21476939 (Cal. App. June 27, 2003) (unpublished), the court held that the California fair report privilege protected a newspaper’s report on an SEC announcement even if the newspaper summary contained slight inaccuracies and colloquialisms. For example, stating that plaintiff was “caught” by the SEC was a fair description of entering into a consent decree with the SEC. Id. at 1559-60. Newspapers, the court noted, are not required to quote “word-for-word” from legal documents. Id.

Two Connecticut trial courts relied on the fair report privilege to dismiss media libel actions over police blotter and crime reports. In Dellacamera v. New Haven Register, 2002 WL 31501855 (Conn. Super. Oct. 28, 2002) (unpublished) the court dismissed an action brought over a two-sentence police blotter item stating that plaintiff was arrested for breach of the peace and public
indecency for “masturbating” in his car. Plaintiff did not deny that he was arrested for public indecency based on exposing himself in public, but complained on the ground that the arrest warrant affidavit did not describe him “masturbating.” The court held that the article fairly and accurately reported on the circumstances surrounding the plaintiff’s arrest.

_Mackowski v. New Haven Register_, 2002 WL 3134285, at *4-5 (Conn. Super. Sept. 22, 2002) arose out of an article published in the Register reporting arrests for kidnapping, assault and drug-related crimes, arrests based on signed statements to the police made by the victim. The victim recanted after the article was published, and the two men who had been charged sued the newspaper. The court granted summary judgment on the fair report privilege. As an article on the arrest and “contents” of an arrest report, the court held that the article fell within the scope of the fair report privilege. _See also Burton v. American Lawyer Media_, 2002 WL 31171008, at *1 (Conn. Super. Aug. 16, 2002) (holding that the headline “Lawyers Attempt to Hide 19 Violins Results in Sanctions,” was a fair summary of a judicial decision and therefore protected by the fair report privilege).

In _Alpine Industries Computers Inc., v. Cowles Pub. Co._, 57 P.3d 1178, 1188 (Wash. 2002), the court affirmed summary judgment to a newspaper on fair report grounds, holding its report that an electronics store sold counterfeit software was a fair summary of a civil action brought against plaintiff. Moreover, the court noted that under Washington law the fair report privilege is absolute and is not defeated even if defendant knows that a report relied upon is false.

_Neutral Reportage_

Last year the Pennsylvania Superior Court in _Norton v. Glenn_, 797 A.2d 294, 30 Media L. Rep. 1637 (Pa. Super. 2002), rejected the neutral report privilege under Pennsylvania law. At issue was an article that accurately republished comments made by a local official at a council meeting that plaintiff council members were “queers” and “child molesters.” The court held that an instruction to the jury recognizing the neutral report privilege was reversible error. This year the Pennsylvania Supreme Court granted an appeal, 815 A.2d 1040 (Pa. 2003), on the issue. The case was briefed and argued in late 2003.

Although it did not mention the neutral report privilege, the court in _Global Relief Foundation, Inc., v. New York Times Co._, 2003 WL 403135, 31 Media L. Rep. 1468 (N.D. Ill., Feb. 20, 2003), appeared to apply a version of it. The court granted summary judgment to news organizations that reported that the federal government was investigating an Islamic-based charity for having possible links to terrorist organizations and was considering freezing plaintiff charity’s assets. The court noted that defendants “merely reported that the government alleged or suspected that GRF provided financial support to terrorism. They did not present their own evidence of GRF wrongdoing, purport to ‘impute guilt to plaintiff,’ or seek ‘to build a case against GRF’ as GRF contends.” _Id._ at *6.
**Other Privileges**

The Fourth Circuit affirmed the dismissal of a defamation lawsuit based on the absolute privilege that permits the government to block disclosure of state secrets in *Trulock v. Lee*, 66 Fed.Appx. 472, 2003 WL 21267827 (4th Cir. 2003) (unpublished). In *Trulock*, a former Department of Energy (DOE) official alleged that DOE colleagues had defamed him by accusing him of racial bias in his investigation of Wen Ho Lee, a DOE scientist accused of mishandling sensitive nuclear weapons documents. The district court dismissed Trulock’s lawsuit because the state secrets privilege protected the information he needed to pursue his claims. The Fourth Circuit agreed, concluding that “basic questions about truth, falsity, and malice cannot be answered without the privileged information,” and that “the public interest in national security must take precedence” over allowing the defamation case to proceed.

In *Cardtoons, L.C. v. Major League Baseball Players Assn.*, 335 F.3d 1161 (10th Cir., 2003), the Tenth Circuit affirmed summary judgment for defendant Major League Baseball Players Association on plaintiff’s claim that it was libeled by a letter threatening a third party with litigation if it printed plaintiff’s parody baseball cards. The court, applying Oklahoma law, held pre-litigation communications were privileged: “As long as the speaker or writer of the defamatory communication has an actual subjective good faith belief that litigation is seriously contemplated, the privilege attaches whether or not he has a good faith belief in the truth of the communication.”

In *Cape Publications, Inc. v. Reakes*, 840 So.2d 277 (Fla. App. 2003), the court reversed a $400,000 award to plaintiff, finding the complained of statements substantially true or alternatively privileged. In an incident that received considerable attention in the journalism community, plaintiff reporter was fired for entering the apartment of a criminal suspect and taking a document. The court held that a Gannett official’s comment the plaintiff “broke the law” was substantially true where plaintiff admitted to entering an apartment without permission. Alternatively the statement was privileged because it was made to other newspaper editors who shared a common interest with the speaker. Interestingly, the complained of statement was also published on Gannett’s website, but the court did not consider whether web publication – arguably to the world at large – affected the application of the privilege under the circumstances.

7. **Discovery**

**Disclosure of Sources**

The Seventh Circuit, in a decision written by Judge Richard Posner, rejected a First Amendment based federal reporter’s privilege in *McKevitt v. Pallasch*, 339 F.3d 530, 31 Media L. Rep. 2141 (7th Cir. 2003). The decision arose from a subpoena issued by an Irish criminal court where Michael McKevitt was on trial on terrorism charges. He subpoenaed several Chicago newspaper reporters who had written a biography of the main prosecution witness, seeking their unpublished notes. A district court ordered disclosure and the Seventh Circuit refused to issue a stay. Despite the absence of a full briefing, the Judge Posner later issued a decision on the refusal to issue a stay. He found there is no “federal common law reporter’s privilege rooted in the First
Amendment,” explaining that such a privilege was rejected by the U.S. Supreme Court in *Branzburg* “even in the context of a confidential source.” Moreover, he described those decision finding a privilege for non-confidential information as “skating on thin ice,” indicating that the compelled disclosure of such information creates no First Amendment issue. Instead, he proposed a “reasonableness in the circumstances” test that would involve some of the same traditional reporter’s privilege factors, but without the First Amendment underpinning.

*McKevitt* appears to have been implicitly followed by the D.C. federal district court in *Lee v. Dept. of Justice*, 287 F.Supp.2d 15, 31 Media L. Rep. 2473 (D.D.C., Oct 09, 2003). Plaintiff Wen Ho Lee, a former Los Alamos scientist suspected but cleared of passing nuclear secrets to China, brought a Privacy Act claim against the government for releasing information about him to the media. The court ordered several reporters to submit to depositions to identify their government sources for articles about Lee. As in *McKevitt*, the court reasoned that there is no First Amendment based privilege against disclosure of confidential sources. Interestingly, another district court judge in the D.C. Circuit last year explicitly recognized a First Amendment based reporter’s privilege. *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002). The court in *Lee* instead applied a balancing test, concluding that plaintiff had no other source for the critical information after he had taken numerous depositions of high level officials who claimed to have no knowledge of the source of the leak. The court also notably added that protecting the identity of sources involved in actual criminal conduct is “hardly deserving of constitutional protection.” 287 F. Supp.2d at 24.

A related point was made on very different facts in *Ventura v. The Cincinnati Enquirer*, 246 F. Supp. 2d 876 (S.D. Ohio, 2003) where the court granted summary judgment to a newspaper on breach of contract and promissory estoppel claims. The plaintiff, a source for a controversial *Cincinnati Enquirer* report on the Chiquita company, alleged the newspaper breached a promise of confidentiality by providing information to prosecutors that revealed his identity. Assuming that plaintiff had submitted sufficient evidence to support a breach of contract / promissory estoppel claim, the court held that under Ohio law the newspaper was immune from civil liability for disclosure of information relating to the reporting and prosecution of a crime to the prosecuting attorney and/or the grand jury.

A divided Minnesota Supreme Court granted a libel plaintiff’s motion to compel third party reporters to reveal the identities of confidential sources quoted in an allegedly defamatory newspaper article. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 31 Media L. Rep. 2281 (Minn. 2003). The article discussed plaintiff’s firing as a high school football coach, and included quotes from unnamed sources that attributed the firing to his abusive behavior. Plaintiff sued several school officials for libel alleging they were the unnamed sources. The appellate court quashed the subpoena, finding that plaintiff had failed to establish a prima facie case of falsity. Considering the issue solely under Minnesota’s shield statute, Minn. Stat. § 595.021-025, the state supreme court reversed. Under the statute, a plaintiff in a defamation action need only show “that the identity of the source will lead to relevant evidence on the issue of actual malice.” *Id.* at 673. A sharp dissent chides the court for “fail[ing] to give any First Amendment context to its decision.” *Id.* at 676.
A federal court in New York held that a third party student journalist was covered by a federal common law reporter’s privilege, and the court declined to compel disclosure of her confidential sources in an employment discrimination suit – at least until plaintiff met the stringent test of showing that the information sought was not available from other sources. *Persky v. Yeshiva Univ.*, 2002 WL 31769704, 31 Media L. Rep. 2004 (S.D.N.Y., Dec 10, 2002) (noting that taking three depositions and informally questioning three other people was inadequate).

The Second Circuit held that a credit rating agency was not entitled to assert the protection of New York’s shield statute for its work on a series of financial transactions. *In re Fitch, Inc.*, 330 F.3d 104 (2d Cir. 2003). While not deciding the general status of credit rating agencies for purposes of the state shield law, it reasoned that here the agencies “information-disseminating activity does not seem to be based on a judgment about newsworthiness, but rather on client needs.” *Id.* at 110.

A New Jersey appellate court held that the reality television program *Trauma, Life in the ER* was covered by the state’s shield law which creates a privilege for “news media” not to disclose information obtained in newsgathering. *Kinsella v. New York Times*, 827 A.2d. 325, 31 Media L. Rep. 1961 (App. Div. 2003). Plaintiff brought an invasion of privacy suit against the producers of the show for filming him in a hospital emergency room. While recognizing “that the mere fact a videotape is taken for use in a television show does not automatically mean that the videotape producer is part of the ‘news media’ for purposes of applying the statute, the court concluded ‘‘that ‘news’ is not limited to reports of significant public events” but can include “‘human interest’ stories that may be considered more entertaining than informative.” *Id.* at 331.

8. **Damages**

On reconsideration of a $7 million jury award for mental anguish in a libel suit, a Texas appeals court ordered a remittitur to $150,000 or a new trial. *Bunton v. Bently*, 2003 WL 21831533 (Tex. App. – Tyler, Aug. 7, 2003), no pet.). Plaintiff, a state court judge, sued the host of a public access cable show for repeatedly referring to him as “corrupt.” The court held that the $7 million award was unsupported by the evidence where plaintiff never sought counseling, suffered no economic loss, and was not hampered professionally.

The Oklahoma Court of Appeals reversed a $6 million compensatory damage award against media defendants because of an improper instruction on presumed damages in *Mitchell v. Griffin Television, L.L.C.*, 60 P.3d 1058 (Okla. Civ. App 2002), cert. denied, 123 S.Ct. 1931 (U.S. 2003). The court held that under Oklahoma law in a defamation action over statements made on a television broadcast, damages must be proved and cannot be presumed. The trial court erred in instructing the jury that it could award presumed damages without proof of harm. *Id.* at 1066.

In *Sprague v. American Bar Association*, 2003 WL 21949127 (E.D. Pa. July 31, 2003), the district court held that, even in the absence of evidence that anyone reading the article had a diminished view of the public figure plaintiff, so long as an inference existed that there might somewhere be an unidentified reader with a diminished view of him there was sufficient evidence to satisfy the constitutional requirement of actual damages.
The Third Circuit in *McNulty v. Citadel Broadcasting Co.*, 58 Fed.Appx. 556, 2003 WL 500171 (3d Cir. 2003) (unpublished), affirmed dismissal of a radio personality’s defamation and disparagement suit against his former employer for failure to show any damage to reputation. The Court held that, even assuming that the allegedly defamatory statement (that plaintiff was too old to appeal to the broadcaster’s target market) imputed business misconduct and therefore could be defamatory *per se*, plaintiff must still prove “‘general damages,’ that is ‘that one’s reputation was actually affected by the slander or that one suffered personal humiliation.’” *Id.* at 567. See also *Hussain v. Palmer Communications*, 60 Fed. Appx. 747, 31 Media L. Rep. 1585 (10th Cir. 2003) (granting summary judgment to a broadcaster in a case where the plaintiff offered no proof that anyone thought less of him as a result of the broadcasts).

In a non-media case, the Eleventh Circuit held that under Florida law the plaintiff’s failure to prove actual damages was sufficient “‘good cause’” for the trial court to *sua sponte* vacate a default judgment for the plaintiff and to enter final judgment for the defendant. *Anheuser-Busch, Inc. v. Philpot*, 317 F.3d 1264, 1266-67 (11th Cir. 2003).

Reviewing Utah law, the Tenth Circuit held that reports that stocks were sold at a discounted rate, that the market price of stocks was too high, and that plaintiff corporation was losing money were not actionable absent pleading and proof of special damages – and affirmed that a general allegation of drop in market capitalization, i.e. stock price, was insufficient to provide such proof. *Computerized Thermal Imagining, Inc. v. Bloomberg, L.P.* 312 F.3d 1292, 1297-98 (10th Cir. 2002).

**Punitive Damages**

According to the 2003-2004 MEDIA LIBEL SURVEY, eight jurisdictions do not permit punitive damages in defamation cases.¹ Ten states impose statutory limitations on punitive damage awards² and 21 states limit punitive damages through retraction laws.³

Punitive damages in defamation cases are determined by state law, with only rough guidance from the Supreme Court on the constitutionality of such awards in the First Amendment context.⁴

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¹ Louisiana, Michigan, Nebraska, Puerto Rico and Washington do not allow punitive damages; Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; and New Hampshire, although prohibiting punitive damages, permits plaintiffs an “enhanced recovery” in tort cases where defendant acted with malice or wanton disregard of plaintiff’s rights.

² Colorado, Georgia, Kansas, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Texas and Virginia.

³ Alabama, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma (rarely invoked), South Dakota, Tennessee, Utah and Wisconsin.

More recently, the U.S. Supreme Court has reviewed the constitutionality of punitive damages on due process grounds,\(^5\) weighing in again on the subject this year in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), reversing, 65 P.3d 1134 (Utah 2001). On appeal of a jury award against an insurance company for fraud and related claims, the Court held that a $145 million punitive damage award on only $1 million in compensatory damages violated due process. The Court reasoned that the punitive award was not proportional to the harm committed and constituted an arbitrary deprivation of property.

Prior to the Court’s ruling, an Ohio court affirmed a $100,000 punitive damage award on $250 in compensatory damages in an invasion of privacy action. *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, 30 Media L. Rep. 1993 (Ohio App. 2002). The court held that the large disparity between the compensatory and punitive damages assessed by a jury is not in and of itself cause to reverse the judgment or to grant a remittitur. Factors that might make a large punitive damage award appropriate in a particular case include substantial harm, continuing risk, the deterrent effect and the financial size of the defendant.

The Oklahoma Court of Appeals conditionally affirmed a $500,000 punitive damage award against media defendants in *Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, 60 P.3d 1058 (Okla. Civ. App 2002), cert. denied, 123 S.Ct. 1931 (U.S. 2003). The court found sufficient evidence of actual malice to affirm the award, but having reversed a compensatory damage award for an improper instruction on presumed damages, the court held the punitive award was conditional on plaintiff’s recover of actual damages on remand.

9. **Criminal Libel and Slander**

The First Circuit struck down Puerto Rico’s criminal libel statute as applied to public officials or public figures. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 31 Media L. Rep. 1297 (1st Cir. 2003). The Puerto Rico criminal defamation statute, 33 P.R. Laws Ann. §§4101-4104 (2001), was enacted in 1974, and had been amended four times – most recently in 1999, to increase the criminal penalties to deter “anti-social” acts. The opinion notes drily, “the amendments have not attempted to conform the statute to the requirements of the First Amendment.” 317 F.3d at 58. The statute purported to penalize anyone who “maliciously, by any means, or in any way, publicly dishonors or discredits, or charges the commission of an act constituting a crime, or impugns the honesty, integrity, virtue or reputation of any natural or judicial person, or who blackens the memory of one who is dead.” 33 P.R. §4101. Possible sanctions include up to six months in jail, a requirement to pay restitution, a fine of up to $500, or all three. *Id.* The statute provided that truth is a defense “provided it is proven that the charge made is true and [the accused] had good intention and justifiable ends.” *Id.*, §4102 (emphasis added). In the case of a matter of public interest or a libel referring to a public officer’s performance of duties, then truth is an absolute defense if proved by

the accused. Finally, the statute contained a privilege for a “true and fair” report of governmental acts and debates. Id., §4103.

The statute was challenged by reporters for a newspaper that published a series of stories about governmental corruption, to which the government responded “with actual and threatened criminal prosecution of the reporters.” 317 F.3d at 64. Later, the newspaper published a story critical of a political candidate, and the reporter was again threatened with prosecution. In the Court’s succinct summary: “The free press is threatened for commenting on public officials on matters of public concern.” Id.

After sweeping aside standing, ripeness, and mootness challenges that had caused the district court to dismiss the claim, see Mangual v. Fuentes Agostini, 203 F. Supp. 2d 78, 81 (D.P.R. 2002), the First Circuit struck down the statute as applied to public officials and public figures. It held that the statute was constitutionally flawed because: (1) it did not require that “actual malice be proven in order for a statement disparaging a public official or figure to be successfully prosecuted,” 317 F.3d at 66; (2) the truth defense was in some circumstances limited to cases where the accused “had good intention and justifiable ends,” 317 F.3d at 67; (3) it did not extend a complete truth defense to cases of public-figure (as opposed to public-official) libel, 317 F.3d at 67; and (4) the “fair report” defense built into the statute was limited to “true and fair” reports of official acts, 317 F.3d at 68, in spite of established principles that where official acts are concerned, the First Amendment does not require “fairness” and falsity cannot be established by mere “‘minor inaccuracies,’ whether deliberate or not,” id., quoting Masson v. New Yorker Magazine, 501 U.S. 496, 516-17 (1991).

Late last year the Utah Supreme Court struck down Utah’s criminal libel statute, Utah Code §§ 76-9-502, because it failed to incorporate an actual malice standard or provide for truth as an absolute defense. I.M.L. v. State, 61 P.2d 1038 (Utah 2002). A high school student was charged with criminal libel for creating a web site that contained derogatory comments about other students, teachers and the school principal. Considering “the application of a law drafted more than one hundred years ago to the most modern of preoccupations – the Internet,” the court found that the “plain language of Utah’s statute does not comport with the requirements laid down by the United States Supreme Court.” Id. at 1044. Interestingly, after the decision, the prosecutor scheduled an arraignment under Utah Code § 76-9-404, a separate criminal defamation statute enacted in 1973 that incorporates the actual malice standard. The prosecution was dropped after the prosecutor’s term of office expired.

10. Statute of Limitations / Single Publication Rule

In Van Buskirk v. New York Times Co., 325 F.3d 87, 90, 31 Media L. Rep. 1609 (2d Cir. 2003), the Second Circuit dismissed as time barred a claim against the writer of a letter posted on the Internet. The court held that the single publication rule applies to Internet publications, applying last year’s decision by the New York Court of Appeals in Firth v. New York, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002) (holding that single publication rule barred claim over alleged defamatory report available on state website).
Interestingly, this year the plaintiff in *Firth* was found to have stated a claim over the same report after it was moved to “to a new directory on the State Library's Web site as part of defendant's Web site revision project.” *Firth v. New York*, 761 N.Y.S.2d 361 (3'd Dept. 2003). The appellate court held that moving the report to a new website at a new Internet address was “akin to the repackaging of a book from hard cover to paperback.” Id. at 36.

In *Mitan v. Davis*, 243 F.Supp. 2d 719 (W.D. Ky. 2003) the court, applying Kentucky law, reasoned that there is no difference between statements posted on the Internet and those published in books and newspapers. Therefore, the single publication rule was held to apply to instances of Internet publication and the one-year statute of limitations began running on date the statements were first posted online.

In *Jin v. Ministry of State Sec.*, 254 F. Supp. 2d 61, 64 (D.D.C 2003), the court held that the single publication rule barred a claim by Falun Gong practitioners against the Chinese Television Corporation for allegedly defaming them in “staged” news reports “as advocates of suicide, intra-family violence, anti-family values, and cult worship.” The court held the claim was time barred by the District of Columbia’s one year statute of limitations, not withstanding the allegedly rebroadcast of the reports by other Chinese government defendants. *Id.* at 68.

Where there is a republication of an allegedly defamatory statement, a new cause of action accrues on the date of republication, but the cause of action is only against the party that republished the statement and not against the party which originally published the statement. *Vondra v. Crown Publishing Co.*, 2002 WL 31379948 (Mass. Super. 2002).


The continuing tort theory, that articles published in a series constitute an unbroken continuous tortious act so as to allow suit upon articles more than one year old together with more recent articles in the series, was rejected in *Rosenbaum v. The Chronicle Telegram*, 2002 WL 31890101, 31 Media L. Rep. 1827 (Ohio App. Dec. 31, 2002).

11. **Procedural Matters**

   **Summary Judgment**

   *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 330 F.3d 1110 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 468 (2003), revealed a deep division in the Ninth Circuit on the applicability of the *New York Times v. Sullivan* independent examination rule to the review of a grant of summary judgment. Responding to a petition for en banc review of last year’s decision reinstating a disparagement claim over a negative car review, the majority of judges held that the independent examination rule functions within the court’s normal procedural review of grants of summary judgment to prevent an impermissible weighing of the evidence at the summary judgment
stage, but 11 judges disagreed and argued that the independent examination rule provides additional First Amendment protection by requiring a weighing of the evidence at the summary judgment stage.

In Mach v. Allison, 2003 WI App 11 ¶ 15 n.8, 259 Wis. 2d 686, 656 N.W.2d 766, the court refused to adopt summary judgment as “favored method” in private figure cases against the media.

**Jurisdiction**

Agreeing with the Fourth Circuit’s decision last year in Young v. New Haven Advocate, 315 F.3d 256, the Fifth Circuit in Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002), held that a Texas court did not have jurisdiction over out-of-state defendants simply based on their publications on the Internet. At issue was a posting by a Massachusetts resident on an Internet bulletin board maintained by Columbia University in New York City. The posting accused plaintiff, a former senior FBI official, of being involved in a government cover-up of the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland.

In dismissing the claim for lack of jurisdiction, the court found that its charge was to decide fairness:

judged by the reasonableness of Texas exercising its power over residents of Massachusetts and New York. This inquiry into fairness captures the reasonableness of hauling a defendant from his home state before the court of a sister state; in the main a pragmatic account of reasonable expectations. It is not fairness calibrated by the likelihood of success on the merits or relative fault. Rather, we look to the geographic focus of the article, not the bite of the defamation, the blackness of the calumny, or who provoked the fight.

*Id.* at 476.

The court found that the alleged defamatory posting made no reference to Texas, or to any Texas activities of the plaintiff, and it was not directed at Texas readers as distinguished from readers in other states. Accordingly, Texas was not the focal point of the article or the harm suffered so as to permit jurisdiction.

Similar reasoning was applied in Falwell v. Cohn, 2003 WL 751130 (W.D.Va. 2003). The court dismissed a libel action brought by a nationally known religious figure, Jerry Falwell, against an Illinois defendant who created the satiric website, jerryfalwell.com. The court found that the website was not aimed at a Virginia audience, did not discuss anything that relates specifically to Virginia and did not expressly target a Virginia audience. Thus the defendant could not have reasonably anticipated being haled into court in Virginia and the court could not constitutionally exercise jurisdiction over him. See also Medina Mining, Inc. v. Amunategui, 237 F. Supp.2d 1132, 1136-37 (D. Nev. 2002) (Nevada court did not have personal jurisdiction over an Arkansas resident who posted allegedly defamatory messages about a Nevada corporation on a passive website, where
the Arkansas resident did not do business with anyone in Nevada or direct the allegedly defamatory statements at Nevada; *Hammer v. Trendl*, 2003 WL 21466686 at *5 (E.D.N.Y. Jan. 18, 2003) (posting a book review to Amazon.com that can be read by New York Internet users is not the type of purposeful activity in New York sufficient to support the exercise of personal jurisdiction over an out of state libel defendant).

In contrast, the Ninth Circuit in a non-media case, *Northwest Healthcare Alliance Inc. v. Healthgrades.Com, Inc.*, 50 Fed.Appx. 339, 2002 WL 31246123 (9th Cir. 2002) (unpublished), *cert. denied*, 123 S.Ct. 190 (2003), reinstated a libel suit against an out-of-state website operator, holding that the Washington district court had personal jurisdiction over the defendant. Defendant Healthgrades.com, a Delaware corporation with its principal place of business in Colorado, operates a website that rates home health care providers in all 50 states. Plaintiff Northwest Healthcare Alliance, a Washington home care provider, sued Healthgrades.com in Washington for libel and violation of the Washington’s Consumer Protection Act after receiving an unfavorable rating. The district court dismissed the claims for lack of personal jurisdiction. Reversing, the Ninth Circuit held that “Healthgrades.com has purposefully interjected itself into the Washington state home health care market through its intentional act of offering ratings of Washington medical service providers.” *Id.* at 341. Specifically, the court found that ratings of Washington home health care providers would be of value primarily to Washington consumers, defendant obtained information from Washington sources, the allegedly defamatory rating concerned the Washington activities of a Washington resident and the brunt of harm occurred in Washington. Thus “defendant could reasonably expect to be called to account for its conduct in the forum where it understood the effects of its actions would be felt.” *Id.*

Similarly, the North Dakota Supreme Court held that its courts had personal jurisdiction over a non-resident pro se libel defendant over statements on her website <www.undnews.com> that focused on the plaintiff, a professor at the University of North Dakota. *Wagner v. Miskin*, 660 N.W.2d 593 (2003). Distinguishing *Young v. New Haven Advocate*, the court held that defendant’s website specifically “targeted” the state by linking to articles about the University of North Dakota, plaintiff, his lawyer and this litigation. *Id.* at 598. See also *Jane Doe One v. Oliner*, 2003 WL 21235402 (Conn. Super. 2003) (in non-media libel case, trial court held that Connecticut has personal jurisdiction over defendant where plaintiff alleged that defendant sent defamatory e-mails from Virginia to 31 Connecticut recipients with intent to cause plaintiff harm); *Becker v. Hooshmand*, 841 So.2d 561 (Fla. App. 2003) (upholding personal jurisdiction based on alleged defamatory chat room posting and defendant’s failure to submit affidavit challenging jurisdiction).

**Other Personal Jurisdiction Cases**

the book *Sharon Tate and the Manson Murders*, which Barricade Books published in 2000. One passage in the book stated that plaintiff, the daughter of a former Manson follower, was known to police as “lady dangerous,” and that she had been convicted of possession of controlled substances and sentenced to a year in state prison. Only two copies of the book were sold in New Hampshire through third party distributors, and the defendant only directly sent one book to the state which was returned. Without analysis of plaintiff’s alleged injury in New Hampshire as a basis for jurisdiction, the court concluded that under the circumstances the publisher could not reasonably have anticipated being haled into court in New Hampshire.

In *Realuyo v. Villa Abrille*, 2003 WL 21537754 (S.D.N.Y. July 8, 2003), the court dismissed a libel claim against defendants, including a newspaper and Internet news service based in the Philippines, for lack of personal jurisdiction and alternatively pursuant to the doctrine of forum non conveniens. See also *Metropolitan Worldwide, Inc. v. Bunte Entertainment*, (Sup. Ct. N.Y. Co. 2003) (where article was written and edited in Germany, newsgathering was conducted primarily in Germany by German publishing company, newspaper had limited circulation in New York and all the essential parties were located in Germany, the court held that Germany was the more appropriate forum to hear the case).

In *Emerson v. Cole*, 847 So.2d 606 (Fla. 2d DCA 2003), the court held Florida had personal jurisdiction over a nonresident defendant who made numerous allegedly defamatory telephone calls to a Florida journalist knowing they would be used in a Florida publication. The court reasoned that the nonresident could have reasonably foreseen being haled into court in Florida because he repeatedly made defamatory calls into Florida knowing they would be used for an article published in the state.

Going even further the Florida Supreme Court in *Acquadro, M.D. v. Bergeron*, 851 So.2d 665 (2003), held there is personal jurisdiction in Florida under both Florida’s “long arm” statute and the Due Process Clause over nonresident defendants who are alleged to have made defamatory remarks in a single, isolated telephone conference call where one of the parties to the call was in Florida.

**Choice of Law**


12. **International Developments**

**Canada**

The Quebec Court of Appeal recognized an unprecedented libel class action claim in *Malhab v. Metromedia C.M.R. Montreal*, 500-09-011219-011, 03-03-24, J.E. 2003-711 (C.A. Quebec March
At issue were comments by a controversial radio talk show host, Andre Arthur, of CKVL Radio, stating, among other things, that most taxi cab drivers in Montreal speak either Arabic or Creole, and that they don’t know the city, their cabs smell and they receive their licenses through corruption. Plaintiff cab driver sought class certification for approximately 1,000 Arab and Creole speaking cab drivers in Montreal as of the date of the broadcast, seeking $950 in damages for each driver. The trial court dismissed on the ground that the claim was barred by the group libel doctrine. Reversing, a unanimous Court of Appeal held that since defendant stated that every Arab or Haitian cab driver was corrupt, unclean and incompetent there was no possibility that their reputations were not damaged.
FINDINGS OF THE MLRC 50 STATE SURVEY 2003-2004: MEDIA PRIVACY AND RELATED LAW

1. False Light

Recognition

According to the 2003-2004 MEDIA PRIVACY AND RELATED LAW SURVEY, 34 jurisdictions currently recognize the false light tort.\(^1\) In six of these jurisdictions, however, the tort has not been applied in the media context.\(^2\) Ten other jurisdictions have explicitly rejected the tort.\(^3\)

Significant Media Cases

The Oklahoma Court of Appeals affirmed a jury verdict of liability on false light and defamation claims in *Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, 60 P.3d 1058 (Okla. Civ. App 2002), *cert. denied*, 123 S.Ct. 1931 (U.S. 2003). The jury found in favor of a plaintiff veterinarian in a lawsuit over a series of news reports that alleged he had improperly treated race horses and show horses. The appellate court held that the news reports, based on a federal complaint relating to a dispute over the sale of one horse and a racing commission report, were not protected by the fair report privilege because the broadcasts were not fair summaries of the information contained in the official reports and did not support the allegations of misconduct made against plaintiff. Moreover, since the reporter testified that he read both documents, the court held there was clear and convincing evidence of reckless disregard of falsity to support the jury’s finding of liability. The jury’s $6 million award was reversed, though, because they improperly instructed that they could award presumed damages.

The Seventh Circuit reinstated false light and related claims over a fictional movie inspired by a true story. *Muzikowski v. Paramount Pictures Corp.*, 2003 WL 755874 (7th Cir. March 6, 2003). The plaintiff coached Little League Baseball teams in depressed areas of Chicago. In the fall of 2001, Paramount Pictures released *Hardball*, a movie based loosely on a book about the plaintiff. Muzikowski sued for defamation and false light invasion of privacy, claiming that the film portrayed him as a violent, self-centered, hard-drinking gambling addict, engaging in illegal activities such as ticket scalping. The district court dismissed the false light claim, holding that plaintiff had failed to properly plead that the fictional character was “of and concerning” plaintiff and therefore the defendants could not have acted with actual malice. The Seventh Circuit reversed, holding that the complaint was sufficient to permit the plaintiff to attempt to introduce facts showing

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2. Delaware, Indiana, Kansas, Nebraska, Vermont, and Virgin Islands.

3. Colorado, Massachusetts, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia, and Wisconsin.
that the challenged statements in the film “cannot reasonably be construed as pertaining to anyone other than himself.” *Id.*

In another Illinois case addressing the “of and concerning” element, *Villalovos v. Sundance Assoc., Inc.*, 31 Media L. Rep. 1274 (N.D. Ill. 2003), the court held that the plaintiff stated a claim for false light where she alleged that a magazine published a lewd personal advertisement that contained her name and address, although the photograph accompanying the ad was not of plaintiff.

In *Heekin v. CBS Broadcasting, Inc.*, No. 99-5478-CA (Fl. Cir. Ct. May 28, 2003), the court dismissed a false light claim brought over a *60 Minutes* segment on domestic violence. Plaintiff complained that the juxtaposition of pictures of his ex-wife and children with pictures and stories about other women who had been abused and battered created the false impression that plaintiff mistreated his wife in the same fashion. In a bench ruling the judge held the broadcast did not convey that impression.

In *Harris v. City of Seattle*, 278 F.Supp.2d 1111 (W.D. Wash. March 5, 2003), the court held that plaintiff stated a claim for false light over a news report showing her gambling in a Las Vegas casino. At issue was a news report about a city official’s trip to Las Vegas to attend a conference. Plaintiff alleged she was gambling on her “free time,” and the broadcast falsely portrayed her as gambling instead of working. *Id.* at *5.

In *Tyne vs. Time Warner Entertainment Co.*, 336 F.3d 1286, 31 Media L. Rep. 1929 (11th Cir. 2003), the Eleventh Circuit affirmed dismissal of a false light claim brought against the makers of the motion picture *The Perfect Storm*, which dramatized the 1991 “storm of the century” that destroyed the fishing boat *Andrea Gail*, killing its crew. Survivors of deceased crew members and a former crew member brought claims against the film’s producers for false light, private facts and misappropriation under Florida law. The district court granted summary judgment in favor of the defendants on all counts. As to the false light claim the district found that plaintiffs lacked standing to bring claims on behalf of decedents. On appeal to the Eleventh Circuit, plaintiffs argued that a “relational right of privacy” applied. Affirming dismissal, the Eleventh Circuit noted that such a claim “is very limited and applies only where a defendant's conduct towards a decedent is found to be sufficiently egregious to give rise to an independent cause of action in favor of members of the decedent's immediate family.” *Id.* at 1292. Here the portrayal of the ship’s captain as “obsessed” fell “considerably short of this standard.” *Id.*

A Michigan trial court granted summary judgment to rap singer Eminem on a false light claim brought against him by a former grade school classmate over song lyrics. *Bailey v. Mathers*, 2003 WL 22410088 (Mich. Cir. Oct. 17, 2003). The court found that the lyrics, which described being beaten and harassed by the classmate, were substantially true where plaintiff admitted to doing “bully type things,” and being part of a group that assaulted defendant. *Id.* at *5. Alternatively, the court held that in context reasonable people would not interpret the song as stating actual facts about plaintiff, but rather would understand that Eminem was “telling a story” of “hard time during grade school.” *Id.* at *6.
Also reaffirming that falsity is an essential element of the tort, a Florida federal court granted summary judgment to the producer of the *Girls Gone Wild* video series on a claim brought by a young woman depicted in one of the videos. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002). The video depicted the plaintiff “truthfully and accurately as doing exactly what she did, ... exposing her breasts on a street in Panama City, in exchange for a beaded necklace.” *Id.* at 1222. Plaintiff claimed that the defendants placed her in a false light by including this footage with other, arguably more outrageous, footage on the same video and by marketing that video together with another video containing “even more extensive and offensive sexually explicit scenes.” The court rejected both arguments. Because the portrayal of Lane was “reasonable, accurate, and truthful,” intersplicing her footage with that of “other women engaging in similar acts was neither unreasonable nor inaccurate.” *Id.* Additionally, the marketing of another, more explicit tape alongside *Girls Gone Wild*, failed to give rise to a false light claim because there was “no suggestion, implication, or innuendo connecting Lane with the more offensive and sexually explicit scenes” of the second video. *Id.*

### 2. Private Facts

#### Recognition

According to the 2003-2004 **MEDIA PRIVACY SURVEY**, 43 jurisdictions currently recognize a claim for publication of private facts.\(^4\) The tort has been specifically rejected in four jurisdictions.\(^5\)

#### Significant Media Cases


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\(^5\) Nebraska, New York, North Carolina, and Virginia.
embarrassing private facts caused by the accurate publication of information in a court record open to the public, and that special protection is given to judicial proceedings. The age of the court records (forty years) was not significant, because “there is no indication that the First Amendment provides less protection to historians than to those reporting current events.” 67 P.3d at 35.

In *Doe v. Haw*, 31 Media L. Rep. 1491, 2003 WL 21015134 (Idaho Feb 5, 2003), the Idaho Supreme Court dismissed a private facts claim against a newspaper for publishing an advertisement by a doctor that allegedly disclosed a patient’s private medical information. The court found that the advertisement, which was directed to the state governor and legislators and concerned state regulations of physicians, was newsworthy.

Reversing the trial court, a California appellate court dismissed a private facts claim against the producers of the true crime television series *The Prosecutors* for truthfully reporting that plaintiff had pleaded guilty to being an accessory after the fact to a murder for hire. *Gates v. Discovery Communications*, 106 Cal. App. 4th 677, 692, 131 Cal. Rptr. 2d 534, 545, 31 Media L. Rep. 2133 (2003). Plaintiff argued that although his conviction was a matter of public record he had rehabilitated himself and was entitled to have his identity kept private – a position endorsed by the California Supreme Court in 1971 in *Briscoe v. Readers Digest*, 483 P.2d 34, 1 Media L. Rep. 1845 (Cal. 1971) (a strong public interest exists in keeping private the identity of past offenders since doing so preserves the integrity of the rehabilitative process). The court concluded that in light of later United States Supreme Court authority, including *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), “Briscoe is no longer the law.” Note: In June 2003, the California Supreme Court granted review, superceding this decision. 70 P.3d 387.

In *Tyne vs. Time Warner Entertainment Co.*, 204 F. Supp. 2d 1338 (M.D. Fla. 2002), aff’d in part, 336 F.3d 1286, 31 Media L. Rep. 1929 (11th Cir. 2003), the federal district court also dismissed claims for public disclosure of private facts under Florida common law. The plaintiffs claimed that the film’s depiction of a woman’s “intimate involve[ment] with another man” was “entirely fabricated.” *Id.* at 1344. The court found this allegation fatal to the plaintiffs’ public disclosure claim because “an essential element of the tort ... is that the facts at issue be true.” *Id.* (citing Restatement (Second) of Torts, Special Note to § 652D). “Where the ‘facts’ disclosed ... are, in actuality, false, the interest invaded is that protected by the defamation and false-light torts: the interest in being represented truthfully to the world.” *Id.*

The same principle was noted in *Villalovos v. Sundance Assoc., Inc.*, 31 Media L. Rep. 1274, 2003 WL 115243 (N.D. Ill. 2003), where the court dismissed a private facts claim over a fabricated personal ad.

In *Daly v. Viacom*, 238 F. Supp. 2d 1118, 1124 (N.D. Cal. 2002), the court granted a motion to dismiss in favor of the producers of the television show *Band on the Run*. Although plaintiff consented to appearing in the program, she alleged the producers without consent followed her into nightclub bathroom and filmed her kissing a man in a bathroom stall. The kiss was not a private fact, since plaintiff had been seen kissing the same man in public. Moreover, the disclosure that plaintiff “kissed someone in a bathroom or any other seemingly unromantic locale” was not, as a matter of law, sufficiently offensive to state a claim. *Id.* at 1125.
3. Intrusion and Related Causes of Action

Recognition

According to the 2003-2004 MEDIA PRIVACY SURVEY, 44 jurisdictions recognize a claim for intrusion. Two jurisdictions have explicitly declined to recognize intrusion; in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort.

Significant Media Cases

In Harris v. City of Seattle, 278 F.Supp.2d 1111 (W.D. Wash. March 5, 2003), the court dismissed an intrusion claim based on a news broadcaster’s videotaping of plaintiff gambling at a Las Vegas casino. Not only was the casino public, but “any person in a casino in Las Vegas would expect to be filmed and observed by the establishment’s security.” Id. at *5.

Last year an Ohio appellate court affirmed a $100,000 punitive damage award on $250 in compensatory damages in an invasion of privacy action based on a newspaper’s telemarketing activity. Irvine v. Akron Beacon Journal, 770 N.E.2d 1105, 30 Media L. Rep. 1993 (Ohio App. 2002). The court held that the evidence that plaintiffs received hundreds of hang up calls was sufficient to affirm the jury’s award for invasion of privacy.

Significant Non-media Cases

In Quigley v. Rosenthal, 327 F.3d 1044 (10th Cir. 2003), the Tenth Circuit reversed a jury verdict in favor of plaintiff on an intrusion claim based on the unauthorized interception and recording of cordless telephone conversations. At trial, the district court instructed the jury that it could find in favor of the plaintiffs on the claim “if they found the defendants had either intercepted the Quigleys’ private telephone conversations on or after October 25, 1994 (the date on which intercepting and taping became illegal under federal law), or had ‘used’ the contents of those conversations. Id. at 1073. (emphasis added). On appeal, the Tenth Circuit considered whether the ‘use’ of intercepted conversations alone can constitute an unlawful intrusion. The Court concluded it could not: “[O]nce the interception of the conversations was complete, any subsequent ‘use’ of the conversations could not have resulted in any additional intrusion on the Quigleys’ seclusion or solitude. Certainly, the ‘use’ of such conversations might have resulted in another type of invasion of privacy, i.e., unreasonable publicity given to another’s private life. But no such claim was asserted in this case.” Id.

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7 New York and Virginia.

8 Eighth Circuit opinion interpreting North Dakota law.
The New Hampshire Supreme Court discussed whether and to what extent intrusion claims could be stated against a private investigation company for obtaining a person’s social security number and employment address. Remsberg v. Docusearch, Inc., 816 A.2d 1001 (2003). On a certified question from the New Hampshire federal court hearing a wrongful death action and related privacy claims against the defendant, the state supreme court held that an intrusion claim could be based on the unauthorized accessing of a person’s social security number. On the other hand, no claim could be stated for obtaining a person’s employment address by using pretext phone calls because “we have no reasonable expectation of privacy as to our identity or as to where we live or work.” Id. at 1010. See also Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 31 Media L. Rep. 1884 (Minn. 2003) (private facts claim over dissemination of social security numbers failed because of insufficient publication).

In Toomer v. Garrett, 574 S.E.2d 76, 90 (2002), the court held that plaintiff had stated a claim for intrusion against state officials for improperly accessing his personnel file and releasing portions of it to the media.

Eavesdropping/Hidden Cameras/Other Forms of Surveillance

According to the 2003-2004 MEDIA PRIVACY SURVEY, in addition to the Federal Wiretap Statute, 18 U.S.C. §2510 et seq., 52 jurisdictions have electronic eavesdropping statutes. In 39 of those jurisdictions, however, it is not a violation of the statute, as a general proposition, if one party gives consent to the recording. The other 13 jurisdictions require the consent of all parties, at least in delineated circumstances.

Significant Media Cases

A California appellate court reversed a jury verdict in favor of media defendants on common law and statutory invasion of privacy claims because of an erroneous and prejudicial instruction on intent. Marich v. MGM/UA Telecommunications, Inc., 2003 WL 22708668 (Cal.App.2.Dist. Nov. 18, 2003). Plaintiffs sued over an episode of the television series LAPD: Life on the Beat which featured portions of a telephone conversation in which Los Angeles police officers informed plaintiffs that their son had been discovered dead in his home. The trial court instructed the jury that...
defendants would not be liable for intentionally intruded into plaintiffs’ solitude, seclusion or private affairs if they acted “by reason of a mistake in fact.” *Id.* at *4. The appellate court held this impermissibly shifted the burden onto the plaintiffs to disprove mistake of fact as an element of the cause of action.

In *Lieberman v. KCOP Television, Inc.*, 1 Cal.Rptr.3d 536, 31 Media L. Rep. 1933 (Cal. App.2.Dist. 2003), the court allowed a doctor’s eavesdropping case to proceed against a television station that secretly recorded his conversations with two reporters posing as patients. Affirming denial of an anti-SLAPP motion to strike, the court held that the doctor had a reasonable expectation of privacy in the consultations with the reporters. Plaintiff would be entitled to recover statutory and/or actual damages from the recording itself, but not for harm to his reputation from the subsequent broadcast which criticized the doctor as a “drug dealer” and “candy doctor” for prescribing controlled substances without proper medical examinations.

In *Stephens v. Dolcefino*, 2003 WL 21357281 (Tex. App. – Houston [14th Dist.] June 12, 2003), the plaintiffs brought a number of claims in Texas state court against media defendants, including a wiretapping claim under Texas law for the secret recording by a reporter of the plaintiffs’ conversation in a hotel courtyard during the morning break of a continuing legal education program. The trial court judgment in favor of the defendants on all claims, but the Court of Appeals reversed with regard to the wiretapping claim. The court held, *inter alia*, that fact issues existed as to whether the defendants’ camera could or did intercept and record the actual contents of the conversation, whether defendants intercepted or attempted to intercept the conversation, and whether they did so without the plaintiffs’ consent. The Court declined to adopt a rule “that conversations conducted in public, outside areas are per se devoid of any privacy expectation.” *Id.* at *11. The Court also rejected the defendants’ assertion that they were protected by the First Amendment because they had lawfully obtained truthful information about a matter of public significance. The Court held that factual issues regarding whether the defendants had actually obtained the recording lawfully needed to be resolved before it could assess the availability of any First Amendment defense. *Id.* at *10-11.

In *Vazquez-Santos v. El Mundo Broadcasting Corp.*, 219 F. Supp. 2d 221, 31 Media L. Rep. 1015 (D.P.R. 2002), the district court held that in Puerto Rico a journalist did not violate the Federal Wiretap Statute, 18 U.S.C. § 2511(1), merely by contacting the plaintiff (legal counsel to the governor) and secretly recording the plaintiff’s statements, and then broadcasting portions of the recording on the radio. The court held that the Federal Wiretap Statute was limited to prohibiting secret recordings for the purpose of committing a criminal or tortious act, and that the requirement of a criminal or tortious act was not satisfied merely by the fact that the recording at issue might also violate local laws prohibiting wiretapping. *Id.* at 226-230. But the court denied defendant’s motion to dismiss where the complaint where plaintiff alleged defendants intended to commit various crimes and torts other than the interception itself. *Id.* at 230. *See also Vazquez-Santos v. El Mundo Broadcasting Corp.*, 283 F.Supp.2d 561 (D. Puerto Rico 2003) (granting summary judgment to defendant after discovery).
Video Voyeurism

New technology and the Internet pornography market are creating some challenges to the application of hidden camera statutes. In late 2002, the Washington Supreme Court reversed the convictions of two men under Washington’s voyeurism statute, RCW 9A.44.115, for photographing and videotaping up females’ skirts in a shopping mall and an outdoor public event. *State v. Glas*, 147 Wn.2d 410, 54 P.3d 147 (2002). The court held that by its terms, the statute could only be applied to places where a person would have a reasonable expectation of privacy and that in a public place, one cannot reasonably expect to be safe from casual or hostile intrusion or surveillance. In the wake of the decision, the Seattle City Council enacted a law to criminalize such photography, making it illegal to use any device to record or transmit images of a person’s “intimate areas covered by clothing” taken without consent while that person is in a public place.

This summer New York enacted a video voyeurism statute, NY Penal Code 250.45, that specifically includes a prohibition on filming under another person’s clothes.

4. Misappropriation/Right of Publicity

Recognition

According to the 2003-2004 Media Privacy Survey, 46 jurisdictions currently recognize the tort of misappropriation / right of publicity. In eight jurisdictions the courts have not yet had the opportunity to rule on the issue.

The New Hampshire Supreme Court recognized the tort of misappropriation of one’s name or likeness for the first time. *Remsberg v. Docusearch, Inc.*, 816 A.2d 1001 (2003). In *Remsberg*, the plaintiff alleged that the decedent's work address and social security number were provided by a private investigator to a client who then murdered the decedent. The court, in responding to several certified questions, considered whether the complaint stated various causes of action, including invasion of privacy by intrusion upon seclusion and by misappropriation of the decedent’s name or likeness. The court held that, although it now recognized the latter cause of action, “a person whose personal information is sold does not have a cause of action for appropriation against the investigator who sold the information.” *Id.* at 1008. Citing the Restatement (Second) of Torts, the court emphasized that the “defendant must have appropriated to his own use or benefit...
the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness” – concluding that appropriation “is not actionable if the person's name or likeness is published for purposes other than taking advantage of [the person’s] reputation, prestige or other value.” Id. at 1010.

Pennsylvania adopted a statutory right of publicity law making actionable the unauthorized use of a name or likeness. 42 Pa. S. § 8316 et seq. It provides that any natural person can seek injunctive relief or damages for the unauthorized use of a commercially valuable name or likeness for commercial or advertising purposes. Notably the statute does not apply to the unauthorized use of a name or likeness when: (1) the person appears as a member of the public and is not named or otherwise identified, (2) it is associated with a news report or presentation having public interest, (3) it is an expressive work or original work of fine art, (4) it is associated with an announcement for a commercial or advertising purpose for certain permitted uses, or (5) it is associated with the identification of a natural person as the author or contributor to a written work or the performer of a recorded performance under circumstances in which the written work or recorded performance is lawfully produced, reproduced, exhibited or broadcast. 42 Pa. S. § 8316(e)(2).

The Ninth Circuit addressed an interesting issue regarding the scope of California’s right of publicity statute, 3344.1, in post mortem claims. Cairns v. Franklin Mint Co., 292 F.3d 1139 (9th Cir. 2002). The court affirmed dismissal of a claim brought by the estate of Princess Diana against a company selling memorabilia in California bearing her name and likeness. The court reasoned that under California’s “default choice of law provision” set forth in Civil Code Section 946, a court must look to the law of the decedent’s domicile to determine what personal property is owned by the estate. Because the law of England – Diana’s domicile at the time of her death – did not recognize a post-mortem right of publicity the court ruled her estate had no claim under the statute. Id at 1147.

Significant Media Decisions

The California Supreme Court issued a significant decision on the “transformative use” defense to right of publicity claims. Winter v. DC Comics, 69 P.3d 473, 31 Media L. Rep. 1774 (2003). The Court reversed an appellate court decision that reinstated a right of publicity claim brought by musicians Johnny and Edgar Winter against the authors and publisher of a comic book series that featured half human characters called the “Autumn Brothers” that were suggestive of plaintiffs. The Court of Appeals declined to rule that the portrayal was transformative as a matter of law, instead ruling that it presented a jury question. See Winter v. DC Comics, 121 Cal. Rptr. 2d 431 (2002). Reversing, the California Supreme Court held that it could “readily ascertain that they are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs' mere likenesses” and thus the comic book characters were sufficiently “transformative” as a matter of law to merit constitutional protection. 69 P.3d at 479.

The California Supreme Court notably emphasized the importance of early disposition of such cases, finding that courts should be able to resolve the transformative use issue on a motion to dismiss or on summary judgment “simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed.” 69 P.3d at 643.
The Missouri Supreme Court, in a very similar case, expressly rejected the “transformative use” test, instead endorsing a fact intensive approach that will likely make early disposition difficult. *Tony Twist v. TCI Cablevision*, 110 S.W.3d 363, 31 Media L. Rep. 2025 (Mo. 2003), *pet. for cert. filed*, 72 U.S.L.W. 3309 (U.S. Oct 22, 2003). At issue here was a misappropriation claim of a former NHL hockey player over the use of his name for a fictional character in the comic book and animated television series *Spawn*. Last year the Missouri appellate court affirmed a post-trial JNOV dismissing the claim. The Missouri Supreme Court reversed and remanded for a new trial. Plaintiff Tony Twist, a retired professional hockey player, claimed that defendants misappropriated his name by using it for a comic book villain by the same name without his consent and identifying him as the source of the name for the character. The misappropriation claim against the creator of the series and the publisher of the comic went to trial in 2000 and resulted in a $24.5 million verdict for plaintiff. The trial court set aside the verdict. The appellate court affirmed, holding that the fictional Tony Twist in *Spawn* was not “of and concerning” plaintiff and that the use was for expressive purposes protected by the First Amendment.

Reversing, the Missouri Supreme Court held that even though the fictional character does not physically resemble plaintiff or track his real life, “the sharing of the same (and most unusual) name and the common persona of a tough-guy ‘enforcer’ create an unmistakable correlation between Twist the hockey player and Twist the Mafia don that, when coupled with Twist's fame as a NHL star, conclusively establishes that respondents used his name and identity.” 110 S.W.3d at 370. Moreover the court found that by marketing the comic book and television series specifically to hockey fans, defendants used Twist's name to attract consumer attention to the *Spawn* comic books and related products. Finally, the court addressed and rejected the “transformative use” test as applied in *Winters*. According to the court, the transformative test is inadequate because it would permit fictionalized characterizations of a person’s celebrity status even where the sole purpose was commercial. *Id.* at 374. It cited with approval what it described as “a sort of predominant use test” for cases where speech is both expressive and commercial:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight. *Id.*

Finally, the court remanded for a new trial, noting that the trial court failed to instruct the jury that they had to specifically find that the defendants used the plaintiff’s name “with the intent to derive” or “for the purpose of deriving” a commercial advantage.

Several Florida cases considered the application of that state’s misappropriation statute to “reality” videos and movies. In *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002), the court granted summary judgment to the producers of the *Girls Gone Wild* video series. Plaintiff had voluntarily exposed her breasts for a cameraman and thus found herself in one of the defendants’ videos. The district court concluded that the video on which plaintiff appeared was “an
expressive work created solely for entertainment purposes,” and not use for a commercial purpose under Florida’s statute. *Id.* at 1213. The court further found that “while Lane’s image and likeness were used to sell copies of *Girls Gone Wild*, her image and likeness were never associated with a product or service unrelated to that work.” *Id.* In addition, the court determined that the defendant voluntarily consented to the use of her image in the video.

The claim by another woman against the same producers fared better, at least at the motion to dismiss stage. *Gritzke v. M.R.A. Holding, LLC*, No. 4:01CV495-RH, 2002 WL 32107540 (N.D. Fla. March 15, 2002). The court denied a motion to dismiss a misappropriation claim where the plaintiff complained of the use of her image on the outside cover of the videotape package. This was sufficient for pleading purposes to suggest she endorsed the product.

The Florida statute was also considered by the Eleventh Circuit in a claim over a movie based on real events. *Tyne vs. Time Warner Entertainment Co.*, 336 F.3d 1286, 31 Media L. Rep. 1929 (11th Cir. 2003). As discussed above, *Tyne* involved claims against the producers of the movie *The Perfect Storm*, which was based on the sinking of the Andrea Gail fishing vessel in the so-called “storm of the century.” The district court granted summary judgment to the movie producers on the ground that the use of plaintiffs’ names in the movie and in advertisements for the movie was not “for any commercial or advertising purpose” within the terms of Fla. Stat. § 540.08. 204 F. Supp. 2d 1338 (M.D. Fla. 2002). On appeal, plaintiffs argued that they had a cause of action because 1) the film involved deliberate falsifications; and, 2) that as a matter of statutory construction Florida’s misappropriation law could apply to indirect “commercial” use, as distinct from direct “advertising.” Without considering the First Amendment overlay to the issue, the Eleventh Circuit somewhat cryptically concluded it was “uncertain as to the scope of § 540.08” and asked the Florida Supreme Court to decide “To what extent does Section 540.08 of the Florida Statutes apply to the facts of this case?”

The Sixth Circuit reinstated the right of publicity claim brought by civil rights icon Rosa Parks against a record company and rap music duo that used her name as a title of a song. *Parks v. LaFace Records*, 329 F.3d 437, 31 Media L. Rep. 1897 (6th Cir.), *cert. denied*, 2003 WL 22303348 (U.S. Dec. 8, 2003). The court held that the First Amendment protects the use of a person’s name as the title of creative work if 1) there is an artistic relationship between the title and the underlying work and 2) the title does not explicitly mislead as to the source or content of the work. *Citing Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Here the court found that there was no obvious artistic relationship between the title and the content of the song, at least as a matter of law. While the song repeatedly used the phrase “move to the back of the bus,” the court found that in the context of the lyrics the phrase had “absolutely nothing to do with Rosa Parks.” Instead, the song’s message was that the rap duo was better than its competitors. Thus a reasonable jury could find the title was merely a commercial use of Rosa Park’s name.

In other California decisions, a state appellate court affirmed dismissal of statutory and common law right of publicity claims against the reality-based television show *Cops*. *Ingerson v. Twentieth Century Fox Film Corp.*, 2003 WL 1477771, 31 Media L. Rep. 1289 (Cal. App. 2 Dist.) (unpublished decision), *cert. denied*, 124 S.Ct. 181 (U.S.2003). At issue was an episode that
depicted plaintiff’s encounter with police after he was robbed “in a bad area” and admitted he was there to buy drugs. Affirming dismissal under the public affairs exception, the decision notes that “even if Cops is not a traditional news show, it is plainly a news or public affairs broadcast in the broad sense and is therefore entitled to protection.”

A federal court considered a related issue in Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 31 Media L. Rep. 2307 (N.D. Cal. 2002). The court held whether or not the television show Bands on the Run was a “public affairs” broadcast, it was a protected expressive work and advertising to promote the program was protected. See also Schivarelli v. CBS, Inc., 333 Ill. App. 3d 755, 776 N.E.2d 693 (1st Dist. 2002) (holding that television station’s promotions of news reports were not for commercial purposes and therefore not actionable under the Illinois Right of Publicity Act.)

Another California federal court held that parties who aid and abet others in violating a plaintiff’s right of publicity may also be held liable under a theory of secondary liability. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1183-84 (C.D. Cal. 2002). The court granted a preliminary injunction on behalf of an adult magazine against a web site age verification service that knew that participating web sites were violating plaintiff’s publicity rights by copying plaintiff’s content without permission.

Last year, a California court held that pen names and pseudonyms are also protected by the state’s right of publicity statute. Ackerman v. Perry, 2002 WL 31506931 (Cal. App. 2d Dist. Nov. 12, 2002).

Several New York cases considered misappropriation claims under New York Civil Rights Law § 50-51 which prohibits the use of the name or likeness of a living person for purposes of trade or advertising without that person’s consent.

Movie director Spike Lee sued under the statute to prevent cable network TNN from rebranding itself “Spike TV.” A trial court granted a temporary injunction, finding Lee had demonstrated a likelihood of success on the merits based on his submission of 1) affidavits from friends and business associates stating they believed Lee was involved with “Spike TV”; 2) an expert affidavit stating that a substantial number of African Americans would believe Lee was associated with the network; and 3) evidence that the name “Spike TV” was inspired by Lee and his reputation for “irreverence and aggressiveness.” Lee v. Viacom, No. 110080-03 (NY Sup. Ct. June 12, 2003). The court noted that “in this age of mass communication, a celebrity can in fact establish a vested right in the use of only their first name or a surname.” The case later settled.

In another high profile action, Fox News sued to prevent publication of the book Lies and the Lying Liars Who Tell Them A Fair and Balanced Look at the Right by humorist Al Franken. Fox alleged that the title violated Fox’s trademark in the slogan “fair and balanced” and that use of a photograph of Fox talk show host Bill O’Reilly on the cover created the false impression that Fox endorsed the book in violation of federal and state trademark law. Denying a motion for a preliminary injunction, the court described the suit as “wholly without merit both factually and legally.” Fox News Network v. Penguin Group (USA), Inc., (S.D.N.Y. 2003).
A New York appellate court vacated a preliminary injunction and granted summary judgment in favor of an artist who had caricatured a judge as a devil in a painting and used a photograph of the judge in flyers promoting his work. *Altbach v. Kulon*, 754 N.Y.S.2d 709 (3d Dep’t 2003). The court held that the defendant’s flyers were artistic expressions entitled to protection under the First Amendment.

In *Bement v. N.Y.P. Holdings, Inc.* 760 N.Y.S.2d 133, 31 Media L. Rep. 1722 (1st Dept. 2003), a New York appellate court granted summary judgment to the *New York Post* on a claim brought by a former beauty queen. The newspaper reported that a movie treatment about plaintiff was circulating in Hollywood that claimed she worked as a CIA spy who “slept with foreign government officials in order to plant electronic eaves-dropping devices in their offices and private homes.” *Id.* at 135. Reversing the trial court, which had found that issues of fact existed as to whether the article was a deliberate falsification, the court held that the article reported on newsworthy events that were undoubtedly a matter of public interest.

There is also a statutory artistic exception in section Civil Rights Law § 51 that provides, “nothing contained in this article shall be so construed as to prevent any person, film or corporation … from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith.” This exception was explored in *Donahue v. Artisan Entertainment, Inc.*, 2002 WL 523407 (S.D.N.Y. Apr. 8, 2002), an action by the stars of the movie *Blair Witch Project* against the producers of the sequel *Blair Witch 2*. The court held that the artistic exception barred plaintiffs’ action against the producers for their use of plaintiffs’ names and likenesses in the advertisements for the movie sequel.

The Puerto Rico federal district court elaborated on the issue of personal jurisdiction in the privacy context in *Salgado v. Les Nouvelles Esthetiques*, 218 F. Supp. 2d 203 (D. P.R. 2002). The case involved a claim for invasion of privacy stemming from the sale of a video in which the plaintiff appeared as a model. Defendant began to sell the video through a trade magazine. The court found that personal jurisdiction in Puerto Rico was not proper because, under First Circuit law, there is no personal jurisdiction in an invasion of privacy claim where the offending material is not widely distributed within the forum. Here only two copies of the video were sold in Puerto Rico (one to the plaintiffs) and only 20 subscriptions of the trade magazine were sent to Puerto Rico monthly. There also was no evidence that the defendants targeted Puerto Rico with respect to advertising for the sale of the video. *Id.* at 209-212.

5. **Intentional Infliction of Emotional Distress**

**Recognition**

According to the 2003-2004 MEDIA PRIVACY SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress (“IIED”), and 39 have case law specifically dealing
with the tort in the media context. In the remaining 15 jurisdictions, the courts have yet to address the application of the tort to the media context.

**Significant Media Cases**

The First Circuit affirmed summary judgment to media and non-media defendants on claims of defamation and intentional infliction of emotional distress under Massachusetts law arising out of reports of the plaintiff’s arrest and psychiatric examination. *Yohe v. Nugent*, 321 F.3d 35 (1st Cir. 2003). With respect to the claim for intentional infliction of emotional distress, the Court upheld the district court’s finding as to the non-media defendants that the statements which allegedly caused the distress could not be considered extreme or outrageous, and affirmed summary judgment. *Id.* at 42. The Court also affirmed summary judgment in favor of the newspapers with respect to the intentional infliction of emotional distress claim, because the claim was premised on the same facts and thus subject to the same restrictions as the plaintiff’s defamation claim, including the “fair report” privilege. The Court held that plaintiff was not entitled to “evade the protection of the fair report privilege merely by re-labeling his claim.” *Id.* at 44-45.

In *Harris v. City of Seattle*, 278 F.Supp.2d 1111 (W.D. Wash. March 5, 2003), the court held that a claim for IIED premised on the same facts as claims for defamation and false light could survive where the defamation claim was dismissed, but the false light claim survived.

Noting that “New York courts have imposed a very high threshold for intentional infliction of emotional distress claims,” a New York federal court dismissed claims of IIED against the producers of the Rickie Lake show where potential guests claimed they were intimidated, locked in guarded rooms, and then thrown out into the street for failure to sign a contract before appearing on the show. *Campoverde v. Sony Pictures Entertainment*, 2002 WL 31163804, 31 Media L. Rep. 1361 (S.D.N.Y. Sept. 30, 2002).

A New York state appellate court affirmed dismissal of an IIED claim by a former beauty queen – and alleged CIA spy. *Bement v. N.Y.P. Holdings, Inc.*, 760 N.Y.S.2d 133, 31 Media L. Rep. 1722. As discussed above, a newspaper article reported she slept with and was raped by foreign government officials whom she spied on while working for CIA. The court held that publication was not the “extreme and outrageous conduct” necessary to sustain an IIED action.

The Alabama Supreme Court has also held that a radio sportscaster’s on-air remarks comparing another radio sportscaster’s interview to “oral sex” did not give rise to liability for

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14 Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas (federal), Kentucky (intermediate), Louisiana, Maine (federal), Maryland, Massachusetts, Michigan (intermediate), Minnesota, Mississippi (federal), Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma (intermediate), Pennsylvania, Puerto Rico, Rhode Island (federal), South Carolina, Texas, Utah, Virginia, Washington, and Wyoming.

15 Delaware, Guam, Indiana, Iowa, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Tennessee, Vermont, Virgin Islands, West Virginia, and Wisconsin.

**Significant Non-Media Intentional Infliction of Emotional Distress Decisions**

In *Pane v. City of Danbury*, 33 Conn. L. Rptr. 377 (Conn. Super. 2002) (unpublished), the court rejected an IIED claim against municipal defendants based on their release of plaintiff’s personnel file to a newspaper reporter pursuant to a FOIA claim. The court concluded the defendants’ conduct was not extreme and outrageous.

In contrast, in *Kogut v. Church Homes, Inc.*, 2002 WL 31662388, at *8 (Conn. Super. 2002) the court concluded that genuine issue of material fact existed as to whether defendants’ behavior was extreme and outrageous where defendant told a reporter that plaintiff was a supporter of the Ku Klux Klan.

**6. Negligent Infliction of Emotional Distress**

**Recognition**

According to the 2003-2004 MEDIA PRIVACY SURVEY, 45 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress.16 Seven jurisdictions have expressly rejected the tort in all cases.17

**Significant Media Cases**

A New York district court dismissed a negligent infliction of emotional distress claim against the producer and distributor of *The Ricki Lake Show* because the plaintiffs failed to allege sufficiently outrageous and extreme conduct by the media defendants and because plaintiffs did not allege that media defendants owed a special duty to the plaintiffs that was different from that owed to any other potential guests on the Show. *Campoverde v. Sony Pictures Entertainment*, 2002 WL 31163804, 31 Media L. Rep. 1361 (S.D.N.Y. Sept. 30, 2002).

In *Wilson v. Midway Games*, 198 F. Supp. 2d 167 (D. Conn. 2002), the court dismissed claims against a video game manufacturer for allegedly causing an obsessed player to kill another child. The claims were dismissed on the basis that the game was not a “product” under Connecticut’s Product Liability Act and because the negligent and intentional infliction of emotional distress claims were precluded by the First Amendment.


17 Alabama, Arkansas, Georgia, Iowa, Kentucky, Maryland, and Texas.
7. **Conspiracy**

In a lawsuit by proclaimed ex-Clinton mistress Gennifer Flowers against Hillary Clinton and former Clinton Administration officials George Stephanopoulos and James Carville alleging an ongoing conspiracy to defame her and invade her privacy, the court held that Nevada’s four year statute of limitations for conspiracy begins to run when the plaintiff discovered or should have discovered all of the necessary facts constituting the substantive claim, including that defendants acted with actual malice. *Flowers v. Carville*, 2003 WL 22844112 (D. Nev., Nov 24, 2003). Under this standard, the court dismissed the conspiracy claim against Hillary Clinton as time barred where Flowers could have alleged actual malice against her more than four years before she brought suit. But the claim survived as to the other defendants where they had “not submitted evidence irrefutably proving Flowers knew [more than four years before she sued that] she had a claim against them that would meet the actual malice standard.” *Id.* at *8.

8. **Breach of Contract**

In *Ventura v. Cincinnati Enquirer*, 246 F. Supp.2d 876, 884, 31 Media L. Rep. 1513 (S.D. Ohio 2003), the court granted summary judgment to a newspaper on breach of contract and promissory estoppel claims. The plaintiff, a source for a controversial *Cincinnati Enquirer* report on the Chiquita company, alleged the newspaper breached a promise of confidentiality by providing information to prosecutors that revealed his identity. Plaintiff had provided a reporter for the newspaper with an access code for Chiquita’s voice mail system. He was subsequently convicted of illegally accessing the company’s computer system. Assuming that plaintiff had submitted sufficient evidence to support a breach of contract / promissory estoppel claim, the court held that under Ohio law the newspaper was immune from civil liability for disclosure of information relating to the reporting and prosecution of a crime to the prosecuting attorney and/or the grand jury. In addition, the newspaper could not be held vicariously liable for the reporter’s disclosure of plaintiff’s identity which occurred after the reporter was terminated by the newspaper. Finally, assuming the newspaper did not enjoy civil immunity for disclosing information relating to a crime, the court found that the material the newspaper itself provided to prosecutors – a Post-it note with the plaintiff’s initials and telephone numbers on it and information about plaintiff from Martindale-Hubbell – was not substantial enough to constitute a breach of contract to protect a source’s identity.

A New York trial court dismissed a breach of contract action against the *New York Times* for publishing the photograph of a participant at a public news conference. *Ramalho v. The N.Y. Times Co.*, N.Y.L.J., Jan. 24, 2003, at 18 (Sup. Ct. N.Y.). The plaintiff, who was a victim of a securities fraud, appeared at a news conference organized by the state Attorney General. He claimed he appeared on the condition that the press not photograph or identify him and that this instruction was conveyed to the press. The court held that under these circumstances a breach of contract claim was not stated absent the allegation that the press was advised that the plaintiff’s appearance was conditional upon acceptance of the reporting restriction.


Two New York cases considered the civil rights claims against the media for “ride alongs” and “perp walks” – two newsgathering methods that have recently been the subject constitutional

The Second Circuit summarily affirmed dismissal of a § 1983 claim against a city and media defendants where plaintiff alleged that the city defendants invited a local news station to witness the closing of nude dance club. O’Neil v. Schenectady, 45 Fed.Appx. 33, 30 Media L. Rep 2502, 2002 WL 200980130 (2d Cir. 2002) (unpublished). Plaintiff, the manager of the club, alleged her Fourth Amendment privacy rights were violated when WRGB-TV 6 broadcast her image on the evening news and when The Daily Gazette published an article on the closure. The summary order by the Second Circuit panel, which included Judge Robert Sack, noted that the media defendants photographed and observed plaintiff at the entrance to the club where any member of the public was welcome, and therefore her federal privacy interests were not violated.

In Otero v. Town of Southampton, 194 F. Supp. 2d 167 (E.D.N.Y. 2002) the court held that the filming of the plaintiff, a school bus driver who had been arrested for drunk driving, en route to his arraignment, did not violate the Fourth Amendment. The decision notes that while Lauro v. Charles, 219 F.3d 202, 213 (2d Cir.2000) bars staged “perp walks” it does not apply to "cases in which there is a legitimate law enforcement justification for transporting a suspect." Id. Here the media covered the actual transport of plaintiff to his arraignment. “There was no staged recreation here.”

The Fifth Circuit affirmed Rule 11 Sanctions against a lawyer who invited the media to accompany him into a Kmart store to attempt to collect a judgment. Whitehead v. Food Max of Mississippi, 332 F.3d 796 (5th Cir. 2003). While there was no issue as to the store’s right to privacy, the court found that sanctions were justified where the lawyer sought media attention to embarrass Kmart.

In Voorhaar v. Rossignol, 316 F.3d 516, 31 Media L. Rep. 1417 (4th Cir.), cert. denied, 124 S.Ct. 135 (2003), the Fourth Circuit reinstated a newspaper publishers § 1983 claim against a county sheriff and other law enforcement officers who participated in the mass purchase of plaintiff’s newspaper on election eve to suppress circulation of articles critical of the sheriff’s performance in office. The district court granted summary judgment to defendants, holding that their actions were not under color of state law. In an opinion by Circuit Chief Judge Harvey Wilkinson, the court reversed, holding that “defendants’ scheme was a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit,” concluding that “both the First Amendment and 42 U.S.C. § 1983 exist in significant part to deter the kind of misdeeds perpetrated by defendants on election day.” Id. at 526.

A newspaper reporter’s § 1983 claim against a Native American tribe was dismissed on immunity grounds. Armstrong v. Mille Lacs County Sheriff’s Dept., 228 F.Supp.2d 972 (D.Minn. 2002), aff’d, 63 Fed.Appx. 970, 2003 WL 21212166 (8th Cir. 2003) (per curium). The reporter was arrested for trespassing by the Mille Lacs Band of Chippewa Indians for refusing to leave a meeting room when asked by tribal council members. The charges were ultimately dropped. The district
court found that the defendants were protected by official immunity. The Eighth Circuit summarily affirmed.

10. **Interference With Contract/Business Relations**

A New Jersey appellate court affirmed summary judgment in favor of a law firm on a tortious interference claim based on its newspaper advertisement soliciting potential clients who might have complaints against plaintiff. *Russo v. Nagel*, 358 N.J. Super. 254, 268-69, 817 A.2d 426, 434-35 (App. Div. 2003). The advertisement asked whether readers were "treated by Dr. Dello Russo or Dr. William Kellogg at the NJ Eye Center," and whether they "suffered a bad result from eye surgery," and if so, defendants offered a "free consultation to discuss your legal rights." The court found that the advertisement was not defamatory and therefore there was no possible intentional harm to support the cause of action.

11. **Injurious Falsehood/Product Disparagement**

The Ninth Circuit reinstated a claim for product disparagement against Consumers Union, publisher of *Consumer Reports* magazine, based on a negative review of the Suzuki Samurai sports utility vehicle. *Suzuki Motor Corp. v. Consumers Union*, 292 F.3d 1192 (9th Cir. 2002), *superseded on denial of rehearing en banc by Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110 (9th Cir. 2003), cert. denied, 124 S.Ct. 468 (2003).

In a 1988 magazine article, and in a subsequent anniversary issue and pledge drive, *Consumer Reports* described the vehicle as “Not Acceptable” due to a propensity to roll over. In 2002, and in an amended decision in 2003, the Ninth Circuit reversed summary judgment in favor of Consumers Union, holding there was sufficient evidence of actual malice to defeat summary judgment based on evidence that Consumer Union engaged in “rigged testing,” failed to adequately investigate flaws in its testing, and, because it was in debt at the time of testing, it had a “financial motive” to publish “a blockbuster story to raise CU’s profile and increase fundraising revenues.” Over a vigorous dissent by Judge Ferguson, the court also rejected the application of the “independent examination” standard in reviewing summary judgement in a media libel case.

In a stinging dissent from a denial of rehearing en banc (on a 13-11 vote), Judge Kozinski found no direct evidence that the testing methods were flawed. “If Suzuki can get to trial on evidence this flimsy,” he wrote, “no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics.” 330 F.3d at 1121. And he concluded, “I would long hesitate before letting anyone I care about drive or ride in one of these vehicles.” *Id.* at 1123.

In *Global Relief Foundation v. The New York Times Co.*, 2002 WL 31045394 *13 (N.D. Ill. Sept. 11, 2002), the court granted a motion to dismiss a disparagement claim against media defendants for reporting that plaintiff, an Islamic charity, was being investigated for suspected links to terrorism. The court held that while plaintiff stated a claim for defamation, the disparagement claim failed as a matter of law because the news reports were not about the quality of plaintiff’s goods or services.
12. Unfair Competition Law

Last year, the BULLETIN reported on the troubling decision by the California Supreme Court in *Kasky v. Nike*, 45 P.3d 243, 119 Cal.Rptr.2d 296 (Cal. 2002), holding that Nike could be liable under California’s unfair business practices and false advertising law for press releases and letters directed toward the general public defending its labor practices. In early 2003 the U.S. Supreme Court granted certiorari on the question: when a corporation participates in a public debate ... may it be subject to liability for factual inaccuracies on the theory that its statements are “commercial speech” because they might affect consumers opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

It was hoped that a decision by the Court would bring some doctrinal clarity to the protection of commercial speech. But disappointingly, in a 6-3 *per curiam* decision, the court dismissed certiorari as improvidently granted. 123 S. Ct. 2554 (2003). Justices Stevens, joined by Ginsburg and Souter (in part) wrote a concurrence articulating “three independently sufficient reasons” for the dismissal of certiorari: that the California Supreme Court’s judgment was not final, that neither party had standing to invoke the jurisdiction of a federal court and that “the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.” *Id.* at 2555.

Justice Breyer, joined by Justice O’Connor, wrote a dissenting opinion, arguing that the court should have decided the case because “the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on.” *Id.* at 2560. He noted that the “private attorney general” statutes discourage businesses from engaging in speech directly injuring Nike, concluding that the “the communications at issue are not purely commercial in nature.” *Id.* at 2565. Justice Kennedy dissented without opinion.

The decision returned the case to the trial court for further proceedings. In September 2003, the case settled, with Nike donating $1.5 million to the Fair Labor Association.

In *Boyce & Isley, PLLC v. Cooper*, 568 S.E.2d 893 (N.C. Ct. App. 2002), *cert. denied*, 124 S.Ct. 431 (U.S. Oct 20, 2003), the Court of Appeals reversed the grant of a motion to dismiss an unfair trade practices claim brought by a law firm against the sponsors of a political advertisement. At issue was an advertisement on behalf of the Democratic Party candidate for state Attorney General in the 2000 election which stated that the opposing candidate’s “law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.” Reinstating the claim, the court held that a libel *per se* of a type impeaching a party in its business activities may also constitute an unfair or deceptive act in or affecting commerce. Furthermore, the court found no “compelling grounds ... to distinguish defamatory remarks concerning one's trade or profession made during the course of a political campaign from those made in some other forum” and it rejected defendants’ argument that political statements have no effect on the consuming public. *Id.* at 902.
13. **Lanham Act**

The Sixth Circuit reinstated Lanham Act and right of publicity claims brought by civil rights icon Rosa Parks against a record company and rap music duo that used her name as a title of a song. *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir.), cert. denied, 2003 WL 22303348 (U.S. Dec 08, 2003). The Sixth Circuit held that the First Amendment protects such use if 1) there is an artistic relationship between the title and the underlying work and 2) the title does not explicitly mislead as to the source or content of the work. *Citing Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Here the court found that there was no obvious artistic relationship between the title and the content of the song, at least as a matter of law. While the song repeatedly used the phrase “move to the back of the bus,” the court found that in the context of the lyrics the phrase had “absolutely nothing to do with Rosa Parks.” Instead, the song’s message was that the rap duo was better than its competitors. Thus a reasonable jury could find the title was merely a commercial use of Rosa Park’s name.

A Maryland federal district court reached the sensible conclusion that there was no Lanham Act claim where plaintiff’s name was included “at the end of [a] Film in a list of individuals and entities to whom the producers wished to give ‘thanks.’” *Comins v. Discovery Communications, Inc.*, 200 F. Supp. 2d 512, 523 (D. Md. 2002). That court reasoned that a textual ‘thank you’ to plaintiff in the credits did not imply that plaintiff was involved in, or had expressed approval for, the film. The appearance of plaintiff’s name as “one among thirty-nine others to whom Defendants acknowledged an intellectual or other debt ... is a far cry from falsely or misleadingly representing [plaintiff] as the source or sponsor of the Film.” *Id.* at 522.

In *Kournikova v. General Media Communications Inc.*, 278 F.Supp.2d 1111 (C.D. Cal. 2003), the court dismissed tennis star Anna Kournikova’s Lanham Act claim against *Penthouse* magazine for a cover headline and feature entitled “KOUINIKOVA CAUGHT CLOSE UP ON NUDE BEACH.” In June2002 *Penthouse* published several pictures of a woman erroneously identified as Kournikova, sunbathing topless. The court held that there was no evidence of competitive injury to support a false advertising claim; and no clear and convincing evidence that *Penthouse* deliberately created the false impression that Kournikova endorsed or had voluntarily posed for the magazine, particularly where the word “caught” in the headline implied she had not cooperated with the magazine.

In *Condit v. Star Editorial, Inc.*, 259 F.Supp.2d 1046, 31 Media L. Rep. 1673 (E.D. Cal. 2003), the court dismissed a Lanham Act claim brought by a private figure over an allegedly false tabloid article. At issue was a *Star* magazine article entitled “Condit Wife’s Agony” that discussed her reaction to the scandal surrounding her husband, former Congressman Gary Condit, and the unsolved murder of his former intern, Chandra Levy. Carolyn Condit alleged that the article falsely suggested she was telling her personal story to the magazine. The court held that plaintiff failed to state a claim where she failed to plead that her persona had commercial value akin to a trademark or that she intended to use her identity to create such value at the time of the publications, adding that the Lanham Act is not intended to be a federal false light statute. *Id.* at 1054.

In *Columbus Rose, Ltd. v. New Millenium Press*, No. 02 Civ. 2634, 2002 WL 1033560 (S.D.N.Y. May 20, 2002), the court held that the prominent display of mystery writer David
Baldacci’s name on the cover of an anthology book violated the Lanham Act. While such use was subject to the “artistic exception” under New York’s misappropriation law, Civil Rights Law § 51, it violated Section 43(a) of the Lanham Act by intentionally misleading the public that the anthology was a new work by Baldacci.

In a significant decision discussing the boundaries of commercial speech, the Second Circuit in *Boule v. Hutton*, 328 F. 3d 84, 31 Media L. Rep. 1793 (2d. Cir. 2003), affirmed summary judgment in favor of defendants who had been sued under the Lanham Act for their statements to *ARTnews* magazine about fraud in the market of Russian avant-garde art. The court had “little hesitation” in concluding that the article, and the defendants’ statements quoted in that article, were not commercial speech since the article discussed a matter of public concern-- fraud in the art market-- and defendants statements were “inextricably intertwined” with the article on the topic.

14. Other Theories of Media Liability

*Incitement / Wrongful Death*

In *Byers v. Edmondson*, 826 So. 2d 551 (La. App. 1st Cir. 2002) plaintiffs sued the producers, director, and distributors of the Oliver Stone film *Natural Born Killers*. One of the plaintiffs, Patsy Ann Byers (who died during the pendency of the action from other causes) was shot and seriously injured by individuals who allegedly were inspired to do so by viewing the film, which allegedly “glorified” the type of violence committed against Mrs. Byers. The plaintiffs alleged that the defendants “knew, intended or should have known” that the content of the film would incite certain individuals to commit violent acts of the type engaged in by the assailants who shot Ms. Byers. The Court of Appeal affirmed summary judgment in favor of defendants dismissing the action on the ground that the film, although “a portrayal of violence [that] can be viewed as a glorification and glamorization” of violence, did not “rise to the level of incitement” because it did not “purport to order or command anyone to perform any concrete action immediately or at any specific time,” and “we cannot say that *Natural Born Killers* exhorts, urges, entreats, solicits, or overtly advocates or encourages unlawful activity or violent activity on the part of viewers.” 826 So. 2d at 556. The court also rejected plaintiffs’ claim that the film was obscene. *Id.* at 557.

*Negligence / Products Liability*

In *Doe v. Haw*, 31 Media L. Rep. 1491, 2003 WL 21015134 (Idaho Feb 5, 2003), the Idaho Supreme Court dismissed a negligence claim against a newspaper for publishing an advertisement by a doctor that allegedly disclosed a patient’s private medical information. The advertisement, which was directed to the state governor and legislators and concerned state regulations of physicians, reprinted a letter plaintiff wrote to the state board of medicine approving of the treatment she received from him. As to the negligence claim against the newspaper, the court noted that “the burden on newspapers to verify every type of endorsement claim made in the advertisements it runs is enormous. Where the risk of harm is low and the burden great, and other adequate remedies exist, there is no reason to impose a duty on a newspaper to confirm if an endorsement letter published in the context of an advertisement was authorized by the author.” *Id.* at *8.
In James v. Meow Media, Inc., 300 F.3d 683, 30 Media L. Rep. 2185 (6th Cir. 2002), cert. denied, 537 U.S. 1159 (2003), plaintiffs were the parents and estate administrators of three high school students shot and killed at their school by a 14 year high school freshman. Plaintiffs sued the producers and distributors of video games, movies, and Internet sites for negligence, products liability, and RICO violations. The district court dismissed all of plaintiffs’ causes of action and plaintiffs appealed the dismissal of the negligence and product liability claims only. The 14 year old killer had regularly played interactive computer games that involved the player shooting virtual opponents. He also possessed a copy of the movie The Basketball Diaries, in which the high school student protagonist dreams of killing his teacher and several of his fellow classmates. Additionally, he had visited several sexually suggestive computer web sites. The Sixth Circuit affirmed dismissal of the negligence action finding that the video game, movie production, and Internet content provider firms owed no duty of care to victims of the school shootings because the victims’ deaths were not reasonably foreseeable results of the creation or distribution of their games, movies and internet sites, and because individuals are entitled to assume that third parties will not commit intentional criminal acts absent extraordinary circumstances. The court further ruled that imposing liability in such a case would create significant First Amendment problems. The court also affirmed dismissal of the products liability claim because plaintiffs failed to demonstrate that the ideas and images conveyed in the game, movies, and Internet sites were “products” for purposes of strict liability.

The Connecticut federal district court also dismissed a products liability claim against a video game manufacturer. Wilson v. Midway Games, 198 F. Supp. 2d 167 (D. Conn. 2002). Plaintiff alleged that the design and marketing of the game Mortal Kombat was responsible for her son’s death at the hands of another boy who was “obsessed” by the game and believed he was one of its violent characters. In an interesting discussion, referencing Marshall McLuhan and Shakespeare the court concluded that the game was protected by the First Amendment.

**Other**

A novel civil rights claim against an Internet service provider was dismissed in Noah v. AOL Time Warner, Inc. 2003 WL 21135701 (E.D. Va. May 15, 2003). Plaintiff alleged that he and other Moslem subscribers to AOL were being harassed in AOL chat rooms because of their religion in violation of Title II of the Civil Rights Act. Title II prohibits discrimination in places of public accommodation. The court held that the claim was barred by Section 230 of the Communications Decency Act; and alternatively that an online chat room is not a place of public accommodation. Id. at *8-9 (distinguishing physical facilities from the virtual space of the Internet). The court also dismissed a claim that AOL was breaching its Terms of Service agreement by permitting harassing speech. Although AOL’s “Community Guidelines” ban derogatory racial and ethnic speech, the court held that under the terms of service AOL had sole discretion to enforce the guidelines and specifically disclaimed liability for third party speech. Id. at *3.

In Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279 (11th Cir. 2002), plaintiff sued the producers of the quiz show “Who Wants to Be a Millionaire,” claiming that the producers violated the Americans with Disabilities Act (“ADA”) by operating a telephone selection process that screened out disabled individuals who wished to be contestants on the show. The district court had
dismissed plaintiffs’ complaint finding that the automated telephone contestant selection process was not conducted at a physical location and was not a place of “public accommodation” under the Title III of the ADA. The Eleventh Circuit reversed, holding that plaintiffs stated a cause of action under Title III by alleging that the “fast finger” telephone selection process is a discriminatory screening mechanism, policy or procedure, which deprives them of the opportunity to compete for the privilege of being on the show, which takes place in a studio that constitutes a public accommodation.

In *Lee v. Pennington*, 830 So. 2d 1037, 31 Media L. Rep. 1267 (La. App. 4th Cir. 2002), writ denied, 836 So. 2d 52 (La. 2003), plaintiff included allegations that television broadcasts and newspaper articles allegedly portraying him as a "serial rapist" violated Louisiana's “abuse of rights” doctrine and constituted the tort of “racial profiling in the media.” The court rejected both claims, finding that the abuse of rights claim did not satisfy the requirements for the tort (a “sparingly” invoked civil tort which involves, inter alia, the exercise of a legal right for the predominant motive of causing harm and for a purpose other than that for which the right was granted) and that Louisiana does not recognize a cause of action for “racial profiling in the media.”

In *Morris Communications Corp. v. PGA Tour*, 235 F. Supp.2d 1269, 31 Media L. Rep. 1642 (M.D. Fla. 2002), the court considered the antitrust implications of conditioning access to golf tournaments on media companies’ agreement not to syndicate “real time” golf scores. Newspaper publisher Morris Communications brought an antitrust action challenging the PGA’s restriction, alleging that the PGA possesses monopoly power over access to its golf tournaments and has unfairly used that power by attempting to stifle competition in the separate market for syndicated real-time golf scores. The court denied plaintiff’s motion for a preliminary injunction, finding that plaintiff failed to show a substantial likelihood of success on the merits of its monopolization claims. The court noted that even assuming the PGA possessed monopoly power in the market for real-time golf scores, plaintiff had not shown that the PGA Tour lacked a legitimate business justification for its restrictions on syndication of real-time scores.


C. Statutes and Related Case Law Reported in the 2003-2004 Surveys

1. Anti-SLAPP Statutes

Based on the 2003-2004 SURVEYS, nineteen states – California, Delaware, Georgia, Hawaii, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington – now have anti-SLAPP statutes. While anti-SLAPP statutes generally provide for the early dismissal of claims brought against the protected right of petition and/or free speech, and may also provide for the recovery of legal fees, application of the statutes to the media remains uneven.
California


In Batzel v. Smith., 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit held that a party in federal court is entitled to an interlocutory appeal of a denial of an anti-SLAPP motion to strike, because the statute creates “substantive immunity from suit” and is not merely a procedural provision.

In a trio of non-media companion cases decided on the same day last year, the California Supreme Court clarified that a defendant using the anti-SLAPP law is not required to plead or prove that the action was brought with subjective “intent to chill” or “actually has had a chilling effect on the exercise of such rights.” Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 57, 124 Cal. Rptr. 2d 507 (2002); City of Cotati v. Cashman, 29 Cal. 4th 69, 74, 124 Cal. Rptr. 2d 519 (2002); Navellier v. Sletten, 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530 (2002).


Other State Statutes

In Poulard v. Lauth, 793 N.E.2d 1120 (Ind. App. 2003), an appellate court affirmed dismissal of a libel action against a newspaper and its source under Indiana’s anti-SLAPP statute, Ind. Code § 34-7-7-1 to 34-7-7-9. On appeal plaintiff argued that the statute “was not intended to immunize the media from suits for defamation,” but the court found this argument was not raised below and was therefore waived.

In Thomas v. City of Monroe, 833 So.2d 1282, 31 Media L. Rep. 1859 (La. App. 2d Cir. 2002), the Second Circuit Court of Appeal affirmed dismissal of a defamation action against a television station based upon an anti-SLAPP motion to strike, finding that the broadcast at issue,
involving republication of a police report, was clearly subject to a qualified privilege, that the Louisiana statute is virtually identical to the California anti-SLAPP statute, and that the statute is to be construed broadly.

Citing its own decision in Thomas, several months later the same court of appeal reversed a trial court's denial of an anti-SLAPP motion to strike, holding that plaintiff, a university vice-president for external affairs, was a public official and that he had failed to meet his burden of demonstrating a prima facie case of actual malice in response to defendant website publisher's motion to strike. Baxter v. Scott, 847 So.2d 225 (La. App. 2d Cir. 2003). The court also held that statements relating to a state university involve matters of public interest and rejected the plaintiff's argument that the statute applies only to media defendants.

In Lee v. Pennington, 830 So.2d 1037, 31 Media L. Rep. 1267 (La. App. 4th Cir. 2002), writ denied, 836 So. 2d 52 (La. 2003), another Louisiana appeals court upheld the anti-SLAPP law against constitutional challenge, affirmed the trial court's dismissal on a special motion to strike, and reversed the trial court's refusal to award attorneys' fees to the prevailing media defendants. The court held that “the language of the statute is clear that attorney fees must be awarded to a prevailing defendant.” Id. at 1046.

In Benson v. City of Marksville, 812 So. 2d 687 (La. App. 3d Cir. 2002), another court of appeal addressed the application of the law, in a non-media context, to a defamation action filed two months before the law became effective. It held that the attorneys’ fee provision of the statute was substantive, and could be applied only to causes of action arising after the effective date, but that the other provisions of the statute, including the special motion to strike itself, were procedural and could be applied retroactively.

In MacDonald v. Paton, 782 N.E.2d 1089, 1093 (Mass. App. Ct. 2003), the court granted a special motion to dismiss under the Massachusetts Anti-SLAPP statute where a town selectman filed a libel claim against a website operator whose site was a forum for town political issues. The website posted a definition of the word “Nazi” that referred to a town selectman who favored certain controversial town projects. The Court held that the Anti-SLAPP statute applied to defamation claims and could be used to combat claims by citizens of even modest means, such as the selectman. This represents the first appellate decision applying the Anti-SLAPP statute to media defendants.


2. Access

Cameras in the Courtroom

In State ex rel. Rosenthal v. Poe, 98 S.W.3d 194 (Tex. Crim. App. 2003), the Texas Court of Criminal Appeals vacated a controversial trial court order that would have allowed for the videotaping of jury deliberations in a capital murder case. The murder defendant consented to the
videotaping which was to be used in a post trial documentary on PBS’s *Frontline* series. The trial court found that this was a public educational endeavor “uniquely deserving of the exclusive right to broadcast the footage it records.” Reversing, the appellate court held that cameras in the jury deliberation room violated not only the plain language of the authorizing statute, but also “the ancient and centuries-old rule that jury deliberations should be private and confidential.” *Id.* at 202.

A New York trial court rejected a constitutional challenge to New York State’s statutory ban on cameras in the courtroom. *Courtroom TV Television Network LLC v. State*, 2003 WL 21787909, (N.Y.Sup., Jul 15, 2003). The cable network sought a declaratory judgment that § 52 of the Civil Rights Law, which prohibits television coverage, is unconstitutional. The court held that under U.S. Supreme Court precedent cameras in the courts are not required under the First Amendment. The ban, therefore, is a time, place and manner restriction subject only to rational basis scrutiny and it found “ample evidence from which the Legislature could rationally conclude that advances the State interest in fair trials.” *Id.* at *27.

In contrast, a New York trial court hearing a highly publicized case of a judge charged with bribery held that the ban on cameras in the courts was unconstitutional and it approved television and still camera coverage of the trial of Judge Victor I. Barron. *People v. Barron*, 30 Media L. Rep. 2120 (Sup Ct. Kings Co. 2002). Another trial court held that ban on television coverage was not unconstitutional, but went on to hold that the ban did not apply to still camera photography. *People v. Kopp*, 756 N.Y.S.2d 830 (N.Y. Co. Ct. 2003).

New Hampshire law governing the use of cameras in the courtroom changed dramatically in December 2002. Prior to that time, the use of cameras was left to the discretion of the presiding judge, but court rules created a presumption against their use. In *Petition of WMUR Channel 9*, 148 N.H. 644 (2002), the New Hampshire Supreme Court recognized that the existing court rules did not reflect the technological advances of the past 25 years, and it held that a “trial judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public. A judge may limit electronic media coverage if there is a substantial likelihood of harm to any person or other harmful consequence.” The court further held that complete closure of proceedings to the electronic media may occur, however, only if certain specific requirements are met, including particularized findings on the record.

3. “Son of Sam” Laws

In *State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 31 Media L. Rep. 1624 (Ariz. App. 2002), the court upheld the application of a racketeering forfeiture statute, A.R.S. 13-2301 to 2318 and 13-4301 to 4316, to book royalties payable to Sammy “the Bull” Gravano, a notorious Mafia hitman, who was the subject of a 1997 biography by Peter Maas entitled *Underboss: Sammy the Bull Gravano’s Story of Life in the Mafia*. Upholding the forfeiture order, the court held that the royalties were directly connected to Gravano’s racketeering crimes and forfeiture would not violate the First Amendment because the relevant statutes are content neutral, distinguishing New York’s “Son of Sam” statute declared unconstitutional in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).
New York’s Son of Sam law was amended in June 2001 to allow victims of crimes or their surrogates to sue criminals who caused them harm when the convict receives a significant sum of money or property from virtually any source. N.Y. Exec. Law. § 632-a(1)(c); CPLR § 5205(k). The amendment withstood constitutional challenges that it violates the rights of inmates to equal protection, substantive due process, and access to the courts. *Snuszki v. Wright*, 751 N.Y.S.2d 344, 93 Misc. 2d 490 (Sup. Ct. Niagra Co. 2002); *New York State Crime Victims Board v. Majid*, 749 N.Y.S.2d 837, 193 Misc. 2d 710 (Sup. Ct. Albany Co. 2002) (upholding as constitutional the provision of the Son of Sam law that allows the New York State Crime Victims Board to seek provisional remedies against inmate).