MLRC 2004 REPORT ON
SIGNIFICANT DEVELOPMENTS

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NEW DEVELOPMENTS

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INTRODUCTION

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

In what was something of a surprise, the U.S. Supreme Court agreed to hear a libel case in its 2004-2005 Term. The case, Tory v. Cochran,1 raises the issue of post-trial injunctions in libel cases and, indirectly, the opinion defense to libel claims. This is the first libel case accepted for review in 14 years,2 so the Court’s holding and suggestions on libel doctrines will be carefully scrutinized.

The case was brought by high-profile lawyer Johnnie Cochran against a disgruntled former client. The defendant picketed outside Cochran’s office with signs stating among other things: “Johnnie is a crook, a liar and a Thief”; “Unless You have O.J.’s Millions – You’ll be Screwed if You Use J.L. Cochran, Esq.”; and “Johnnie Cochran I Know What You, the County and city Did to my Case.” The trial court found these statements to be deliberately false and it issued a broad permanent injunction against the defendant, barring him from making any public comments at all about Cochran and his firm. A California appellate court affirmed, finding that “although a prior restraint can be presumptively unconstitutional, that rule has no application where, as here, an injunction against a private person operates to redress alleged private wrongs,” namely deliberate defamatory falsehoods.

In addition to reviewing the appeal court’s suggestion that the First Amendment poses no bar to such injunctions, at least against non-media libel defendants, the Court may venture into the thicket of the opinion defense given the nature of the statements at issue.

Interestingly, in 2003 another California appeals court held that a similarly broad post-trial injunction against a non-media libel defendant was an unconstitutional prior restraint – and questioned whether defamatory speech can ever be enjoined.3

Also on the libel front, the Pennsylvania Supreme Court in Norton v. Glenn,4 expressly rejected the neutral report privilege – a particularly disappointing result because the case presented the paradigm scenario for adopting the privilege. The newspaper reported on outrageous – but clearly newsworthy – allegations leveled by an elected government official against other elected officials.

The Pennsylvania Supreme Court, however, concluded that there is no constitutional basis for


2. The last case the Court accepted for review was Masson v. New Yorker Magazine 501 U.S. 496 (1991).


protecting the accurate reporting of statements one public official makes about another public official, beyond the actual malice standard. The court suggested that recognizing a constitutionally-based neutral report privilege would jeopardize the state’s interest in protecting reputation. The decision provides little comfort for journalists or media counsel confronted with the situation where a public official makes a charge that, while the reporter might doubt its validity, is nonetheless extremely newsworthy.

More positively, the Texas Supreme Court in *New Times, Inc. v. Isaaks*,⁵ issued a strong decision on the First Amendment protection of satire. It reversed an appellate court decision that held that an intended satire could be defamatory if some readers were misled and believed the satire to be true. The proper rule, according to the Texas Supreme Court, is a reasonable person standard – and that “hypothetical reasonable person ... is no dullard.... He or she can tell the difference between satire and sincerity.”

One relatively small libel damage award was affirmed on appeal this year. In *Schlieman v. Gannett Minnesota Broadcasting, Inc.*,⁶ the court upheld a $110,000 jury award, finding sufficient evidence that a television reporter’s “hot news” story about a police shooting disregarded available facts.

On the media privacy law front, the California Supreme Court in *Gates v. Discovery Communications*,⁷ expressly overruled its 1971 decision in *Briscoe v. Reader's Digest Association, Inc.*, that had recognized a private facts cause of action for true reports of past criminal convictions. The court recognized that a line of subsequent U.S. Supreme Court cases, including *Cox Broadcasting Corp. v. Cohn*⁸ and *Florida Star v. B.J.F.*,⁹ effectively overruled that holding.

In an unusually harsh opinion, a California federal court found that a hidden camera investigation of Hollywood acting workshops raised a host of triable privacy claims, including intrusion, wiretap and violation of California’s anti-paparazzi law, all because the participants could have had a reasonable expectation of privacy and that the filming could be “highly offensive.”¹⁰

In a non-media wiretap decision with important implications for newsgathering, the D.C. federal district court granted summary judgment to plaintiff in *Boehner v. McDermott*, the long-running federal wiretap claim over an intercepted cell phone conversation involving Congressman John Boehner, former House Speaker Newt Gingrich and other Republican Party officials. The court

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held that by knowingly accepting an illegally recorded conversation, Congressman James McDermott participated in an illegal transaction and therefore could be liable under the wiretap statute without running afoul of the U.S. Supreme Court’s ruling in *Bartnicki v. Vopper*.

Over the past year federal courts continued to attack reporters privilege law in the context of criminal leak investigations. At press time, the D.C. Circuit Court of Appeals heard the combined appeals of reporters Judith Miller and Matthew Cooper who were held in contempt for refusing to answer questions from the special prosecutor investigating whether any government officials violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame. The D.C. federal district court had earlier held that the reporters had no First Amendment or common law privilege to resist answering questions before the grand jury. If the ruling is affirmed, the reporters will likely be sentenced to jail terms.

Another reporter, James Taricani, was recently found guilty of criminal contempt by a Rhode Island federal court and sentenced to 6 months house arrest for refusing to disclose the source of a leaked law enforcement surveillance videotape.

The common doctrinal thread in both cases is the conclusion that under *Branzburg v. Hayes*, the federal government’s interest in investigating alleged criminal leaks of information trumps the public interest in protecting the identity of confidential sources – regardless of whether that interest is founded on the First Amendment, common law or ordinary discovery rules. The rulings have galvanized one Senator – and the media law community – to push for a federal shield law bill that would provide absolute protection to confidential sources.

Finally, two foreign law decisions illustrated the perils that surround online publishing. A Canadian court ruled it had jurisdiction over the *Washington Post* in a libel case where the only publication in Canada was plaintiff’s own downloading of the news article. The court found that an internationally known newspaper like the *Post* should be prepared to defend libel actions anywhere in the world. And the Court of Appeals of England affirmed that any material downloaded in England is “published” in England for purposes of defamation suits there.

These and other cases are discussed herein.

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11. *In re Grand Jury*, No. 04-3138.


A. MEDIA LIBEL LAW

1. Defamatory Meaning

Among the interesting judicial determinations on defamatory meaning this past year, a federal district court in Massachusetts held that the false suggestion that a person is homosexual is not capable of a defamatory meaning. Albright v. Morton, 321 F. Supp. 2d 130, 136, 32 Media L. Rep. 1769 (D. Mass. 2004). Dismissing a claim brought by a former bodyguard/boyfriend of pop singer Madonna over a misidentified photograph, the court concluded that to find otherwise would be to give effect to prejudices against homosexuals. The decision was not appealed to the First Circuit.

A New York federal district court suggested the same in dismissing a suit filed by a gossip columnist over a reference to him as the “closeted editor of a certain paper.” The court noted in dicta that there is now “good reason to question the reliability of ... precedents” that an imputation of homosexuality is libelous per se. Lewittes v. Cohen, 2004 WL 1171261 (S.D.N.Y. May 26, 2004) (collecting recent cases and law review articles).

In Tucker v. Philadelphia Daily News, 32 Media L. Rep. 1705, 848 A.2d 113 (Pa. 2004), the Pennsylvania Supreme Court dismissed, on actual malice grounds, a lawsuit over rap song lyrics, but not before it affirmed a broad ruling on defamatory meaning. The court held that the colloquial description of a loss of consortium claim as a $10 million claim for loss of sexual relations was capable of the defamatory meaning that plaintiff was overly interested in sex – or money. See also Gordon v. Boyles, 99 P.3d 75 (Colo. App. 2004) (false allegation of an extramarital affair is still defamatory as an accusation of “serious sexual misconduct”).


A New York federal court held that statements made by writer Dominick Dunne implicating former Congressman Gary Condit in the murder of Chandra Levy were defamatory. Condit v. Dunne, 317 F. Supp. 2d 344 (S.D.N.Y. 2004). Among the statements at issue: that a “horse whisperer” said Levy was put on a plane and dropped over the ocean; that Condit “knows more [about the murder] than he has ever said”; and “could have known” she was going to be murdered. The court rejected arguments that in a “media frenzy,” statements made on radio shows and talk shows were statements of opinion and hypotheses and not assertions of facts.

The saga of Muzikowski v. Paramount Pictures Corp. continued this past year at the trial court level. As reported last year, the Seventh Circuit reinstated a defamation claim against the creators of the fictional movie Hardball – a film inspired by the true story of an inner city little league team. Muzikowski v. Paramount Pictures Corp., 322 F.3d 918 (7th Cir. 2003). Plaintiff claimed – and the Seventh Circuit agreed – that the movie’s portrayal of the fictional coach lying, drinking and gambling could be defamatory of plaintiff. On remand, an apparently chastened Illinois district court declined to dismiss additional defamation allegations, including a claim that the portrayal of

In contrast, three other Illinois cases illustrated the generally more forgiving approach under the innocent construction rule.

An Illinois federal court dismissed a defamation action against the *Chicago Sun-Times* over a columnist’s colorful comments on a woman’s palimony-type claims against basketball star Michael Jordan. *Knafel v. Chicago Sun-Times, Inc.*, 2004 WL 628242 (N.D. Ill., Mar. 25, 2004). Describing plaintiff as having heard the “ka-ching of a cash register”; and that the money she was seeking from Jordan was “making herself sound like someone who worked in a profession that’s a lot older than singing or hair designing,” was subject to an innocent construction and did not imply plaintiff was a prostitute.

The phrase “reputed organized crime figure” did not necessarily mean that plaintiff is a mobster, but could also mean that plaintiff is “a person who is believed to be, possibly erroneously, an organized crime figure.” *Salamone v. Hollinger Int’l, Inc.*, 807 N.E.2d 1086 (Ill. App. 2004).

An item in a Chicago Tribune column reporting that a sports agent tried to attend the memorial service of a former client but was turned away three times was not defamatory. *Zucker v. Chicago Tribune Company*, Nos. 1-02-2394, 1-02-3406 (Ill. App. March 12, 2004).


**Of and Concerning**

Co. 2003). Plaintiff claimed that a character in the book was based on her and damaged her reputation by falsely implying she had a sexual liaison with then-candidate Clinton. Reviewing the similarities between plaintiff and the book character, the court concluded that reliance “on minimal superficial similarities” and “speculative gossip” is insufficient to sustain a libel in fiction claim.

An advertisement for the United Negro College Fund, depicting a homeless derelict named “Larry Botts” was not “of and concerning” a father and son in New Jersey with the same name. *Botts v. The New York Times Company*, 2004 WL 1616354, 32 Media L. Rep. 1993 (3rd Cir. Jul 20, 2004). Plaintiffs could not plead and readers could not reasonably conclude that plaintiffs were “in need of a UNCF college scholarship.”

An Ohio appellate court held that a newspaper profile of a businessman could also be “of and concerning” his closely held company, at least where the corporation was perceived as the alter ego of its owner. *Murray v. Knight-Riddor, Inc.*, 2004 WL 333250, 32 Media L. Rep. 2168 (Feb. 18, 2004).

**Defamation by Implication or Innuendo**

Several cases addressed whether a defamatory implication must be intended or endorsed to sustain liability.

In *Leddy v. Narragansett Television*, 843 A.2d 481(R.I. 2004), the Rhode Island Supreme Court held that a news report stating that plaintiff was “ripping off the system” by accepting a tax-free disability pension was protected opinion and/or fair comment on a matter of public interest based on true facts. Moreover, the court held that while true statements of fact may imply a defamatory meaning, a plaintiff must show that the defendant intended to or actually endorsed the defamatory implication.

Similarly in *Battaglieri v. Mackinac Center for Public Policy*, 680 N.W.2d 915 (Mich. App. 2004), the appellate court relied on defamation case law to dismiss a false light claim brought by the president of a teacher’s union against a public policy group over its use of an unauthorized quote in a fundraising letter. Plaintiff alleged that the quote falsely implied he endorsed the defendant’s policy goals. Granting summary judgment, the court held that there was no evidence that the letter was intended to convey a false impression. The court held that “in a case such as this, where the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant’s article, he must show with clear and convincing evidence that the defendant intended or knew of the implication that the plaintiff is attempting to draw.”

The Texas Supreme Court also addressed this issue in a media case alleging business disparagement. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172, 32 Med. L. Rep. 1498 (Tex. 2003). The trial court granted summary judgment for the defendants, the intermediate appellate court reversed and remanded for trial, and the Supreme Court reversed and rendered judgment for the defendants, finding no fact issue on actual malice. In doing so, the court noted, “When the defendant’s words lend themselves to more than one interpretation, the plaintiff must establish either that the defendant knew that the words would convey a defamatory message, or had reckless disregard for their effect.”
However, in *Hearst Corp. v. Skeen*, 130 S.W.3d 910, 32 Media L. Rep. 2151 (Tex. App. – Fort Worth 2004, pet. filed), the court found that an investigative newspaper piece on a controversial district attorney’s office could create the defamatory impression that prosecutors obtained convictions by wrongful means. Although the article attributed criticisms of plaintiffs to others, the court treated the criticisms as those of the newspaper and reporter, coming to the conclusion that the article affirmatively implied that the prosecutor’s office in fact has a “win at all costs policy” and a “rule or policy of misconduct.”

In *Brown v. Gatti*, 2004 WL 2294320 (Or. Ct. App. Oct. 13, 2004), the court reinstated a doctor’s libel claim against a lawyer over the lawyer’s comments to the media following the conclusion of a medical malpractice action against the doctor. The lawyer opined that telephone directories should “requir[e] doctors to somehow certify that they are indeed certified in the area in which they are wanting to advertise.” The court found that his could imply that plaintiff misrepresented himself as a plastic surgeon. Without addressing whether defendant actually intended this implication, the court suggested he could be liable if the implication is one a “reasonable person” could make.

**Publication**

Several federal and state court cases considered the viability of the theory of compelled self-publication in the employment context, i.e., where an employee-plaintiff published the allegedly defamatory statements of his former employer to prospective employers.

The Eighth Circuit noted that Minnesota accepts the doctrine of compelled self-publication. *Anderson v. Indep. School Dist.*, 357 F.3d 806, 809-10 (8th Cir. 2004) (citing *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214 (Minn. App. 2002) (“A person with the reasonable belief that a potential employer knows or will learn of defamatory statements made by a former employer may be compelled to self-publish the defamatory statements in order to defend his or her reputation.”)).

The District of Columbia, however, does not recognize a cause of action for compelled self-publication. *Austin v. Howard University*, 267 F. Supp. 2d 22, 30 (D.D.C. 2003) (“there simply is not the historical and judicial context at this time to predict ... that the District of Columbia Court of Appeals would adopt the tort of self-publication”).

In *Cwelinsky v. Mobil Oil Company*, 267 Conn. 210, 837 A.2d 759 (2004), the Connecticut Supreme Court held that the state does not recognize a cause of action for defamation based on the theory of compelled self-publication. The Court considered the issue on a certified question from the Second Circuit Court of Appeals. Following the Connecticut court’s answer, the Second Circuit vacated and remanded a jury verdict for plaintiff in an employment libel case, finding it was impossible to tell whether emotional distress damages stemmed from an intra-corporate publication or the plaintiff’s own re-publication. *Cwelinsky v. Mobil Chemical Co.*, 364 F.3d 68 (2d Cir. 2004).

In *White v. Blue Cross and Blue Shield of Massachusetts, Inc.*, 809 N.E.2d 1034 (Mass. 2004), the Massachusetts Supreme Judicial Court declined to recognize the doctrine of compelled self-publication defamation in the employment context. The Court reasoned that to recognize such a
doctrine would harm the concept of at-will employment, abrogate an employer’s qualified privilege, and chill effective communication and evaluation in the workplace.

**Group Libel**

An Ohio appellate court affirmed dismissal of a prisoner’s unusual pro se libel complaint against television networks and stations for jokes and comments in various sitcoms and talk shows about homosexuality in prison. *Whiteside v. United Paramount Network*, No. CA2003-02-008, 2004-Ohio-800, 2004 WL 323183 (Ohio App. Feb. 23, 2004). The plaintiff alleged that shows such as *Will and Grace* and *The Late, Late Show* defamed Ohio’s male prisoners by implying they were all involved in homosexual relationships. Assuming without deciding that the allegation of homosexuality is defamatory, the court ruled that the claim was barred by the group libel doctrine.

In the non-media context, a New York court allowed a defamation counter-claim brought by a 15-member medical group to proceed. *Excellus Health Plan, Inc. v. Tran*, 287 F. Supp. 2d 167, 175-76 (W.D.N.Y. 2003) (denying a motion to dismiss). At issue were statements and advertisements by an HMO (published in the local press) that alleged, among other things, that the “Promedicus” medical group had abandoned its patients. Reviewing New York’s group libel jurisprudence, the court concluded that New York rejects an absolute limitation on group defamation actions based on the size of the group alone, but rather applies an “intensity of suspicion” test to evaluate a group action. Here the references to the medical group sufficiently focused on each of the physician counter-claimants.

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.

Affirming a motion to dismiss, the Fourth Circuit held that statements about a protracted litigation among dog breeders were all opinion or hyperbole as a matter of law, including describing an affidavit as “some 60 pages of fact and fiction, innuendo, half-truths, exaggerations and fabrications.” *Schnare v. Harris Publications*, No. 03-1879, 2004 WL 1557804 (4th Cir. July 13, 2004) (per curium) (unpublished). The court noted that the “snide tone, stern quotations, and responsive posture,” of the article made clear to reasonable readers that the article was no more than a “lusty and imaginative expression of the contempt felt” toward an adversary.

Denying a motion to dismiss a libel claim brought by former Congressman Gary Condit against writer Dominick Dunne, a district court rejected arguments that, in a “media frenzy,” Dunne’s statements on radio and television talk shows implicating Condit in the murder of Chandra Levy were opinions and hypotheses rather than actual assertions of fact. *Condit v. Dunne*, 317 F. Supp. 2d 344 (S.D.N.Y. 2004).

The Texas Supreme Court issued a strong decision on the First Amendment protection of satire in *New Times, Inc. v. Isaaks*, 146 S.W.3d 144, 32 Media L. Rep. 2480 (Tex. 2004). It reversed an appellate court decision that held that an intended satire could be defamatory if actual readers were
misled and believed the satire to be true. The proper rule, according to the Texas Supreme Court is a reasonable person standard – and that the “hypothetical reasonable person ... is no dourd.... He or she can tell the difference between satire and sincerity.” Plaintiffs, a judge and district attorney, had been involved in a controversial prosecution of a junior high school student who wrote an allegedly violent school essay. The newspaper later published a satire in which the judge and district attorney prosecuted and jailed a six-year-old girl for writing a book report on the children’s classic Where the Wild Things Are. The Texas Supreme Court held that the satire was not actionable because (1) an objectively reasonable reader would not have taken the satire as purporting to state actual facts about the plaintiffs, and (2) actual malice did not exist because the defendants neither knew nor strongly suspected that the satire could reasonably be read as stating actual facts.

In contrast, the South Dakota federal district court declined to dismiss a libel suit filed by ex-South Dakota Senator Abourezk against a website that included Abourezk and other opponents of the Iraq War on a so-called “Traitor List.” Abourezk v. ProBush.com, Civ. 03-4146 (D. S.D. March 14, 2004). Although the “Traitor List” appeared to be an obvious parody and included a disclaimer, the court denied a motion to dismiss on grounds that “it is obviously too early to decide whether the speech is of public concern” and “too early to decide whether Abourezk is a public figure.”

The Oklahoma Supreme Court held that television news reports about patients’ dissatisfaction with cosmetic surgery performed by the private figure plaintiff – including references to “botched” surgeries and “devastating” scars was opinion or privileged as fair comment where the broadcaster accurately reported the allegations of the patients and the doctor was given an opportunity to respond. Magnusson v. New York Times Co., 2004 OK 53 (Okla. 2004). The court treated the opinion defense and common law defense of fair comment as essentially the same.

The Rhode Island Supreme Court also treated the overlap between fair comment and opinion in Leddy v. Narragansett Television, 843 A.2d 481(R.I. 2004). The court concluded that the “derogatory” opinion that plaintiff was “ripping off the system” by collecting a municipal pension while working another job was fair comment on a matter of public interest. Sketching out a distinction between the defenses, the court noted that fair comment can be overcome by actual malice, but an opinion based upon disclosed nondefamatory facts is wholly non-actionable.

In an unreported opinion, an Ohio appellate court reinstated a libel claim against the Akron Beacon Journal based on a profile of the owner of a coal mining company. Murray v. Knight-Ridder, Inc, 2004 WL 333250, 32 Media L. Rep. 2168 (Feb. 18, 2004). At issue were statements in the profile that plaintiff’s competitors jokingly call him “Honest Bob”; that even plaintiff’s “friends roll their eyes at his hyperbole”; that “he tends to exaggerate a good bit”; and “is sick” and “wants a long line at [his] funeral.” Reversing summary judgment for the newspaper, the court ruled that statements that plaintiff exaggerated, used hyperbole, and was jokingly called “Honest Bob” implied that he was a dishonest liar. The statement about a funeral and being sick implied that plaintiff is dying, which would harm the reputation of his alter ego company.

In an interesting non-media case, another Ohio appellate court gave wide berth to the opinion defense. Toledo Heart Surgeons, Inc. v. Toledo Hospital, 154 Ohio App. 3d 694, 2003-Ohio-5172 (2003). At issue were a doctor’s statements on his own website and in letters which, among other
things, stated that plaintiff hospital “den[jed] patients the right to life-saving treatment,” “illegally closed the medical staff and jeopardized its non-profit status,” and “engaged in many illegal, anti-competitive business activities.” As to publication on the website, the court reasoned that “the marketplace of ideas has widened to include computer communications, and an ordinary ‘surfer’ is attuned to the blend of hyperbole and exaggeration in the expression of opinion that is contained on the Internet.”

A newspaper column’s reference to a former mayor as a “convicted felon” when he was convicted only of misdemeanors was opinion because the overall context was a strident newspaper column. *Grabow v. King Media Enterprises, Inc.*, 806 N.E.2d 591 (Ohio App. 2004).

In a case of first impression involving the standards applicable to defamation claims based on anonymous consumer ratings and comments, a New York trial court dismissed a libel lawsuit brought by a restaurant owner against Zagats, publisher of the well-known restaurant guides. *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d 441 (N.Y. Sup. Ct. 2004). The comments “God knows ‘you don't go for the food,’” and “weary well-wishers suggest they ‘freshen up the menu-and their makeup’” were both subjective statements expressing a writer’s viewpoint. In addition, the court found that the numerical ratings given to plaintiff were “quintessential opinions” by consumers assessing “subjective qualities,” and that a “disagreement over taste and fashion is not the stuff of defamation.”

A California appellate court granted an anti-SLAPP motion dismissing libel and related claims against the *Los Angeles Times* over an article reporting on inaccuracies in a CEO’s public resume. *Page v. Los Angeles Times*, 2004 WL 847527 (Cal App. April 24, 2004) (unpublished). Beginning with the observation that “There are three kinds of falsehoods: lies, damn lies and resumes,” the court noted that while “resume puffing .... once was acknowledged with a wink and a nod,” the newspaper’s article had to be assessed in the current context of corporate scandals. Thus the newspaper’s questions about the motivation for the inaccuracies – without adopting any conclusion – were non-actionable opinions.


An editorial criticizing behavior at a student prom, which included the observation of one student that “it was sex with clothes on,” was opinion and could not be read to falsely imply that plaintiff actually engaged in sex with her clothes on at the prom. *Combs v. Knott County Publishing Company, Inc.*, No. 2003 000372, 2004 WL 2413579 (Ky. App. Oct. 29, 2004) (unpublished).

A federal district court in Delaware held that labeling a public sports figure a “liar” was not defamatory because the average reader was more likely to view the term as an epithet than as a statement of fact. *Gill v. Delaware Park, LLC*, 2003 WL 22888932 (D. Del. Dec. 2, 2003). *But see Ulrich v. Shilling*, 2003 WL 21540387 (Mich. Ct. App.) (unpublished) (calling a political opponent a “liar” in a campaign flyer was not a protected expression of opinion where reasonable readers would understand the statement to describe actual facts).

A lawyer’s statement that a charge of cheating against a card player was a “slam dunk” was not capable of being proved true or false since “even on the basketball court, ‘slam dunks’ are sometimes missed. *Blubaugh v. Am. Contract Bridge League*, 2004 WL 392930 (S.D. Ind. Feb. 18, 2004).

A Florida appellate court reversed a jury verdict for the plaintiffs on the ground that a photograph of their home displayed in the local town hall with the caption “Our View of the Hillbilly Hellhole” constitutes “pure opinion” protected by the First Amendment. *Town of Sewall’s Point v. Rhodes*, 852 So. 2d 949 (Fla. 4th DCA 2003).

3. Truth/Falsity

**Substantial Truth**

The Seventh Circuit issued an important decision on the substantial truth doctrine and reporting on allegations. *Global Relief Foundation, Inc. v. New York Times Co.*, 2004 WL 2725742 (7th Cir. Dec. 1, 2004). At issue were a series of news reports in several different newspapers that plaintiff, an Islamic charity, was under investigation for allegedly funding terrorist organizations and that the government was considering freezing its assets. Plaintiff alleged that the gravamen of the reports was not simply that it was under investigation, but that it was actually involved in funding terrorist operations. The investigation – which plaintiff conceded was true – was an “inoffensive detail” to the “true defamatory sting of the reports, that GRF was a front for terrorists, including al Qaeda.” The Seventh Circuit ruled that all the news reports were substantially true accounts of the government’s suspicions about and actions against plaintiff. And it rejected plaintiff’s argument that the press defendants should have “prove[d] the truth of the government’s charges before reporting on the investigation itself.”

A newspaper’s motion for summary judgment on substantial truth was denied, and the denial upheld on appeal, in a suit over its report of a debate between candidates for sheriff. *Freedom Newspapers v. Cantu*, 126 S.W.3d 185, 32 Media L. Rep. 1555 (Tex. App. 2003). The newspaper wrote that plaintiff stated at the debate “no Anglo can be sheriff.” A tape of the debate later showed that plaintiff did not use that phrase but stated “you have to have the right character to be a sheriff .... You have to be bi-cultural to understand what is going on in our neighborhoods, where there is a lot of burglaries, how are you going to relate to these people – in Spanish.”

In a follow up report, the newspaper published plaintiff’s statement that “I did not say that an Anglo could not be sheriff,” as well as statements from voters at the debate. One woman understood plaintiff to mean that “the only person who could be sheriff is an Hispanic.” Another “didn't hear it that way” and said “claiming that he said no Anglo could ever be sheriff wasn’t a fair representation” of plaintiff’s comments. Citing that last statement, the appellate court concluded that an issue of fact existed as to whether the newspaper’s characterization was substantially true. In November 2004,
the Texas Supreme Court granted review.

A California federal court granted an anti-SLAPP motion to dismiss product disparagement and related claims against Consumers Union over a negative product review published in *Consumer Reports* magazine finding none of the complained of statements false. *Sharper Image Corp. v. Consumers Union of United States, Inc.*, 2004 WL 2554451 (N.D. Cal. Nov. 9, 2004). Among other things, *Consumer Reports* stated that plaintiff’s Ionic Breeze air purifier “barely worked at all,” and “proved unimpressive in our tests.” The fact that plaintiff’s own tests showed its product was effective only served to show that “there exists divergent views as to what factors or criteria should be considered in determining whether a portable air cleaner is ‘effective,’” and did not prove that *Consumer Reports*’ conclusions were false.


In an interesting non-media case, an Illinois appellate court held that the statement that there was “widespread disapproval” of a high school football coach among parents was demonstrated through affidavits by parents confirming that they signed a petition complaining about plaintiff. *Myers v. Levy*, 808 N.E.2d 1139 (Ill. App. 2004). The court held that substantial truth was not defeated by plaintiff’s submission of counter-affidavits by six parents (including one judge) stating that defendant had falsely included them as signers of the petition. While these affidavits showed that defendant exaggerated the level of discontent among all of the parents, the charge was still substantially true.

An Illinois appellate court refused to determine whether statements that plaintiff was an “infidel” and “scofflaw” were true or false since that inquiry would have required interpretation of Jewish law, and the court noted its responsibility to sit out of ecclesiastical disputes. *Thomas v. Fuerst*, 345 Ill.App.3d 929, 803 N.E.2d 619 (2004).

Several cases considered substantial truth with respect to describing criminal convictions and other legal nomenclature.

A newspaper columnist’s accusation that a former mayor “stole city assets” was substantially true where the former mayor was originally charged with theft in office, which was reduced to a lesser charge of receiving improper compensation. *Grabow v. King Media Enterprises, Inc.*, 806 N.E.2d 591 (Ohio App. 2004).

A letter published in a newspaper in which the author described actions of inmate convicted of first-degree murder as an “execution,” was not defamatory where the inmate admitted to killing with deliberate and premeditated malice, the equivalent to the colloquial meaning of “execution.” *Hatcher v. McShane*, 12 Neb. App. 239, 670 N.W.2d 628 (2003).

Statements about plaintiff’s history of domestic violence were substantially true where plaintiff was arrested for assault and disturbing the peace in a domestic incident. *Gordon v. Boyles*, 2004 WL 351774 (Colo. App. 2004).

Affirming a jury verdict for defendants over the statement “our dad’s a pimp,” a California appellate court held that evidence of a libel plaintiff’s past conduct was sufficient to establish the truth of allegedly defamatory statement phrased in the present tense. *Hughes v. Hughes*, 2004 WL 2165394 (Cal. Ct. App. Sept. 28, 2004).

**Inaccurate or Distorted Quotes**

In *Murray v. Knight-Ridder, Inc.*, 2004 WL 333250, 32 Media L. Rep. 2168 (Ohio App. 2004), the court reinstated a defamation claim against a newspaper where plaintiff claimed his statements were quoted out of context. Citing to *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 525 (1991) the court reasoned that even if a speaker did make certain statements, those statements can be defamatory if quoted out of context in such a way as to change the meaning. In *Murray*, the newspaper attributed to plaintiff the statement: “The only thing I want is a long line at my funeral. I’m sick. I bought my cemetery plot.” Factual issues existed as to whether this statement was substantially true where plaintiff denied saying “I’m sick” and alleged that the other statements were conflated into a single defamatory quote.

4. **Fault**

**Public Figure Status**

A member of the Board of Directors of a non-profit gay and lesbian community organization was deemed a limited public figure in his suit over a newspaper article discussing his alleged conflicts of interest. *Shepard v. Bay Windows, Inc.*, 16 Mass. L. Rptr. 726, 2003 WL 22225764 (Mass. Super. 2003). The court found that plaintiff, through his board and business roles, had voluntarily entered a controversy about the governance of a non-profit organization with a substantial membership and impact on the Boston area gay community.

Two technology companies and individual executives were not public figures in their defamation suit over thousands of e-mails and internet postings by two former employees. *Varian Medical Systems, Inc. v. Delfino*, 6 Cal. Rptr.3d 325, 32 Media L. Rep. 1910 (Cal. App. 2003), rev. granted on other grounds, 85 P.3d 444 (Cal. 2004). The companies did not advertise or sell to the general public and had no “pervasive involvement in the affairs of society.” And the individual executives were not involved in any public controversy other than the one that developed after the case was filed. Quoting from *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the court noted that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”

Similarly, a businessman and leader in the Polish-American community was not a public figure in a libel action over a web newsletter report linking him to the murder of a police chief in Poland. *Mazur v. Szporer*, 2004 WL 1944849, 32 Media L. Rep. 1833 (D.D.C. 2004) (denying a motion to dismiss). Although there was a public controversy surrounding the murder and other
alleged crimes, there was no evidence that plaintiff participated in or took any public role to influence the controversy.

Also on a motion to dismiss, a South Dakota federal district court declined to declare James Abourezk, a former U.S. Senator and opponent of the Iraq war, a public figure in his lawsuit against a website that labeled him a “traitor.” *Abourezk v. ProBush.com*, Civ. 03-4146 (D. S.D. March 14, 2004). The court found it “too early to decide whether Abourezk is a public figure.”

**Public Official Status**

A Maryland assistant prosecutor was held to be a private figure in his libel suit over a newspaper report on his child custody fight with his ex-wife. *Mandel v. The Boston Phoenix, Inc.*, 322 F. Supp. 2d 39 (D. Mass. 2004). The court distinguished prosecutors from police officers who are generally held to be public officials, noting that “prosecutors are less visible in the community than police officers, tending to work in courts and offices rather than in the community among the general public.” Moreover, plaintiff held the lowest-level position in the prosecutor’s office, was closely supervised and did not have access to the press. *But see Pardo v. Simons*, 148 S.W.3d 181 (Tex. App. 2004) (assistant district attorney with “substantial responsibility or control over the conduct of government affairs” held to be a public official).

The Alabama Supreme Court held that a police officer criticized for his off duty behavior was a public official. *Smith v. The Huntsville Times Company, Inc.*, 2004 WL 473377, 32 Media L. Rep. 1776 (Ala. March 12, 2004). Relying on *Garrison v. Louisiana*, 379 U.S. 64 (1964), the court had “no difficulty in deciding that the criticisms in the Commentary touch on [a public] official’s fitness for office.”


**Application of Actual Malice Rule**

The Minnesota Court of Appeals reinstated a $110,000 jury verdict to a police officer who sued over a television news report about a incident in which he shot and killed a man who came toward him with a knife. *Schlieman v. Gannett Minnesota Broadcasting*, 2004 WL 1728514 (Minn. Ct. App. Aug. 3, 2004) (unpublished). At issue was a “hot news” report on the shooting headlined “for a second time, a St. Cloud police officer shoots to kill.” It reported that “while police say it was self defense” there was “conflicting information from neighbors” and “two people say they witnessed the shooting and [the deceased] was not being aggressive.” Vacating a post-trial JNOV, the appellate court found sufficient evidence of reckless disregard of falsity where one of the eyewitnesses testified at trial that she never described the deceased as “not aggressive; that she told the reporter that “the
officer had to shoot him”; and this was consistent with her police statement – which the reporter was referred to but did not read.

At the summary judgment stage, a Texas appellate court found a triable fact issue on actual malice based on a variety of “circumstantial evidence,” including testimony from an expert witness that the defendant newspaper’s investigation was allegedly inadequate. *Hearst Corp. v. Skeen*, 130 S.W.3d 910, 920-21 (Tex. App. 2004). The factors supporting the court’s finding included (1) the fact that although the story took six months to research, the plaintiffs were not contacted until two weeks before publication; (2) the reporter told the plaintiffs (members of a prosecutor’s office) that his article would be “critical” of the office; (3) the reporter spent “not more than a couple of hours” with the plaintiffs and “did not discuss many of the substantive issues in the article”; (4) even though the plaintiffs sent the newspaper a letter addressing some of the issues before publication, the newspaper only inserted “one three-sentence paragraph” after receipt of the letter; (5) the reporter knew that findings of misconduct on the part of the prosecutor’s office were rare, but he still wrote an article conveying the “impression” that the office had a “win-at-all-costs rule or policy”; and (6) an expert testified that the defendants did not meet the standard for adequately reporting information and that the article was biased and unbalanced.

Another Texas case also considered expert testimony in evaluating actual malice. *Freedom Newspapers v. Cantu*, 126 S.W.3d 185, 194, 32 Med. L. Rep. 1555 (Tex. App. 2003), rev. granted, (Tex. 2004). In affirming the denial of summary judgment on actual malice grounds, the court cited as significant the testimony of an “expert journalist” who claimed the newspaper defendant “showed a consistent pattern of biased reporting, editing, and publishing regarding [plaintiff], and that the appellants showed a reckless disregard for the truth.”

In *Murray v. Knight-Ridder, Inc*, 2004 WL 333250, 32 Media L. Rep. 2168 (Ohio App. 2004), the court found sufficient evidence of actual malice to defeat summary judgment based on a source’s denial that he made some of the statements about plaintiff attributed to him and evidence that the reporter conflated plaintiff’s statements into an inaccurate quote.

In an interesting non-media case, plaintiff acknowledged on deposition that “he thought defendant sincerely believed each of the allegedly defamatory statements.” *Myers v. Levy*, 808 N.E.2d 1139, 1149 (Ill. App. 2004). Even though this testimony “tend[s] to undermine his argument” that the statements were made with reckless disregard for their truth or falsity, “we cannot conclude that plaintiff has conceded that he cannot prove the malice element of defamation,” and hence, summary judgment was reversed.

The Fourth Circuit affirmed summary judgment in favor of The Rutherford Institute, a religious rights organization, on libel claims over a press release that erroneously accused school officials of anti-religious conduct (making a student read curse words aloud). *Hugger v. Rutherford Institute*, 2004 WL 765067 (4th Cir. April 12, 2004) (unpublished). The court found no evidence that the defendant acted with reckless disregard before issuing the press release even though school officials disputed the truth of the accusation prior to publication and defendant did not wait to hear from other witnesses. “Although a reasonable person may have waited to hear from one of the corroborating witnesses before issuing the press release, the First and Fourteenth Amendments do not allow states to impose a standard of reasonableness upon defamers who are discussing matters of
The Nevada district court dismissed Gennifer Flower’s long-running libel action against former presidential advisers James Carville and George Stephanopoulos and publisher Little, Brown and Company. *Flowers v. Carville*, 310 F. Supp. 2d 1157 (D. Nev. 2004). At issue were their statements that reports found that tapes Flowers had made of her conversations with then-Gov. Clinton were doctored. The court wrote that a defendant who “republishes a statement that is subject to multiple interpretations is entitled to choose the interpretation with which he agrees” and, as long as the interpretation is “rational,” has not acted with actual malice.

The Alabama Supreme Court dismissed as insufficient evidence of actual malice a police department spokesman’s denial rendered to the reporter prior to publication. *Smith v. The Huntsville Times Company, Inc.* , 2004 WL 473377 (Ala. March 12, 2004). According to the court, “To require that a reporter withhold such a story or face potential liability for defamation because a police officer denies a citizen’s allegation of misconduct is exactly the type of self-censorship the *New York Times* rule was intended to avoid.”

Several cases reaffirmed the principle that inadequate investigation is by itself insufficient to establish actual malice.

In *Tucker v. Philadelphia Daily News*, 32 Media L. Rep. 1705, 848 A.2d 113 (Pa. 2004), the Pennsylvania Supreme Court affirmed dismissal of a libel claim based on a newspaper’s description of a loss of consortium claim. The failure to check sources was insufficient to establish actual malice. But the court granted leave to replead and noted that the complaint could survive if plaintiffs could plead that the newspaper deliberately ignored statements from its own attorney that plaintiffs’ separate loss of consortium was not for a loss of sexual relations.

Newspaper articles that excoriated a Pennsylvania judge for releasing a criminal defendant were not published with actual malice. *Lewis v. Philadelphia Newspapers, Inc.*, 31 Media. L. Rep. 2249, 833 A.2d 185 (Pa. Super. 2003). The fact that the reporter misstated facts from a trial court record does not establish actual malice but is “consistent with simple negligence, which remains subject to First Amendment protection.”

A Texas appellate court dismissed a libel suit brought by two prosecutors, a policeman and an expert witness over a magazine article that questioned their tactics in a capital murder prosecution. *Pardo v. Simons*, 148 S.W.3d 181 (Tex. App. 2004). Defendants’ research negated actual malice, even when the plaintiff showed that the defendants did not contact some potential sources that would have provided information favorable to the plaintiffs. The court also noted that reference to a witness’ trial testimony without mentioning the fact that the witness later recanted the testimony (during a hearing outside the jury’s presence) does not amount to “purposeful avoidance” of the truth and cannot serve as evidence of actual malice.

But that same court of appeals in a different case reinstated a libel claim, finding sufficient evidence of recklessness and “ill will” to deny summary judgment. *Lucas v. Burleson Pub. Co., Inc.*, 2004 WL 1177199 (Tex. App May 26, 2004). At issue was an article reporting that official court records demonstrated that plaintiff, a city-council candidate, had been convicted of assault and theft,
and that he had been charged with other felonies and misdemeanors. Over a month before the publication, plaintiff met with the publisher and editor, told them that he had never been convicted of a felony, and claimed that any purport copies of court records did not pertain to him. The newspaper’s failure to verify the documents coupled with evidence of prior ill will was sufficient to defeat summary judgment.

**Public Concern**

Statements about alleged cheating by a tournament bridge player were a matter of public concern and triggered the actual malice standard under Indiana law. *Blubaugh v. Am. Contract Bridge League*, 2004 WL 392930 (S.D. Ind. Feb. 18, 2004).

New Jersey also applies the actual malice standard in private figure cases involving matters of public interest, defined somewhat more strictly. In *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 316 (D. N.J. 2004), the court held that a national moving company’s libel complaint against a “cyber griper” over a moving dispute would be governed by the negligence standard because the “moving business is more naturally likened to an ‘everyday service’ than an activity which ‘intrinsically involves a legitimate public interest’.”

**Gross Irresponsibility**

A New York federal court denied summary judgment to Discovery Communications, Inc., finding that triable issues of fact existed as to whether the rebroadcast of a reality program called “World's Most Outstanding Undercover Stings” was grossly irresponsible. *Lehman v. Discovery Communications, Inc.*, 332 F. Supp. 2d 534 (E.D.N.Y. 2004). Plaintiff had been arrested for insurance fraud in a sting operation, but was acquitted at trial. The program featured brief undercover footage of plaintiff and his mugshot. Summary judgment was denied where defendant’s papers were “completely silent as to the practices surrounding the broadcast of its television program” with no “affidavits explaining the standard procedure for DCI in broadcasting a program or stating that its methods are standard practice in its industry.”

In an interesting decision on a publisher’s duty to review works of fiction, a New York court held that publishers can rely largely on an established writer’s investigation. *Carter-Clark v. Random House, Inc.*, 768 N.Y.S.2d 290 (Sup. Ct. N.Y. Co. 2003). In dismissing a claim against the publisher of the book “Primary Colors,” the court reasoned that “the publisher may rely largely on an established writer’s investigation because to require publishers to do independent research regarding every possibly defamatory reference in a fictional book would likely create a prohibitory economic impediment to the book publishing industry.” To raise an issue of gross irresponsibility or negligence a plaintiff “must demonstrate that the publisher had substantial reasons to question portions of the book or the good faith of the author.”
II Liability for Republication

*Communications Decency Act § 230*

A California appellate court held that § 230 did not immunize internet auction house eBay in a libel claim based on a third-party negative “feedback” review of plaintiff. *Grace v. eBay, Inc.*, 32 Media L. Rep. 2025 (Cal. App. 2004). Departing from the majority of courts that have considered the issue, the court ruled that eBay could be liable if it knew or had reason to know that the information posted was defamatory. The court nevertheless affirmed dismissal of the complaint on contractual grounds, finding that plaintiff had waived his claims by accepting a broadly worded user agreement. The California Supreme Court has granted eBay’s petition for review on the following question: Does the Communications Decency Act (47 U.S.C. § 230) confer immunity on interactive computer services, such as eBay, from liability for publishing or distributing defamatory statements posted by third parties? See 99 P.3d 2, 19 Cal. Rptr. 3d 824.

Earlier in the year another California appellate court on rehearing issued a similar narrow Section 230 ruling. *Barrett v. Rosenthal*, 114 Cal. App.4th 1379, 9 Cal. Rptr.3d 142 (Cal. App. Feb. 3, 2004). Rejecting the decision in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the court held that Section 230 does not apply when the defendant asserting immunity knew or had reason to know that the content at issue was defamatory. The defendant selected allegedly defamatory e-mails and republished them on an Internet newsgroup. The court found that Congress did not intend to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability if he or she knows or has reason to know of its defamatory character. See also *MCW, Inc. v. Badbusinessbureau.com*, 2004 WL 833595 (N.D. Texas April 19, 2004) (noting in dicta that a website may be responsible for information created by a third party “without actually creating or developing the information itself”).

The same plaintiff fared less well in Illinois courts. *Barrett v. Fonorow*, 799 N.E.2d 916 (Ill. App. 2003). In the first reported Illinois appellate decision on § 230, the court held the president and owner of a website were not liable for posting articles written by a third party that they allegedly knew were defamatory.

In another robust application of § 230, a D.C. federal district court held that an adult entertainment website was immune for claims over an advertisement featured on the site. *Ramey v. Darkside Productions, Inc.*, No. 02-730 (D.D.C. April 14, 2004). Plaintiff, a nude dancer, sued the operator of the adult website for intentional infliction of emotional distress, unjust enrichment and fraud after her picture was used without consent in an online advertisement for an apparent escort service. The court granted summary judgment to the defendant, holding that the site receives full immunity under § 230 “because Defendant did no more than select and make minor alterations ... it cannot, as a matter of law, be considered the content provider of the advertisement for purposes of § 230.”

issues, claiming AOL ran afoul of provisions of the Civil Rights Act of 1964 that prohibit discrimination in “places of public accommodation.”

Another court relied on § 230 to dismiss a complaint against a website for allegedly violating federal and state housing laws. *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, C.D. Cal. Case No. CV-03-09386 PA (RZx) (Sept. 30, 2004). The court held that the statute barred claims against an online roommate service for third party user postings that allegedly contained discriminatory preferences for roommates.

6. Privileges

*Fair Report*

The Alabama Supreme Court in *Wiggins v. Mallard*, 2004 WL 2367838 (Ala. Oct. 22, 2004), reinstated a libel claim against a local newspaper over an erroneous arrest report. The newspaper obtained the information by phone from a police chief who later denied supplying the wrong name. The trial court granted summary judgment to the newspaper under the state’s fair report privilege, finding no evidence of ill will, hatred or malice between the parties to defeat the privilege. Reversing, the Alabama Supreme Court found that since there was a factual dispute between the editor/reporter and the police chief about how the misidentification occurred, one of them could be deliberately lying and therefore the fair report privilege was defeated.

In the first published Connecticut decision on the subject, an appellate court recognized the fair report privilege in *Burton v. American Lawyer Media, Inc.*, 83 Conn. App. 134, 847 A.2d 1115, 32 Media L. Rep. 1893 (Conn. App. 2004). The court noted that the privilege applies to accurate or fair abridgments of government proceedings, but is conditional and can be defeated if the publication is made with common law malice, such as spite, ill will, or improper motive. *See also Fuller v. Day Publ’g Co.*, 2004 WL 424505 (Conn. Super. 2004) (dismissing libel and related claims based on news report of criminal trial).

In what may be the first Oregon appellate court decision to address the fair report privilege, the court ruled that the privilege is conditional and can be lost if the publisher did not believe the statements were true or lacked reasonable grounds to believe the truth of the statements. *Gunter v. The Guardian Press Found., Inc.*, 2004 WL 1088290 (Or. App. 2004). On unusual facts, the court found that the “newspaper” defendant was essentially a sham publication created to republish allegations from a complaint created by a co-defendant.

Where multiple police reports precede an arrest, each report falls within the fair reporting privilege so long as that report concerns the matter for which the plaintiff was subsequently arrested. *Oort v. DaSilva*, 18 Mass. L. Rptr. 324 (Mass. Super. 2004). Moreover, where minor exculpatory information is omitted from an article summarizing a police report, that article may still be insulated by the fair reporting privilege.
A newspaper report on the dismissal of a lawsuit was covered by the New York fair report privilege notwithstanding the omission that dismissal was with leave to replead. *McDonald v. East Hampton Star*, 781 N.Y.S.2d 694 (2d Dept. 2004).

A newspaper article reporting that plaintiff had beaten his wife and lied about his finances was a fair report of divorce court proceedings. *Riemers v. Grand Forks Herald*, 688 N.W.2d 167 (N.D. Sup. Ct. 2004).

And a newspaper report that a policeman was videotaped “having sex” in a municipal building while on duty was a fair and accurate summary of an official report read at a town meeting, that plaintiff had “a sexual encounter” in the building since the distinction is “trivial.” *Rabbitt v. Gannett Satellite Television Network Inc.* 32 Med. L. Rep. 1410 (N.J. Super. Ct. Nov. 26, 2003).

**Neutral Reportage**

In a disappointing decision, the Pennsylvania Superior Court expressly rejected the neutral report privilege. *Norton v. Glenn*, 2004 WL 2359400 (Pa. Oct.20, 2004). The court held that there was no constitutional basis to the privilege and suggested recognition of it would undermine the state’s interest in protecting reputation. 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 case against the official who made the charges and the newspaper that reported them went to trial where the court instructed the jury that the newspaper report would be privileged if it accurately reported the official’s statements, and did not espouse or concur in the charges.

Last year an appellate court held the instruction to be reversible error and this year the Pennsylvania Supreme Court agreed. The court found that the Second Circuit’s decision in *Edwards v. National Audubon Soc’y*, Inc., 556 F.2d 113 (2d Cir. 1977), which first articulated the privilege, was flawed because, according to the court, it relied on *Time, Inc. v. Pape*, 401 U.S. 279 (1971), an actual malice case that did not expressly recognize such a privilege. The court concluded that the neutral report privilege was not required by the First Amendment and would unfairly lessen the protection for reputation.

A New York federal court held that the neutral reportage privilege did not apply to former Congressman Gary Condit’s defamation claims against writer Dominick Dunne for statements implicating him in the murder of Chandra Levy. *Condit v. Dunne*, 317 F. Supp. 2d 344, 371 (S.D.N.Y. 2004). None of Dunne’s statements were “neutral” since he “concurred” in the allegations, “making clear in each publication that he believed that plaintiff was criminally involved in Levy’s disappearance.”

**Judicial Proceedings Privilege**

The Pennsylvania Supreme Court held that a lawyer can be held liable for defamation for giving a copy of a filed civil complaint to a reporter. *Bochetto v. Gibson*, 860 A.2d 67, 32 Media L. Rep. 2474 (Pa. 2004). The court held that giving a copy of a filed complaint to the media is not protected by the absolute judicial proceedings privilege because it is “an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to
those proceedings.” The privilege, according to the court, “is not meant to promote the airing of pleadings to the media” and “is only meant to promote the airing of issues and facts during judicial proceedings.” And while the “failure to apply the judicial privilege to an attorney’s communication with the media may inhibit the ability of the media to access the documents filed in a case, that problem is not one that the judicial privilege was designed to remedy.”

The Minnesota Court of Appeals held that an attorney who repeated the substance of her pleadings in an on-camera television interview was not protected by the judicial proceedings privilege. Chafoulias v. Peterson and American Broadcasting Companies, Inc., 2003 WL 23025097, 32 Media L. Rep. 1225 (Minn. App. Dec. 30, 2003) (unpublished). The court recognized that, in some circumstances, extra judicial statements by an attorney will be absolutely privileged, but cast doubt that lawyers’ statements to the media advanced the interests of their clients for purposes of applying the privilege.

Similarly in Brown v. Gatti, 2004 WL 2294320, 32 Media L. Rep. 2505 (Or. App. 2004), the court held that a lawyer’s post-trial statements to the media were not privileged. While agreeing that the alleged defamatory statements related to a medical malpractice litigation, the court concluded that they were not made “in connection” with a judicial proceeding. The court recognized that a number of courts have held that lawyers’ statements made to the press can qualify for the judicial proceedings privilege under certain circumstances – and declined to say “categorically that an attorney’s statements to the press can never qualify for absolute immunity.” Nonetheless, the court stated that it would follow “the great weight of authority” in holding that statements made to the press after a trial has concluded are not made in connection with a judicial proceeding and thus are not covered by the privilege.

**Other Privilege Decisions**

In an interesting decision, an Ohio appellate court held that the publisher of the magazine *Coin World* had a qualified privilege to alert its subscribers to a “scam” subscription service. American Readers Services Corp. v. Amos Press, 2004 WL 170316 (Ohio App. 2004). Following several complaints from subscribers, the magazine published in its hard copy and internet edition that “American Readers Services Corp. is not an authorized agent for *Coin World*. They are taking peoples’ money with no intent of delivering a product. They are a scam operation.” The court held that because the sole purpose of the article was to protect *Coin World* subscribers, it was reasonable that the article be published to that audience. The court also noted that “although the website publication had the potential to reach a broader audience, there was no evidence provided that it actually did.”

A Texas appellate court declined to recognize a privilege for election campaign reporting in *Freedom Newspapers v. Cantu*, 126 S.W.3d 185, 32 Media L. Rep. 1555 (Tex. App. 2003). The newspaper argued that a qualified privilege protects “substantially accurate reports of statements made during political campaigns.” Without much analysis the court concluded that such a privilege “runs contrary to the statutory and common law as established here in Texas.”

The Iowa Supreme Court addressed the degree of fault necessary to defeat a qualified privilege in *Barreca v. Nickolas*, 2004 WL 1336291 (Iowa Jun. 16, 2004). Clarifying conflicting case law, the
court “discard[ed] the old common law wrongful motive standard, and adopt[ed] ... knowing or reckless disregard” as the standard to be applied to determine whether a defendant has abused a qualified privilege.

The Alabama Supreme Court addressed the same issue, but with less clear results in *Delta Health Group, Inc. v. Stafford*, 2004 WL 406760 ( Ala. 2004). The court noted that a qualified privilege could be defeated by “common-law actual malice.” It defined this as “evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like,” but then went on to hold that a qualified privilege to report a suspected theft was defeated due to a failure to investigate.

7. Discovery

Disclosure of Sources

Reporters privilege law continued to be under attack in federal courts this year. As reported last year, Judge Posner leveled a broadside on the theoretical basis for the privilege, holding that there is no First Amendment-basis for a federal reporters privilege. *McKevitt v. Pallasch*, 339 F.3d 530, 31 Media L. Rep. 2141 (7th Cir. 2003). His decision was followed, at least implicitly, by a D.C. federal district court in *In re: Special Counsel Investigation*, 2004 U.S. Dist. LEXIS 15360 (D.D.C. July 20, 2004). Chief Judge Thomas Hogan denied motions to quash subpoenas to *New York Times* reporter Judith Miller and *Time* reporter Matthew Cooper for refusing to answer questions from the special prosecutor investigating whether any government official(s) violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame. The court found no First Amendment or common law-based privilege to resist disclosure in a criminal grand jury context. Both reporters were held in contempt and their appeal is now sub judice to the D.C. Circuit Court of Appeals.

The First Circuit also considered the underpinnings of reporters privilege law. That court noted that its “own cases are in principle somewhat more protective” than Judge Posner’s position in *McKevitt*. Nevertheless, in another leak case, the court concluded that under *Branzburg* and other First Circuit precedent, there was no basis for a television news reporter to resist identifying the source of a leaked surveillance videotape from a high profile criminal trial. *In Re Special Proceedings*, 373 F.3d 37, 32 Media L. Rep. 1897 (1st Cir. 2004). The reporter was later convicted of criminal contempt and sentenced to six months house arrest.

Reporters Privilege in Defamation & Privacy Cases

Several interesting decisions on state shield laws were rendered in the context of libel and privacy cases.

In a highly-publicized libel case by short-lived Alabama University football coach Mike Price against *Sports Illustrated*, the court first ruled that Alabama’s shield law does not extend to magazine reporters. *See Price v. Time*, 2003 WL 23273874 (N.D. Ala. Dec. 8, 2003). Price sought to compel *Sports Illustrated* to disclose the identities of sources who provided information on Price’s alleged inappropriate sexual activities with a stripper. The court reasoned that the Alabama legislature did
not include magazines within the statute’s scope when it amended the statute to broaden it to include radio and television news media. Deciding that magazine reporters were outside the statute’s scope, the court also ruled that no First Amendment-based privilege existed to shield the source. The court subsequently granted a motion to certify the question to the Alabama Supreme Court, finding that there was no clear, controlling, state precedent addressing the issue. See Price v. Time, 304 F. Supp. 2d 1294, 1309 (N.D. Ala. 2004). A decision from the Alabama Supreme Court is pending.

The Oregon Court of Appeals reinstated a non-media libel claim, holding that the trial court erred by quashing the libel plaintiff’s subpoena to a nonparty reporter. Brown v. Gatti, 2004 WL 2294320, 32 Media L. Rep. 2505 (Or. App. 2004). The court ruled that Oregon’s shield law does not apply in any defamation case where the defendant raises a defense based on the content or source of the complained of statements. The court concluded the non-party reporter’s notes fell within the exception to the statute where the non-media defendant disputed making the published statements that formed the basis for the libel suit.

In Wojcik v. Boston Herald, Inc., 60 Mass. App. Ct. 510, 803 N.E.2d 1261 (2004), the Appeals Court declined to order a reporter to disclose confidential sources because the relevance of those sources to the alleged defamation was not yet established. The Appeals Court reasoned that if the undisclosed source told the reporter only of a lottery worker’s suspension and not of the disputed reasons for it, which were subsequently published, any libel claim would lie merely in deviations from what the reporter was told to what she wrote, rendering the identity of sources irrelevant.

In Svoboda v. Clear Channel Communications, Inc., 805 N.E.2d 559 (Ohio App. 2004), the court affirmed a ruling that the Ohio shield law did not apply to comments made on a morning radio show. At issue was a slander claim against a radio station news director who joined in a discussion alleging that plaintiff, a newspaper reporter, was having an affair with an editor. The trial court declined to apply the privilege, holding that although defendant’s “function in part on the radio show... is that of a news person, it’s mainly by default and all she does is rip and read wire service stories... and that doesn’t include gossip, and this is gossip at best.” The appellate court affirmed, reasoning that the shield statute does not apply to a person who “merely perpetuates a rumor that he or she heard from another” because a person “who spreads rumors is not a ‘source,’” within the meaning of the statute.

The New Jersey Appellate Division has held that a lawyer’s inadvertent production of unaired news footage in discovery does not constitute a waiver of the reporter's privilege under the state's shield law and ordered opposing counsel to return the material. Kinsella v. Welch and NYT Television, 851 A.2d 105 (N.J. App. 2004).

In Tripp v. Department of Defense, 284 F. Supp. 2d 50, 31 Media L. Rep. 2505 (D.D.C. 2003), the court held that Stars & Stripes was a newspaper – notwithstanding its government sponsorship – thus entitling its employees to cite the D.C. reporters privilege.

**Discovery of Anonymous Internet Posters**

In Melvin v. Doe, 836 A.2d 42, 32 Media L. Rep. 1599 (Pa. 2003), the Pennsylvania Supreme Court found that compelled disclosure of anonymous Internet posters could “trespass upon their First
Amendment rights.” The court reasoned that [t]here is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular [libel] litigation.” Thus a trial court’s discovery order requiring disclosure was an appealable collateral order and the court remanded for consideration of the constitutional question, “namely, whether the First Amendment requires a public official defamation plaintiff to establish a prima facie case of actual economic harm prior to obtaining discovery of an anonymous defamation defendant’s identity.”

A Connecticut trial court ruled that a French company was entitled to learn the identity of an Internet account subscriber who allegedly sent defamatory e-mails to plaintiff’s employees in France. *La Societe Metro Cash & Carry Finance v. Time Warner Cable*, 2003 WL 22962857 (Conn. Super. 2003) (unpublished). The party in interest argued that the e-mails, supposedly accusing plaintiff of improper business practices, were not actionable since they were only published to plaintiff’s own employees. The court appeared to assume, without discussing, that the French plaintiff would have to have a viable defamation claim under U.S. law to obtain discovery of the subscriber’s identity. It ruled that under Connecticut law, intra-corporate communications can be actionable and thus there was a probable cause of action under Connecticut law. Giving serious consideration to the real party’s interest in speaking anonymously, the court ultimately found probable cause that plaintiff suffered damages from the statements, that the information was being sought in good faith, was limited in scope, was directly related to plaintiff’s cause of action and that plaintiff had no alternative source for the information.

8. Remedies

*Post-trial Injunctions*


The case is a libel action brought by high-profile lawyer Johnnie Cochran against a disgruntled former client. The defendant picketed outside Cochran’s office with signs stating among other things: “Johnnie is a crook, a liar and a Thief”; “Unless You have O.J.’s Millions – You’ll be Screwed if You Use J.L. Cochran, Esq.”; and “Johnnie Cochran I Know What You, the County and city Did to my Case.” The trial court found these statements to be deliberately false and it issued a broad permanent injunction against the defendant, barring him from making *any* public comments at all about Cochran and his firm. A California appellate court affirmed, finding that “although a prior restraint can be presumptively unconstitutional, that rule has no application where, as here, an injunction against a private person operates to redress alleged private wrongs,” i.e., deliberate defamatory falsehoods.

Defendant’s petition for certiorari presented the question: Does a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violate the First Amendment?
Interestingly, in another non-media libel case another California appellate court held that a broad post-trial injunction was an unconstitutional prior restraint. *Varian Medical Systems, Inc. v. Delfino*, 6 Cal. Rptr.3d 325, 32 Media L. Rep. 1910 (Cal. App. 2003), rev. granted on other grounds, 85 P.3d 444 (Cal. 2004). In *Varian* plaintiffs, two companies and several individual executives, sued two disgruntled former employees for publishing thousands of e-mails and bulletin board postings that, among other things, accused plaintiffs of incompetence and trading sexual favors for work.

While the appellate court affirmed a $700,000 damage award, it reversed the post trial injunction noting:

>[T]he nature of defamation law makes it difficult if not impossible to craft an injunction based upon an adequate determination that any future publications will be constitutionally unprotected. In fact, it is not entirely clear that defamatory speech may be enjoined even after a judicial determination that the speech is defamatory.

**Damages**

In *Fiori v. Truck Drivers, Local 170*, 354 F.3d 84 (1st Cir. 2004) the First Circuit upheld a jury verdict in favor of a nonmedia plaintiff who claimed that disparaging comments made by union officials caused him to lose a union election. The Court noted that the plaintiff “needed only to offer enough evidence to permit a rational jury to conclude that, more likely than not, the libel cost him the election.” The court added that no higher level of certainty is required under the First Amendment, noting that libel claims are already subject to unique fault requirements and independent appellate review of constitutional issues. It also observed that the amount awarded ($300,000) did not appear to be a “cloaked award of punitive damages.”

The Fourth Circuit held that under North Carolina law conclusory allegations of damage to reputation are not enough to avoid summary judgment. Otherwise, noted the court, “we would be, in effect, allowing juries to award damages to defamation plaintiffs on the basis of nothing other than the publication of a defamatory statement.” *Hugger v. Rutherford Institute*, 94 Fed. Appx. 162 (4th Cir. 2004) (unpublished).

Similarly, in *Franklin Prescriptions, Inc. v. New York Times Co.*, 32 Media L. Rep. 2238 (E.D. Pa. August 5, 2004), the court ruled that “defamation plaintiffs must prove actual harm.” If plaintiff does not produce evidence sufficient to show damages, even if a jury finds the statements are defamatory, judgment will be entered for the defendant.

A Virginia trial court on post-trial motion reduced a $10 million compensatory damage award to $1 million in *Sheckler v. Virginia Broadcasting Corp.*, 63 Va. Cir. 368 (Cir. Ct. City of Charlottesville, November 7, 2003). Comparing the award to recent Virginia libel damage awards, the court concluded that the jury clearly misperceived its role and awarded a sum far in excess of an amount reasonably calculated to compensate for any proven losses, suggesting that the excess portion of the compensatory award was, in fact, punitive.

In *Finnie v. LeBlanc*, 875 So.2d 71 (La. App. 3d Cir. 2004), an appellate court increased plaintiff’s award of general damages (based on claims of both defamation and malicious prosecution)
from $6,500 to $150,000, finding that the small jury verdict on general damages was inconsistent with its award of $343,875 for special damages and constituted an abuse of the jury’s discretion.
**Punitive Damages**

According to the 2004-2005 Media Libel Survey, eight jurisdictions do not permit punitive damages in defamation cases. Ten states impose statutory limitations on punitive damage awards and 21 states limit punitive damages through retraction laws.

Mississippi limits punitive damages by statute based on a schedule relating to a defendant’s net worth. Miss. Code § 11-1-65(3) (Rev. 2002). In 2004, the Mississippi Legislature lowered the caps on punitive damages further, reducing them for defendants that have a net worth of less than $750 million.

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. Several recent U.S. Supreme Court cases, though, have reviewed the constitutionality of punitive damages on due process grounds, requiring de novo review of awards and cautioning that disproportionate awards will constitute a deprivation of property – standards now being applied in the defamation context.

In *Bunton v. Bentley*, 2004 WL 2913693 (Tex. Dec. 17, 2004) the Texas Supreme Court addressed the constitutional limits on punitive damage awards, vacating and remanding for review as potentially excessive a $1 million punitive damage award. Plaintiff, a state court judge, sued the host of a public access cable show for repeatedly referring to him as “corrupt” and a “criminal.” A jury awarded plaintiff $150,000 for damage to reputation, $7 million for mental anguish and $1 million in punitive damages. On appeal, the award for mental anguish was remitted to $150,000, but the court of appeals did not adjust the punitive award, finding that defendant had not objected and, in any event, that the award was within the ratio set by the U.S. Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003).

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16. 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.

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


Remanding, the Texas Supreme Court held that courts must conduct a de novo review of punitive damage awards to consider (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (citations omitted). These factors are intertwined and should not be viewed in isolation. Specifically, the court noted, that a reviewing court cannot conclude that a particular ratio is constitutionally permitted unless that court examines the ratio in light of the other factors and in light of the actual harm to the plaintiff. While the 3:1 damage ratio in *Bunton* ($300,000 total compensatory damages to $1 million punitive) was in line with ratios upheld by the Supreme Court, “the analysis cannot end there.” Instead, the court should have reviewed the reasonableness and proportionality of the punitive damage award in light of the adjusted compensatory award.

Conducting a de novo review of a defamation award, the Seventh Circuit reduced damages from $3.6 million compensatory and $4 million in punitives to $1 million and $2 million respectively. *Republic Tobacco, L.P. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717 (7th Cir. 2004)

In *Stack v. Jaffee*, 306 F. Supp. 2d 137 (D. Conn. 2004), the court relied on the U.S. Supreme Court’s decision in *State Farm* to reduce an award of $2,000 in compensatory damages and $200,000 in punitive damages to $27,000 in total for violation of First Amendment rights, emotional distress and defamation.

**Libel Proof Plaintiff**

The Tenth Circuit affirmed that the libel proof plaintiff doctrine barred the claim of an incarcerated convicted murderer. *Lamb v. Rizzo*, 2004 WL 2823309 (10th Cir. 2004) (applying Kansas law). Plaintiff sued over a newspaper article that recounted his criminal career. The Tenth Circuit found that “this case presents us with one of those narrow instances where ... allegedly libelous statements cannot realistically cause impairment of reputation.”

A Pennsylvania federal court held that a convicted drug trafficker and credit card thief was libel proof and dismissed his claim against a local newspaper that reported that plaintiff was suspected of terrorist ties. *Istrefi v. Pocono Record Newspaper*, No. 3:02cv0987 (M.D. Pa. Feb. 26, 2004) (applying Pennsylvania law).

9. **Criminal Libel**

The Kansas Court of Appeals affirmed the criminal defamation convictions of a small newspaper and its editor. *Kansas v. Carson*, No. 01-CR-301, 95 P.3d 1042 (Table), 2004 WL 1878312 (Kan. App.). In 2002, the New Observer newspaper, its editor and publisher were convicted by a jury of criminal defamation under K.S.A. § 21-2004, for publishing articles alleging that the Mayor of Kansas City, who was then running for reelection, and her husband, a state court judge,
lived outside the county in violation of residency laws. The appellate decision summarily affirms the constitutionality of the statute – an issue inadequately briefed by defendant – and deals mainly with defendants’ nonconstitutional arguments over conflict of interest and prejudice. The Kansas Supreme Court declined to hear an appeal.

A civil case in Kansas federal court is also challenging the constitutionality of the state’s criminal defamation statute. In the March 11, 2003 edition of The Baxter Springs News, an editorial writer wrote a column critical of a mayoral candidate and a city clerk. A political advertisement in the same edition also criticized the city clerk. The clerk filed a complaint charging the advertiser, publisher, and editorial writer with criminal defamation under the City’s municipal criminal defamation statute, which is identical to the state criminal defamation statute. Although the charges were eventually dismissed, the advertiser and editorial writer brought suit against the city, the city clerk, and the city attorney who attempted to prosecute the case seeking damages and a declaration that the City’s criminal defamation statute is unconstitutional. *How v. City of Baxter Springs, et. al.* and *Thomas v. City of Baxter Springs, et. al.* were filed on June 2, 2004. Defendants have filed motions to dismiss based on statutory immunity.

The Colorado federal district court dismissed a civil and declaratory judgment lawsuit brought by a college student who had been threatened with a felony criminal libel prosecution for statements and pictures on his website that ridiculed a college professor. *Mink v. Salazar*, No. Civ.04-B-23(CBS), 2004 WL 2430092 (D. Colo. Oct. 27, 2004). Granting a motion to dismiss, the court held that the student had no standing to sue for damages (or apparently seek a declaratory judgment) because no criminal charges were actually pending and the district attorney stated that no charges would be filed. Interestingly, last year the First Circuit Court of Appeals held that a reporter who had been threatened with a criminal libel prosecution – but not ultimately prosecuted – had standing to challenge the constitutionality of the Puerto Rico criminal libel statute. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 31 Media L. Rep. 1297 (1st Cir. 2003) (*Mangual I*) (statute unconstitutional as applied to public officials and public figures).

This year the First Circuit had further proceedings in *Mangual*, ruling that the federal district court in Puerto Rico had underestimated the scope of its authority when, on remand of *Mangual I*, it dismissed the plaintiff’s motion for summary judgment declaring Puerto Rico’s criminal libel statute unconstitutional as applied to publications about private figures on matters of public concern. *Mangual v. Medina*, No. 03-1242, 2004 U.S. App. LEXIS 18613 at *3 (1st Cir. Sept. 2, 2004) (*Mangual II*).

The issue may soon be moot. Puerto Rico eliminated criminal libel and slander from its Penal Code effective May 2005. Notwithstanding *Mangual* and the forthcoming change in law, a town mayor was accused of criminal libel for statements about a political adversary which allegedly implied criminal activity. The trial court refused to dismiss the charges, but the appeals court dismissed the case because the complainant was held to be a public figure. *Pueblo v. Nazario*, 2003 WL 23317679 (TCA). The Commonwealth requested certiorari, and the matter is now before the Puerto Rico Supreme Court.

A California federal court ruled that a California statute that makes it a misdemeanor to file a false charge of misconduct against a police officer is facially unconstitutional. *Hamilton v. San*

10. Statute of Limitations / Single Publication Rule

The California Supreme Court strongly reaffirmed California’s single publication rule in Shively v. Bozanich, 80 P.3d 676, 7 Cal. Rptr. 3d 576, 32 Media L. Rep. 1097 (2003). The court unanimously reversed a controversial appellate court decision that applied the discovery rule to libel claims against a book publisher, author and several sources.

Reviewing the history of the single publication rule, the court concluded that the discovery rule to toll the statute of limitations is “an exception based upon equity” and does not apply to libels published in books, magazines and newspapers. Summarizing its analysis, the Court explained:

If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book ... on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark.

A California appellate court, relying on Shively, applied the single publication rule to a claim over the use of “morphed” images of plaintiffs in a children’s television show. Long v. The Walt Disney Co., 10 Cal. Rptr. 3d 836 (Cal. App. 2004). Although plaintiffs sued for misappropriation, right of publicity and emotional distress, the court concluded their claims sounded in defamation and were time barred. Moreover, the court rejected plaintiffs’ argument that the discovery rule tolled the statute of limitations, holding the discovery rule has no application to national television broadcasts.

Several courts considered application of the single publication rule to statements published on the Internet.

In Traditional Cat Ass’n, Inc. v. Gilbreath, 13 Cal. Rptr. 3d 353, 32 Media L. Rep. 1998 (Cal. App. 2004), a California appellate court adopted the sensible rule that the single publication rule applies to statements published on Internet websites. Quoting at length from the California Supreme Court’s decision in Shively, the court wrote:
The need to protect Web publishers from almost perpetual liability for statements they make available to the hundreds of millions of people who have access to the Internet is greater even than the need to protect the publishers of conventional hard copy newspapers, magazines and books.

A Massachusetts court also applied the single publication rule to generally accessible Internet postings. *Abate v. Maine Antique Digest*, 17 Mass. L. Rptr. 288, 2004 WL 293903 (Mass. Super. 2004). The court held that where a defamatory article was posted on the Internet more than three years prior to the filing of plaintiff’s action, the claim was barred by the statute of limitations. The court stated that “to hold otherwise and treat internet publications differently would result in the endless retriggering of the statute of limitations, thus exposing those who ‘publish’ information on the internet to a multiplicity of lawsuits and thereby inhibiting the open dissemination of information and ideas.” *See also Lewittes v. Cohen*, 2004 WL 1171261 at *3 (S.D.N.Y. May 26, 2004) (if a plaintiff believes a web page was updated to include defamatory material, it must be specifically noted in a complaint, otherwise the date the website was created may begin the clock for the statute of limitations) and *E.B. v. Liberation Publications Inc.*, 777 N.Y.S. 2d 133 (N.Y. App. 2 Dep’t. 2004) (limitations period begins when book was posted on the Internet).

The Georgia Court of Appeals joined the ranks of the appellate courts that have upheld the single publication rule in the Internet era in *McCandliss v. Cox Enters.*, 265 Ga. App. 377, 593 S.E.2d 856 (2004). The court held that the fact that a news story can be retrieved via the Internet from an electronic archive does not restart the limitations period.

In 2003, a federal district court in Mississippi extended the single publication rule to an online publications. *Lane v. Strang Communications Co.*, 297 F. Supp. 2d 897 (N.D. Miss. 2003). In *Lane*, the defendant magazine publisher published both a hardcopy edition and an electronic edition of an allegedly defamatory article. Applying the single publication rule, the court found that the statute of limitations began to run on the date the article was first published on the Internet, which was the date the material was first distributed to the public at large.

A Michigan appellate court reinstated a defamation claim against an on air source, holding that the claim could be within Michigan’s one year statute of limitations when measured by the date of broadcast, rather than the date of the interview with the source. *Mitan v. Campbell*, 2004 WL 1124031 (Mich. App. May 20, 2004). The court reasoned that the television broadcast could have been the natural and probable result of the earlier interview.

A New York federal court held the “single publication rule” does not apply to rebroadcasts of television shows. *Lehman v. Discovery Communications, Inc.*, 332 F. Supp. 2d 534 (E.D.N.Y. 2004). At issue was a rebroadcast of a television program entitled “World’s Most Outstanding Undercover Stings” that included footage of plaintiff being arrested for insurance fraud. The court analogized the television rebroadcast to the publication of a morning and evening edition of a newspaper, concluding that here each broadcast of the program was intended to reach a new audience and was therefore actionable.

A Michigan federal court held precisely the opposite in *Nichols v. Moore*, 334 F. Supp. 2d 944 (E.D. Mich. 2004), holding that the single publication rule barred a libel claim over a rebroadcast of
the Oprah show. There was no actionable republication, according to the court, because the show had not “been substantially modified.” But the same court held that the DVD release of a feature film was an actionable republication because it contained new commentaries, interviews and clips and was intended to reach a new audience.

It what may be the first decision on the issue, the New Jersey federal district court applied the single publication rule to dismiss a claim against a newspaper for an alleged defamatory advertisement. Botts v. The New York Times Company, 2003 WL 23162315 (D. N.J. 2003), aff’d on other grounds, 2004 WL 1616354, 32 Media L. Rep. 1993 (3d Cir. Jul 20, 2004). Finding that the newspaper “did nothing more than reuse a statement, without modification or change,” the court held that the statute of limitations would be measured from the first time the advertisement was published.

11. Procedural Matters

Motion to Dismiss

In Darakjian v. Hanna, 840 A.2d 959, 32 Med. L. Rep. 1594 (N.J. App. 2004) the appellate court reversed a trial court’s denial of a motion to dismiss by a media defendant reporting on statements at a public meeting, holding that a bare conclusory allegation that the press defendants “knew and/or reasonably should have known that the statement... was false”, in the absence of other factual references, would not survive a motion to dismiss.

Summary Judgment

Although denials of summary judgment are not generally appealable as a matter of right in North Carolina, the North Carolina Supreme Court held in Priest v. Sobeck, 592 S.E.2d 694, 32 Media L. Rep. 1498 (2003) that the denial of a libel defendant’s summary judgment motion was immediately appealable because it affected a substantial right since misapplication of the constitutional malice standard would have a “chilling effect” on defendants’ free speech rights.

Jurisdiction

In Moosally v. W.W. Norton & Co, 594 S.E.2d 878 (S.C. App. 2004), a South Carolina appellate court considered the question of personal jurisdiction over a book publisher, author and source for a book published nationally and distributed and sold in South Carolina. The court held that while there was no jurisdiction over the out-of-state author and source, the publisher was subject to general jurisdiction since its sale of books in the state on a continuing basis, as well as the sale of several dozen copies of the book in question in South Carolina, satisfied due process requirements since “[n]o unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action.”

The federal district court in Maine affirmed a magistrate’s ruling that neither a defamation defendant nor his allegedly defamatory statement, made in a letter sent from Tennessee to a 60 Minutes producer in New York, had sufficient connection to the state to support the exercise of
jurisdiction. *Donatelli v. UnumProvident Corp.*, 324 F. Supp. 2d 153, 156 (D. Me. 2004). The defendant’s only contacts with Maine were periodic work-related visits that were not “related” to the plaintiff’s claim, even though some of his visits involved gathering information about the plaintiff, because such conduct is neither an element of a defamation claim nor “otherwise tortious.” The plaintiff also failed to demonstrate purposeful availment; he had argued that this aspect of the test was satisfied because the effects of the defamation were felt in Maine and the defamatory statements were intended to be incorporated into a national television broadcast. The court concluded that the gestalt factors did not otherwise alter the equation, and held that it lacked jurisdiction over the defendant.

In *Fielding v. Hubert Burda Media, Inc.*, 2004 WL 532714 (N.D. Tex. 2004), a Texas federal court found that the publisher of German magazines was not subject to personal jurisdiction in Texas even though one of the subjects of the allegedly defamatory articles was a Texas citizen and one or more Texans were sources for the articles; the Texas-citizen plaintiff actually lived in Germany, where the “brunt” of the alleged harm was felt. The magazines were in the German language and circulated very few copies within Texas.

In an action against a Nebraska advertiser, the Wyoming Supreme Court affirmed that there were insufficient contacts to exercise personal jurisdiction over the defendant where the parties’ contract was formed entirely in Nebraska; all contacts associated with the contract took place in Nebraska; and the alleged defamation was not directed to readers in Wyoming. *Cheyenne Publishing v. Starostka*, 94 P.3d 463, 2004 WY 88 (Wyo. 2004).

A federal district court in New Mexico dismissed a defamation suit brought by the wife of ex-Congressman Gary Condit against *USA TODAY* and its parent company, Gannett, for lack of personal jurisdiction. *Condit v. USA TODAY and Gannett Co., Inc.*, U.S.D.C. (N.M.) No. CIV 03-0862. At issue was a *USA Today* article’s reference to a *National Enquirer* story reporting on an allegedly angry confrontation between Condit and murdered intern Chandra Levy. Plaintiff sued in New Mexico presumably to take advantage of New Mexico’s three-year statute of limitations. There was no basis to exercise jurisdiction where the newspaper edition with the article did not circulate in New Mexico and the newspaper’s circulation there was less than 0.6% of its total.

In a non-media case, the First Circuit affirmed that the federal district court in Massachusetts lacked jurisdiction over a London-based parent company of a corporate co-defendant in a defamation case. *Andresen v. Diorio*, 349 F.3d 8, 12 (1st Cir. 2003). The plaintiff had failed to demonstrate that the parent company had any connection to Massachusetts other than its ownership of the co-defendant.

**Internet Jurisdiction Cases**

An Alabama appellate court vacated on appeal a default judgment against an out-of-state defendant over an alleged defamatory Internet posting. *Novak v. Benn*, 2004 WL 692147, 32 Media L. Rep. 2259 (Ala. Civ. App. April 2, 2004). At issue was a statement made in an Internet forum for pet fish enthusiasts. Defendant wrote of plaintiff that “No lawyer worth his salt would do what you are doing, which is why a complaint is pending with your state bar.” Citing to *Calder v. Jones*, 465 U.S. 783 (1984), the court concluded there was no personal jurisdiction over defendant since his
remark “was made in a forum accessible by practically every person whose computer has access to the Internet” and was not targeted to Alabama.

Similarly, in Seldon v. Direct Response Technologies Inc., 2004 WL 691222 at *4 (S.D.N.Y. March 31, 2004) the court held that a posting on an internet message board confers personal jurisdiction “only if the posting is intended to target or focus on internet users in the state where the cause of action is filed.” See also Wisconsin Investment Board v. Schraeder, 2004 WL 1146448, 32 Media L. Rep. 1397 (Wis. Cir. Feb. 9, 2004) (merely posting a message on a web bulletin board, without more, does not establish personal jurisdiction over a non-resident in a defamation action).


A California appellate court reversed a $100,000 default libel and false light judgment entered against a Canadian defendant, holding that creating a “passive website” on the Internet is, by itself, insufficient to subject a non-resident to jurisdiction in California. Rambam v. Prytulak, 2004 WL 25229 (Cal.App.2 Dist. Jan. 5, 2004) (unpublished) (“Creating a site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum state.”).

For an example of “targeting” sufficient to sustain personal jurisdiction see Zidon v. Pickrell, 2004 WL 2549686 (D. N.D. Nov. 8, 2004), where the court found it had personal jurisdiction over an out-of-state resident who created a website about her former boyfriend, warning that he was “a predator” and inviting others to submit information about him.

**Other Jurisdiction Cases**

The Second Circuit affirmed a refusal to assert discretionary jurisdiction over an action attempting to bar a foreign retailer from proceeding with a libel lawsuit in London against a New York-based newspaper. London-based retailer Harrods sued Dow Jones in England for libel over a joking reference to the store as “the Enron of England.” The reference was published in the U.S. edition of the Wall Street Journal and accessed in England via the Internet. Dow Jones sued in New York under the Declaratory Judgment Act to enjoin the English action, arguing that any judgment obtained in the English action would be unenforceable in the U.S. The district court denied the motion, noting that while Harrods’ claim was frivolous by U.S. standards, a declaratory judgment was not the appropriate device to protect the newspaper. See 237 F. Supp. 2d 394 (S.D.N.Y 2002). The Second Circuit agreed “that no useful purpose would be served by a declaration and that principles of international comity would be violated.” Dow Jones & Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359, 31 Media L. Rep. 2402 (2d Cir. 2003). The English libel action went to trial in February 2004
and after hearing two days of testimony the jury returned a verdict in favor of Dow Jones. *Harrods Ltd. v Dow Jones & Co.*, HQ02X01736 (High Court, jury verdict Feb. 22, 2004) (Eady, J.).

A divided Ninth Circuit panel considered similar issues in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120, 32 Media L. Rep. 2185 (9th Cir. 2004). In a separate French court action, Yahoo! was found to have violated French hate speech laws by not blocking the sale of Nazi memorabilia on Internet auction sites. Yahoo! filed an action in the U.S. seeking a declaratory judgment that the French court judgment was unenforceable under U.S. law. The district court agreed, citing *Bachchan v. India Abroad Publications, Inc.* 585 N.Y.S. 2d 661 (N.Y. Sup. Ct. 1992) and *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995). On appeal, the Ninth Circuit reversed, holding there was no personal jurisdiction over the French parties. As to the merits of the case, the court wrote:

Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs – one of which is that, if Yahoo! violates the speech laws of another nation, it must wait for the foreign litigants to come to the United States to enforce the judgment before its First Amendment claim may be heard by a U.S. court.

**Venue**

In *Ramsey v. Fox News Network, LLC*, 323 F. Supp. 2d 1352 (D. Ga. 2004), another case in the extensive defamation litigation arising from publicity in connection with the 1996 murder of JonBenet Ramsey, a Georgia federal district court granted the media defendant’s motion to transfer venue to Colorado because the allegedly defamatory news report was “written, edited, produced, and approved for air in Colorado, by employees at the Defendant’s Denver Bureau.” The court found that few, if any, key witnesses had a connection with plaintiff’s choice of forum and that the interests of justice weighed in favor of transfer. The court speculated that Georgia substantive law may be applied because plaintiffs were citizens of Georgia at the time that the allegedly defamatory report aired.

**Choice of Law**


In *Condit v. Dunne*, 317 F. Supp. 2d 344, 354-355 (S.D.N.Y. 2004), a New York federal district court applied California law to former California Congressman Gary Condit’s defamation claim against writer Dominick Dunne. Even though Dunne’s alleged defamatory statements implicating Condit in the murder Chandra Levy came largely from New York interviews, they were “broadcast nationwide,” and not “to a New York audience or through a New York media outlet.”

**12. International Developments**
Canada

In Bangoura v. Washington Post, [2004] O.J. No. 284 (Ont. Sup. Ct. Jan. 27, 2004), a Canadian trial court ruled it had jurisdiction over the Washington Post in a defamation case. The plaintiff, a former UN official from Africa, moved to Ontario several years after the Washington Post published articles about his alleged misconduct in Africa. Plaintiff claimed he downloaded the complained of articles in Ontario from the Washington Post’s online archive. After considering various factors, the court held that it had jurisdiction over the Post on the grounds that 1) the plaintiff should be entitled to recover for damages where he resides; and 2) the Post is an internationally known newspaper that should be prepared to defend libel actions anywhere in the world.

England

In King v. Burstein, [2004] EWCA Civ1329 (Oct. 19, 2004), the Court of Appeal affirmed a trial court ruling that England has jurisdiction to hear a libel suit brought by U.S. boxing promoter Don King against a New York lawyer. At issue are statements made by defendant Judd Burstein accusing Don King of anti-Semitism. The statements were made in the context of an ongoing New York litigation between the parties and they were published on U.S. boxing websites. These sites were allegedly accessed in England and King alleged they harmed his reputation in England, particularly in the Jewish community. The Court of Appeal reaffirmed the English common law position that a statement on the Internet is “published” for purposes of a libel suit where ever it is downloaded.
B. MEDIA PRIVACY AND RELATED LAW

1. False Light

Recognition

According to the 2004-2005 MEDIA PRIVACY AND RELATED LAW SURVEY, 34 jurisdictions currently recognize the false light tort. In six of these jurisdictions, however, the tort has not been applied in the media context. Ten other jurisdictions have explicitly rejected the tort.

Significant Media Cases

A Washington federal court dismissed a city commissioner’s false light claim over a television news report about her activities on a Las Vegas business trip. Harris v. City of Seattle, 315 F. Supp.2d 1105 (W.D. Wash. 2004). The report showed her gambling in a Las Vegas casino. Plaintiff alleged she was gambling on her “free time,” and the broadcast falsely portrayed her as gambling instead of working. The court found insufficient evidence of actual malice – notwithstanding plaintiff’s claim that she was filmed gambling during a lunch break. The court found persuasive the reporter’s testimony that it was not his intent to have an inaccurate visual image displayed and that if such inaccuracies existed they did not affect the overall accuracy of the report.

The Massachusetts federal court dismissed a false light claim over a misidentified photograph that allegedly implied that plaintiff was a homosexual. Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004). The court found that several “inferential leaps” would be required before a reader could even arrive at that conclusion – and that the term itself should no longer be considered defamatory or offensive.


In Collins v. Creative Loafing Savannah, Inc., 592 S.E.2d 170 (Ga. App. 2003), the plaintiff brought a false light claim, alleging that she had been caricatured on the cover of defendant’s magazine. Plaintiff was employed by defendant in an advertising position, with much of her work

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

23 Colorado, Massachusetts, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia and Wisconsin.
being done over the telephone. The drawing on the cover related to an article about controversial telemarketing practices, but it was undisputed that the article itself had nothing to do with plaintiff or her work. Affirming summary judgment for defendant, the court found the article did not identify plaintiff to support a false light claim. No person had recognized the drawing as being a depiction of plaintiff and it was a “gross exaggeration of a human face,” with “two antennae-like pencils sticking out of its head, four hands holding telephones to unseen ears, and a cigarette hanging out of a gaping mouth.”

An item in a Chicago Tribune column reporting that a sports agent tried to attend the memorial service of a former client but was turned away three times failed to state a claim for false light. Zucker v. Chicago Tribune Company, Nos. 1-02-2394, 1-02-3406 (Ill. App. March 12, 2004).


**Significant Non-media Cases**

In Battaglieri v. Mackinac Center for Public Policy, 680 N.W.2d 915 (Mich. App. 2004), the appellate court relied on defamation case law to dismiss a false light claim brought by the president of a teacher’s union against a public policy group over its use of an unauthorized quote in a fundraising letter. Plaintiff alleged that the quote falsely implied he endorsed the defendant’s policy goals. Granting summary judgment, the court held that there was no evidence that the letter was intended to convey a false impression. The court held that “in a case such as this, where the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant’s article, he must show with clear and convincing evidence that the defendant intended or knew of the implication that the plaintiff is attempting to draw.”
2. Private Facts

Recognition

According to the 2004-2005 Media Privacy and Related Law Survey, 43 jurisdictions currently recognize a claim for publication of private facts. 24 The tort has been specifically rejected in four jurisdictions. 25

Significant Media Cases

The California Supreme Court in Gates v. Discovery Communications, 2004 WL 2785534 (Cal. Dec. 6, 2004), expressly overruled its 1971 decision in Briscoe v. Reader's Digest Association, Inc., 483 P.2d 34, 1 Media L. Rep. 1845 (Cal. 1971), that had recognized a private facts cause of action over a true report of a criminal conviction. In Briscoe the court held there was a strong public interest in keeping private the identity of past offenders to preserve the integrity of the rehabilitative process. At issue in Gates was an episode of the true crime television series The Prosecutors which accurately reported that plaintiff had pleaded guilty to being an accessory after the fact to a murder for hire. 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. Affirming dismissal of the claim, the California Supreme Court recognized that a line of subsequent U.S. Supreme Court cases, including Cox Broadcasting Corp. v. Cohn 420 U.S. 469 (1975) and Florida Star v. B.J.F., 491 U.S. 524 (1989) made clear that Briscoe is no longer good law.

A Massachusetts court issued a notably thoughtful private facts decision in Bonome v. Kaysen, 32 Media L. Rep. 1521 (Mass. Super. 2004). At issue was an autobiographical book that revealed intimate details of the author’s sex life with plaintiff (who was not named in the book), including the suggestion that the plaintiff had raped the author. The court held that the revelations were not actionable because they involved legitimate public interest, such as the impact of the author’s physical condition on her physical and emotional relationship with the plaintiff and the line between desired physical intimacy and non-consensual sexual relations. In an interesting analysis the court reasoned that the private facts claim had to be limited by the author’s own interest in disclosing her intimate affairs as part of a serious autobiography.

A Louisiana federal district court denied summary judgment to the producers of the Girls Gone Wild video/DVD series on invasion of privacy and related claims. Capdebosq v. Francis, 2004 WL 463316 (E.D. La. March 10, 2004). Two female Mardi Gras revelers sued the producers after a picture showing them lifting their shirts and exposing their breasts was used as the cover for one of defendants’ tapes. The plaintiffs had voluntarily posed for the photograph, which was taken at a


25 Nebraska, New York, North Carolina, and Virginia.
party room in a New Orleans bar, but plaintiffs alleged they were promised it would not be included in any of the defendants’ videos. Characterizing its decision as “a close call,” the court ruled that plaintiffs’ invasion of privacy claim could go to trial. Noting that the “photograph was not taken on Bourbon Street, but at a party” on the second floor of a Bourbon Street bar, and the court finds that, **while it is a close call**, there is a genuine issue of material as to whether this party was ‘public’ rather than ‘private.’

In **Doe 2 v. Associated Press**, 331 F.3d 417, 31 Media L. Rep. 1819 (4th Cir. 2003), the court affirmed dismissal of a private facts claim under South Carolina law based on the identification of plaintiff as a sexual abuse victim. Plaintiff had testified in the criminal sentencing phase of his abuser and the trial judge had earlier “ordered the reporters present not to identify any sexual assault victims in press accounts of the sentencing.” The court was not closed to the public during the testimony and an AP story about the sentencing identified plaintiff by name. The Fourth Circuit concluded “we cannot understand how the voluntary disclosure of information in an unrestricted, open courtroom setting could be anything but a matter of public interest” or how there could be a cognizable privacy interest in matters so disclosed.

In **Salupo v. Fox**, 2004 WL 64964 (Ohio App. Jan 15, 2004) the court dismissed a private facts claim over a news broadcast showing plaintiff moving out of his home since “the act of moving is not the type of private fact the law protects. Moreover, moving is usually done in public.”

**Significant Non-media Cases**

A Georgia appellate court affirmed a $365,000 jury verdict on private facts and related claims based on advertisements showing plaintiff before and after his hair transplant. **Zieve v. Hairston**, 598 S.E.2d 25 (Ga. App. 2004). Plaintiff’s hair transplant surgery was a “private fact” notwithstanding that plaintiff had agreed to appear in advertisements for the procedure – but only in markets at least 500 miles outside of Georgia, an agreement breached by defendant.
3. Intrusion and Related Causes of Action

Recognition

According to the 2004-2005 Media Privacy and Related Laws 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

A California federal court held that a hidden camera investigation into Hollywood acting workshops raised triable claims for intrusion, wiretapping, trespass and violation of California’s anti-paparazzi statute. Turnbull v. American Broadcasting Co., No. CV 03-3554 SJO (FMOx) (C.D. Cal. Aug. 19, 2004). The decision turned on the court’s conclusion that plaintiffs, operators and participants in the workshops, could have a reasonable expectation of privacy and that the filming could be “highly offensive.” The California Department of Labor was investigating acting workshops over complaints that they were being used to extract fees from veteran and aspiring actors to audition before casting directors. An ABC producer enrolled in several workshops and used a concealed camera to record footage, portions of which were broadcast. After the broadcast, several workshop operators and participating actors sued ABC alleging the program made them look like “whores” and desperate losers on the fringe of the acting community in Los Angeles. Citing to Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 230 (1998) and Sanders v. American Broadcasting Companies, Inc., 20 Cal. 4th 907 (1999), the court held that plaintiffs could have a reasonable expectation of privacy within the workshop settings. In addition, a jury could find the recordings to be “highly offensive” based on the defendants’ “motivation.” Drawing selectively from defendants’ depositions, the court concluded that “the primary motive appears to be an aesthetic one” – by which the court apparently meant that while the hidden recordings would make the report more interesting they were not “essential.” The court concluded that there was no justification for using hidden camera filming and suggested – without real factual support – that ABC had not followed its own protocols for hidden camera filming. Note: The case went to trial in October 2004 and the jury returned a verdict for ABC on all claims.

The North Carolina Court of Appeals has held that where a defendant newspaper uses public information and conducts interviews of persons to acquire information for an article, there can be no intrusion claim. Broughton v. McClatchy Newspapers, Inc., 588 S.E.2d 20, 28, 32 Media L. Rep. 1313 (2003).


27 New York and Virginia.

28 Eighth Circuit opinion interpreting North Dakota law.
Wiretapping /Hidden Cameras/Other Forms of Surveillance

According to the 2004-2005 MEDIA PRIVACY AND RELATED LAW 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 federal court held that a hidden camera investigation into Hollywood acting workshops raised a triable claim for wiretapping because of their “private” nature and the participants’ reasonable expectation of privacy during the sessions. Turnbull v. American Broadcasting Co., No. CV 03-3554 SJO (FMOx) (C.D. Cal. Aug. 19, 2004). The court analogized the workshops to AA meetings, anger management classes and writing workshops – where participants would not expect their statements to be recorded. The court cited as among the “private” statements recorded during the workshops one participant’s imitation of a chicken, another’s statement that she played “trailer trash” parts and an “overtly sexual comment” between two participants – and rejected what it described as ABC’s inference that “because plaintiffs were attending an acting class, they must want to be famous” and “have a lower threshold of privacy rights.”

The court also permitted plaintiffs’ statutory “anti-paparazzi” claims to go forward under Civil Code Section 1708.08. This section became effective on January 1, 1999 and was designed to deter intrusive conduct by photographers and reporters. The statute provides in relevant part:

A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

30 Only South Carolina and Vermont lack eavesdropping statutes. South Carolina does have a “peeping Tom” statute which prohibits eavesdropping on another’s property, but it is unclear if the statute would apply to electronic eavesdropping. Mississippi has a very narrowly drafted eavesdropping statute limited to criminal controlled substances investigations which was set to lapse in July 2004.


The statutory claim could also go to trial because defendants “1) may have committed trespass; 2) recorded personal conversations and other matters without permission; and 3) did so in a manner that was offensive to a reasonable person.”

**Significant Non-media Cases**

The D.C. federal district court granted summary judgment to Congressman John Boehner in his long-running federal wiretap claim against Congressman James McDermott, over an intercepted cell phone conversation involving Boehner, former Speaker of the House Newt Gingrich and other Republican Party officials. *Boehner v. McDermott*, 2004 WL 1473029 (D.D.C. 2004). On remand to the trial court, following trips to the D.C. Circuit and U.S. Supreme Court, the court held that by knowingly accepting an illegally recorded conversation, McDermott participated in an illegal transaction and therefore could be liable under the wiretap statute without running afoul of the U.S. Supreme Court’s ruling in *Bartnicki v. Vopper*.

In a criminal case, a divided First Circuit panel held that an ISP provider for book dealers had not violated the Wiretap Act when he allegedly copied and read thousands of messages for the purpose of gaining competitive advantage. *U.S. v. Councilman*, 373 F.3d 197 (1st Cir. June 29, 2004). The decision turned on the fact that the messages were intercepted during the fraction of a second when they were in “electronic storage” at the ISP, as opposed to “in transit.” The court ruled that the Wiretap Act protects against interceptions of electronic communications only while they are being transferred, not while they are in electronic storage. The First Circuit has granted rehearing en banc. 2004 WL 2230823 (1st Cir. Oct. 5, 2004).

**Related Claims**

**Trespass**

In *Turnbull v. American Broadcasting Co.*, No. CV 03-3554 SJO (FMOx) (C.D. Cal. Aug. 19, 2004), the court found a triable claim of trespass based on a hidden camera investigation of Hollywood acting studios. An issue of fact existed as to whether an undercover news producer exceeded the scope of consent in attending the acting workshops since cameras were not allowed in the workshops and sign-in sheets stated that participants “agree that I am here to practice my acting.”

A New York appellate court affirmed dismissal of a trespass claim arising out of a media ride-along. *Every Drop Equal Nutrition, L.L.C. v. ABC, Inc.*, 772 N.Y.S.2d 865 (N.Y. App. 2d Dep’t 2004). A reporter and cameraman accompanied New York City inspectors on a raid of a suspected illegal water bottling plant. The court affirmed that because the plaintiff did not allege any property-related damage caused by the alleged trespass, but rather only sought the same publication damages alleged in its defamation claim, the complaint failed to state a claim for trespass as a matter of law.


In *Broughton v. McClatchy Newspapers, Inc.*, 588 S.E.2d 20, 28-29, 32 Media L. Rep. 1313 (N.C. App. 2003), the plaintiff alleged a reporter deceived her and obtained an interview with her at her front door by stating she had come on a “social visit.” The court affirmed dismissal of a trespass claim finding no unauthorized entry onto plaintiff’s property.

**Misrepresentation**

In *Capdebosco v Francis*, 2004 WL 463316 (E.D. La., March 10, 2004), a Louisiana federal district court applied intentional and negligent misrepresentation theories to claims arising from the making of a video. The court denied summary judgment motions seeking dismissal of plaintiffs’ claims that they had relied to their detriment on arguable assurances by rap music star Snoop Dog and a video creator that a photograph of plaintiffs’ “flashing” their breasts at a French Quarter party would not be used in a video/DVD entitled “Girls Gone Wild Doggy Style.”
4. Misappropriation/Right of Publicity

Recognition

According to the 2004-2005 Media Privacy and Related Law 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.

Significant Media Decisions

The Sixth Circuit stayed a preliminary injunction that prohibited defendant from selling or using images of plaintiff, an Ohio television news anchor caught on camera participating in a “Wet T-shirt” contest. *Bosley v. WildWetT.com*, No. 4:04-cv-393 (6th Cir. April 21, 2004), *staying*, 2004 U.S. Dist. LEXIS 5124 (N.D. Ohio 2004). The district court held that plaintiff would likely succeed on her claims of common law and statutory misappropriation. But the Sixth Circuit was “not persuaded ... that the defendant’s speech is outside the protection of the First Amendment,” concluding “defendant has shown a strong likelihood of success in demonstrating that the district court’s preliminary injunction is a prior restraint on speech in violation of the First Amendment.”

The use of plaintiff’s name and likeness in Michael Moore’s documentary *Bowling for Columbine* was not a violation of his right of publicity under the newsworthiness exception to the claim. *Nichols v. Moore*, No. 03-74313, 2004 WL 2039356 (E.D. Mich. Sept. 3, 2004). Giving wide berth to the exception, the court wrote it “is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational, and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.” *See also Kane v. Comedy Partners*, No. 00 Civ. 158, 2003 WL 22383387 (S.D.N.Y. Oct. 16, 2003) (broadly construing newsworthiness exception to “any subject of public interest,” including “entertainment and amusement, concerning interesting phases of human activity in general” — including an advertisement for comedian Jon Stewart’s *The Daily Show*); and *Leddy v. Narragansett Television, L.P.*, 843 A.2d 481 (R.I. 2004) (broadcaster’s promotional advertisements for its investigative news team not actionable).

In contrast, a Texas federal court denied summary judgment in *O’Grady v. Twentieth Century Fox Film Corp.*, 2003 U.S. Dist. LEXIS 24936 (E.D. Tex. 2003). Plaintiff was a former Air Force

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33 Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana, North Dakota (no direct cases but addressed in dicta), Puerto Rico (the federal district court in dicta stated that right of publicity has not been recognized under Puerto Rican law, *Alvarez Guedes v. Marcano-Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001)), South Dakota, and Wyoming.
pilot who gained notoriety as a national hero after he was shot down, evaded capture and was rescued in Bosnia. The event helped inspire the fictional movie *Behind Enemy Lines*. Plaintiff sued for misappropriation over a rebroadcast of a docudrama (also entitled *Behind Enemy Lines*) about his story that featured advertisements for the fictional movie. He alleged the advertisements during the docudrama led viewers to believe he endorsed the fictional movie and that it portrayed his real story. Denying summary judgment, the court found that an issue of fact existed as to whether the broadcast was commercial speech and the court was “not convinced Defendants’ use of Plaintiff’s name, likeness, and image was for a historical or newsworthy purpose.”

In *Muzikowski v. Paramount Pictures Corp.*, 2003 WL 22872117, 31 Media L. Rep. 2601 (N.D. Ill. Dec. 3, 2003), the court denied a motion to dismiss a claim alleging that “the use of a character similar to [plaintiff] in the [defendant’s] movie gives the false impression that he sponsored or endorsed the film.” Plaintiff relied on cases like *White v. Samsung Electronics America*, 971 F.2d 1395, 1400 (9th Cir. 1992), which held that “endorsements can be implied through use of identifiers other than name or likeness,” i.e., by use of plaintiff’s “persona.” The court noted that the “recently passed Illinois Right of Publicity Act (765 ILCS § 1075/5) defines a person’s ‘identity’ broadly,” which counseled in favor of “an expansive approach in determining what kinds of attributes are protected” under Illinois law.

The New Jersey Appellate Division ruled in June that persons filmed for reality television shows do not have a cause of action for commercial misappropriation of their names or likenesses. *Castro v. NYT Television*, 2004 WL 1439687 (N.J. App. June 29, 2004). Plaintiffs sued New York Times Television after they were filmed — with their written consent — for the show *Trauma, Life in the E.R* at a hospital in New Jersey. Plaintiffs argued that only programs presenting hard news should be exempt from liability for misappropriation, but the court declined to embrace that narrow approach. The court pointed out that newspapers and news broadcasts frequently mixed human interest material and more informative news and concluded that the courts should not become involved in distinguishing between the two. “It is irrelevant whether a videotape is broadcast in connection with a television story about important public events or a subject that provides only entertainment and amusement,” the court said.

**Significant Non-media Cases**

The Ninth Circuit affirmed dismissal of Arnold Schwarzenegger’s right of publicity suit against an Ohio car dealership on personal jurisdiction grounds. *Schwarzenegger v. Fred Martin Motor Company*, No. 02-56937, 2004 WL 146244 (9th Cir. June 30, 2004). At issue were car advertisements in local Ohio newspapers that contained a small picture of Schwarzenegger as “The Terminator,” with a bubble stating: “Arnold says ‘Terminate EARLY at Fred Martin!’” The advertisements were not “expressly aimed” at California — they were not circulated in California and there was no reason to believe “any Californians would see it and pay a visit to the dealership.”

In *Battaglieri v. Mackinac Center for Public Policy*, No. 245862, 2004 WL 540257 (Mich. App. Mar. 18, 2004), the Court of Appeals dismissed a misappropriation claim brought by the president of a teacher’s union against a public policy group over its use of an unauthorized quote in
a fundraising letter. The misappropriation claim was dismissed under the newsworthiness privilege notwithstanding that the letter had a commercial purpose. The court easily concluded that the letter’s discussion of education issues addressed an important matter of public concern.

Last year in Tripp v. United States, 257 F. Supp. 2d 37 (D.D.C. 2003), court ruled that under D.C. law, the use of plaintiff’s name for what plaintiff alleged to be defendant’s political advantage was sufficient to state a cause of action for misappropriation. In Tripp, a federal employee alleged that the United States had hampered the high profile investigation of a government agency by publicly discrediting her through the disclosure to the press of information from her application for a security clearance. In denying a motion to dismiss the misappropriation claim, the court held that the use of plaintiff’s (high profile) name provided “value” to defendant sufficient to give rise to a misappropriation claim even though defendant derived no commercial benefit from such use.

5. Intentional Infliction of Emotional Distress

Recognition

According to the 2004-2005 Media Privacy and Related Laws Survey, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 40 have case law specifically dealing with the tort in the media context.\(^\text{34}\) In the remaining 14 jurisdictions, the courts have yet to address the application of the tort to the media context.\(^\text{35}\)

Significant Media Cases

In Harris v. City of Seattle, 315 F. Supp.2d 1105 (W.D. Wash. 2004), the court dismissed a claim for intentional infliction of emotional distress over an allegedly false and defamatory news broadcast where plaintiff failed to supply evidence of actual malice. Citing to Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988), the court ruled that public figures must prove actual malice to recover for intentional infliction of emotional distress arising out of a publication and that an emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action.

Allegations that employees of a television talk show encouraged plaintiff to “act provocatively, and allowed her to be introduced to a purported rapist, with whom she later had a voluntary meeting, well after she was no longer in the physical custody of defendants, simply does

\(^{34}\) 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, West Virginia and Wyoming.

\(^{35}\) Delaware, Guam, Indiana, Iowa, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Tennessee, Vermont, Virgin Islands and Wisconsin.
not rise to the level of conduct necessary to sustain either” intentional or negligent infliction of emotional distress. *Craver v. Povich*, 2004 WL 1900423 (N.Y. App. Div. 1st Dep’t 2004).

An interview and musical performance of a convicted murderer was not so extreme and outrageous to support a claim for intentional infliction of emotional distress by the victim’s family. *Garrett v. Viacom, Inc.*, 2003 WL 22740917 (N.D. W. Va. 2003). The performance was part of a series entitled “Music Behind Bars” that examined prison music programs across the country. Finding the broadcast not outrageous, the court declined to reach the defendant’s constitutional argument that the truthful program was privileged under the First Amendment.

In *Muzikowski v. Paramount Pictures Corp.*, 2003 WL 22872117, 31 Media L. Rep. 2601 (N.D. Ill. Dec. 3, 2003), the court denied a motion to dismiss the intentional infliction of emotional distress claim where defendant’s “sole argument” was that count “cannot stand because of the First Amendment implications of this case.”

In an unusual case, a federal district court in Nebraska denied a newspaper publisher’s motion for summary judgment seeking dismissal of malicious prosecution and intentional infliction of emotional distress claims. *Lynch v. Omaha World-Herald Company*, 2004 WL 138468 (D. Neb. Jan. 27, 2004). In March 2000, the Omaha World-Herald complained to the FBI that plaintiff “hacked” and altered the website of one of its newspapers, the North Platte Telegraph. Plaintiff was indicted for intentionally accessing a protected computer without authorization and recklessly causing damage in violation of 18 U.S.C. § 1030(a), a federal “anti-hacking” statute. The criminal case was subsequently dismissed in August 2001. In denying summary judgment the court found there was sufficient evidence that the publisher intentionally misled the FBI and federal prosecutors about the nature and severity of the event to secure a criminal prosecution.

**Significant Non-Media Cases**

A Columbia Business School Professor’s research project which “allegedly caused havoc at several New York City restaurants [could] form the basis of a lawsuit sounding in various tort causes of action against the academic institution and the researcher.” *164 Mulberry St. Corp. v. Columbia University*, 2004 WL 78353 (N.Y. App. 1 Dept. Jan. 20, 2004). In a project designed to test the responses of restaurants accused of food poisoning, a business school professor sent letters to dozens of restaurants claiming he had become ill after eating there. A restauranteur who suffered heart problems, and one who sought psychiatric care for depression, alleged sufficient harm to have their claims for intentional infliction of distress decided by a jury.

The New Jersey Supreme Court dismissed a police officer’s claim for intentional infliction of emotional distress based on a citizen’s publication of a newsletter accusing the officer of perjury. *DeAngelis v. Hill*, 180 N.J.L., 847 A.2d 1261 (2004). The public figure plaintiff failed to provide evidence of actual malice as required by the First Amendment. Moreover, plaintiff’s proof of emotional distress which consisted of his testimony that he was embarrassed, stressed, lost sleep, and subjected to practical jokes by fellow officers did not suggest that the publication seriously affected him.
In *Barreca v. Nickolas*, 2004 WL 1336291 (Iowa Jun. 16, 2004), the Iowa Supreme Court affirmed dismissal of a corporation’s claim for intentional infliction of emotional distress, noting that a company “certainly cannot suffer emotional distress; such would stretch the bounds of the legal fiction of corporate personhood too far.”

### 6. Negligent Infliction of Emotional Distress

**Recognition**

According to the 2004–2005 *MEDIA PRIVACY AND RELATED LAW SURVEY*, 46 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress. Six jurisdictions have expressly rejected the tort in all cases.

**Significant Media Cases**

In *Nichols v. Moore*, 2004 WL 2039356 (E.D. Mich. Sept. 3, 2004), the federal court held that Michigan would apply a one-year statute of limitations for claims of intentional and negligent infliction of emotional distress where the injury alleged is one to reputation.


### 7. Conspiracy

The D.C. Circuit Court of Appeals affirmed dismissal of an unusual conspiracy complaint brought by former Georgia Congressman Robert Barr against Bill Clinton, his former political advisor James Carville and Larry Flynt, publisher of *Hustler* magazine. *Barr v. Clinton*, No. 03-7047, 2004 WL 1300144 (D.C. Cir. June 11, 2004). In October 1998, Flynt ran an advertisement in the *Washington Post* offering one million dollars to anyone who would admit to having had an affair with a member of Congress. Barr alleged that the defendants acted in concert to leak confidential information about him to the media to prevent him from performing his official duties and to harm

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37 Alabama, Arkansas, Georgia, Kentucky, Maryland, and Texas.
his reputation. The court affirmed dismissal as to Clinton and Carville on statute of limitations grounds; and to Flynt, on the ground that Barr failed to allege that the complained of statements were false. Citing to \textit{Hustler v. Falwell}, 485 U.S. 46 (1988), the Court reasoned that Barr could not evade the First Amendment protections for speech by pleading a conspiracy cause of action. Interestingly, the Court raised at oral argument the issue of whether the First Amendment defense would be affected if Barr had alleged that Flynt obtained the underlying information illegally, citing \textit{Bartnicki v. Vopper}, 532 U.S. 514, 528-29 (2001), for the proposition that the Supreme Court left open the question of whether the First Amendment would permit the punishment of the publication of truthful information illegally obtained. But finding that Barr had not briefed or pressed the issue on appeal, the Court found no need to decide the issue.

8. Breach of Contract / Unjust Enrichment

In \textit{Muzikowski v. Paramount Pictures Corp.}, 2003 WL 22872117, 31 Media L. Rep. 2601 (N.D. Ill. Dec. 3, 2003), the court refused to dismiss a claim of “unjust enrichment,” wherein plaintiff contended that he and the author of a non-fiction book that defendant made into a movie “had an implied contract that Muzikowski would cooperate with the author’s efforts, including giving him special access to the details of Muzikowski’s life,” and in return, the author “would use the information only in a nonfiction book that accurately reflected (in Muzikowski’s opinion), the stories he related.” Plaintiff alleged that “by not complying with the terms of this implied agreement in making the film, Paramount was unjustly enriched at his expense.” Sustaining the claim, the court noted that, in some instances, “Illinois courts recognize unjust enrichment claims in which the benefit plaintiff seeks has been transferred to the defendant by a third party.” The court found the alleged “benefit” went “beyond just the telling of [plaintiff’s] story” to include “access to details that only [plaintiff] could provide. . . [F]or the purposes of a motion to dismiss, Muzikowski states a cognizable claim under Illinois law.”

Without discussing the underlying facts, the court in \textit{Krisha v. Times-World Corp.}, 62 Va. Cir. 33 (Va. Cir. Ct. 2003), appeared to reject a source’s breach of contract claim against a newspaper. In a short ruling, the court held that “a confidentiality promise in a news-gathering context does not give rise to an enforceable contract right under Virginia law, but creates, at best, a moral obligation. Such a moral obligation does not give rise to contractual liability.” Citing to \textit{Steele v. Isikoff}, 130 F. Supp. 2d 23 (D.D.C.2000) (relationship between a reporter and a source is not contractual in nature).

9. Interference With Contract/Business Relations

A New York trial court applied the state’s anti-SLAPP statute to dismiss libel and tortious interference with contract claims against a community newspaper and editorial-advertiser. \textit{Duane Reade, Inc. v. Patrick Clark and The Wave Publishing Co.}, No. 107483/03 (March 10, 2004, N.Y. Sup. Ct. N.Y. County). The court held that the statute applied to criticism of a proposed billboard and that the interference claim failed where plaintiff did not allege specific contracts or business relationships harmed by defendants’ statements.
An Illinois appellate court affirmed dismissal of a high school coach’s interference with contract claim based on defendant’s statements to the press that he was “incompetent,” “kids don’t respect him” and there was “widespread discontent” with him. *Myers v. Levy*, 808 N.E.2d 1139 (Ill. App. 2004). The court found that plaintiff’s claim failed on the causation element of the claim because he provided no evidence that defendant’s statements caused the termination of his employment as the school’s head football coach.

10. Injurious Falsehood/Product Disparagement

A California federal court granted an anti-SLAPP motion to dismiss a product disparagement claim over a negative product review published in *Consumer Reports* magazine finding none of the complained of statements false. *Sharper Image Corp. v. Consumers Union of United States, Inc.*, 03-4094 MMC (N.D. Cal. Nov. 10, 2004). Among other things, *Consumer Reports* stated that plaintiff’s Ionic Breeze air purifier “barely worked at all,” and “proved unimpressive in our tests.” The fact that plaintiff’s own tests showed its product was effective only served to show that “there exists divergent views as to what factors or criteria should be considered in determining whether a portable air cleaner is ‘effective,’” and did not prove that *Consumer Reports*’ conclusions were false.

In *Peper v. Gannett Co., Inc.*, 2004 WL 2538839 (Cal. App. Nov. 10, 2004), the court affirmed dismissal of libel and related claims over newspaper articles reporting that candy manufactured by plaintiff’s company posed a safety hazard. The articles did not specifically mention plaintiff or his company, only his product. The court noted that, therefore, plaintiff cannot state a cause of action for defamation – only a claim for trade libel – which failed on actual malice grounds.

In *Muzikowski v. Paramount Pictures Corp.*, 2003 WL 22872117 (N.D. Ill. 2003), discussed above, the court denied a motion to dismiss a commercial disparagement claim based on the alleged depiction of the plaintiff in a movie implying dishonesty, because honesty was part and parcel of the services the plaintiff offers in his business.

11. Unfair Competition Law

A California appeals court held that movie ads from a fictitious reviewer could be actionable under California unfair competition and false advertising laws. *Rezec v. Sony Pictures Entertainment, Inc.*, 10 Cal. Rptr. 3d 333, 32 Media L. Rep. 1481 (Cal. App. 2004). In its movie advertising, Sony Pictures had included blurbs from a fictitious reviewer, one “David Manning of the Ridgefield Press.” After the misrepresentation was reported in the press Sony apologized and withdrew the ads. Relying on *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002) plaintiffs filed an action against Sony seeking restitution and disgorgement of profits. Affirming the denial of a motion to strike the complaint under California’s anti-SLAPP statute, the court held that defendants’ advertisements were false commercial speech not entitled to protection.

further held that “where allegedly defamatory statements do not support a cause of action for defamation, they also do not support a cause of action” for unfair competition.

12. Lanham Act

The Ninth Circuit affirmed the denial of a motion for preliminary injunction brought by a Seattle sports agency named “PlayMakers” against ESPN over the use of that name as the title of a dramatic series about professional football players. *PlayMakers, LLC v. ESPN, Inc.*, 2004 WL 1575249 (9th Cir. July 15, 2004). There would be little chance of consumer confusion over the two uses, given the commonness of the term and the parties’ different businesses.

A federal court dismissed a Lanham Act claim against Ralph Nader for a campaign commercial parodying MasterCard’s trademarked “priceless” series of advertisements. *MasterCard Intern. Inc. v. Nader 2000 Primary Committee*, 2004 WL 434404, *3 (S.D.N.Y. 2004). The use of the mark was political and not used in connection with the sale or promotion of a product or service, and there was no evidence of intended or actual consumer confusion.

In *Muzikowski v. Paramount Pictures Corp.*, 2003 WL 22872117 (N.D. Ill. 2003), the court denied a motion to dismiss a Lanham Act claim based on the theory that a movie’s use of a character similar to plaintiff is actionable as a false endorsement of the film, holding that there were fact questions as to whether the character reflected the plaintiff’s persona, and whether First Amendment interests defeat the claim.

In *Caterpillar, Inc. v. The Walt Disney Co.*, 287 F. Supp. 2d 913 (C.D. Ill. 2003), the court denied a motion to enjoin distribution of the movie *George of the Jungle 2* for allegedly portraying plaintiff’s bulldozers in an unflattering light, such as flattening houses and referred to as “maniacal machines.” There was no evidence that the movie tried to exploit the plaintiff’s trademark or that reasonable viewers would believe that the movie, which was a live action cartoon, was disparaging plaintiff’s vehicles.

13. Other Theories of Media Liability

**HIPAA**

In what apparently is the first federal court decision addressing the issue, the U.S. District Court for the District of Colorado has held that the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. § 1320d-6, does not create a private right of action against a media outlet for publication of confidential medical records. *University of Colorado Hospital Authority v. The Denver Publishing Company [dba Rocky Mountain News]*, Case No. 03-WM-1977 (D. Colo. Aug. 2, 2004).
Negligence

A California appellate court affirmed the dismissal of negligence and breach of contract claims brought by a former Who Wants to Be a Millionaire contestant who claimed he was unfairly tossed from the show after failing to answer an unanswerable question. *Rosner v. Valleycrest Productions Ltd. et. al.*, 2004 WL 1166175 (Cal. App. May 26, 2004). Plaintiff’s claims were barred by a contract giving the production company an absolute right to interpret questions and answers.

A New York appellate court dismissed claims of negligence and negligent hiring brought against the producers of *The Maury Show*. *Craver v. Povich*, 2004 WL 1900423 (N.Y. App. Div. 1st Dep’t 2004). The case was filed by a minor who traveled to New York with her family to appear on a segment dealing with “out of control teens.” After the show was taped plaintiff alleged she left her family to go out with a show driver who raped her. Dismissing the claims, the court ruled that defendants had no continuing duty to protect and supervise plaintiff after she left their custody.

SEC Laws

In a case with implications for publishers who carry financial news and stock recommendations, a federal court denied a financial/investment publisher’s motion to dismiss a lawsuit brought by the Securities and Exchange Commission. *SEC v. Agora, Inc., et al.*, No. MJG-03-1042 (D. Md. Jan. 7, 2004). The SEC claimed that Agora, Inc. is liable under federal securities laws for knowingly publishing false information about a publicly-traded company that was the subject of one of its stock tips even though the enforcement agency acknowledged that defendants had no financial interest in the company’s stock. The court rejected defendants’ argument that dismissal of the action is warranted because anti-fraud provisions of the federal securities law do not apply to parties engaged in disinterested First Amendment protected activity. Rather, the court held that the “in connection with” element of Rule 10b-5 is satisfied when someone “utilizes a devise” that causes investors to purchase or sell a corporation’s securities. The court stated that although constitutional issues may arise in later phases of the case, presently “none are ripe for decision.”

Other

The Eleventh Circuit affirmed summary judgment in favor of PGA Tour, Inc. (“PGA”), rejecting the novel claim by Morris Communications that the PGA was violating antitrust law by restricting news organizations from reporting and syndicating realtime golf scores. *Morris Communications Corp. v. PGA Tour, Inc.*, 2004 WL 627723 (11th Cir. 2004), *affirming*, 235 F. Supp. 2d 1269 (M.D. Fla. 2002). The court held that the PGA had a “proprietary interest” in the golf scores and a valid business justification to control the market for these scores, concluding that Morris Communications was essentially seeking to “free ride” on scores collected at the PGA’s expense. The court, however, never discussed the legal basis of the PGA’s “proprietary interest” beyond emphasizing that it was not based on copyright or any other intellectual property law. Nor did the court adequately explain how a news organization can “free ride” by disseminating or selling newsworthy facts from a sporting event – at least for purposes of antitrust law.
14. International Developments

**England**

The UK House of Lords also issued an important decision involving privacy rights, reinstating a breach of confidence judgment in favor of model Naomi Campbell against *The Mirror Newspaper: Campbell v MGN Ltd* [2004] UKHL 22 (May 6, 2004). The newspaper reported accurately that Campbell, contrary to many public denials, was a drug addict and was attending Narcotics Anonymous meetings. The article was illustrated with a photograph showing Campbell on a public street leaving a meeting. Although the court stated that there is no general cause of action for invasion of privacy, it extended the longstanding common law action for breach of confidence to protect against the unjustified publication of private information. The court ruled that while the disclosure that Campbell had a drug problem and was seeking treatment was not actionable, the additional information that she was attending NA meetings and the accompanying photograph was an unjustified disclosure of private information.

**European Court of Human Rights**

In a decision with potentially large consequences for the press, the European Court of Human Rights held that Germany violated Article 8 of the European Convention on Human Rights (respect for private life) when it dismissed complaints from Princess Caroline of Monaco over photographs taken of her in public. *von Hannover v. Germany*, No. 59320/00 (June 24, 2004).

At issue were photographs published in several German tabloid magazines of Princess Caroline in public, including a photo showing her on horseback, on a bicycle, shopping on her own and with her bodyguard at a market, leaving her Parisian residence, and tumbling over a chair at a beach club. The German Federal Constitutional Court, the highest German court hearing constitutional questions, had ruled that the publication of the photographs was not an invasion of privacy. The court recognized that Princess Caroline was entitled to some protection of her private life outside her home – but only if she was in a secluded place out of the public eye “to which the person concerned retires with the objectively recognizable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public.” Upholding Princess Caroline’s complaint, the ECHR ruled that German law did not adequately protect her from being photographed in public attending to her private business.
C. **Statutes and Related Case Law Reported in the 2004-2005 Surveys**

1. **Anti-SLAPP Statutes**

   Twenty-three U.S. jurisdictions now have anti-SLAPP statutes – California, Delaware, Florida, Georgia, Guam, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington.

   Anti-SLAPP statutes, designed to combat “strategic lawsuits against public participation,” generally provide for the early dismissal of claims brought against the protected right of petition and/or free speech and may also authorize a stay of discovery and the recovery of legal fees. Application of the statutes to media cases remains very uneven among the states.

   **California**


   In 2004, the scope of the statute was narrowed. See Code of Civ. Proc. § 425.17. Following increased use of anti-SLAPP motions by corporate defendants seeking a quick dismissal of suits arising from commercial speech, the legislature enacted a restriction on the use of anti-SLAPP motions by non-media businesses. Finding that “there has been a disturbing abuse of Section 425.16,” § 425.17 provides that § 425.16 does not apply in two categories of cases: (1) certain representative and class action suits affecting the public interest (§ 425.17(b)); and (2) suits brought against a person “primarily engaged in business” where the statement or conduct at issue consists of representations about that person’s or a competitor’s business, made for business purposes – in other words, virtually any suit arising from California’s expansive definition of commercial speech (§ 425.17(c)). The new legislation, which became effective January 1, 2004, has an exemption for the news media. See § 425.17(d)(1)& (2).

   Several cases have been decided since the section went into effect. In *Brenton v. Metabolife International, Inc.*, 116 Cal. App. 4th 679 (2004) an appellate court affirmed that the anti-SLAPP statute could not properly be raised as a defense to a consumer’s complaint for product liability,
negligence, breach of express and implied warranty and false advertising. The court noted that while the claim for false advertising would have previously been within the scope of section 425.16, newly enacted section 425.17 removed that claim from section 425.16.


**Georgia**

The Georgia Supreme Court considered the state anti-SLAPP statute in *Atlanta Humane Society v. Harkins*, 603 S.E.2d 289 (Ga. 2004). At issue were statements by a source for a television news report about alleged mismanagement at the Atlanta Humane Society, and similar remarks made in an online forum. The court found that the statements fell within the scope of the statute and remanded for further hearings on the merits to determine whether the complaints were improper within the meaning of the statute.

**Louisiana**


Two non-media cases considered the attorneys’ fee provision of the statute and concluded an award of fees is mandatory. *Davis v. Benton*, 874 So.2d 185 (La. App. 1st Cir. 2004); *Darden v. Smith*, 2004 La. App. LEXIS 1751 (La. App. 3d Cir. 2004) (4-1).

**Maine**

In a non-media case, the Maine Supreme Judicial Court affirmed dismissal of defamation claims based on statements about a land dispute that were made to public officials and in letters to local newspapers. *Maietta Construction, Inc. v. Wainwright*, 847 A.2d 1169 (Me. 2004). These statements were “the sort of petitioning activity envisioned by the statute.”

**Maryland**
In 2004, Maryland adopted an anti-SLAPP law. Md. Code Ann. [Cts. & Jud. Proc.] 5-807. The statute provides for an expedited motion to dismiss and a stay of proceedings in actions “brought in bad faith against a party who has communicated with a federal, state, or local government body or the public at large to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment … or article 10, article 13, or article 40 of the Maryland declaration of rights regarding any matter within the authority of a government body.”

Missouri

An anti-SLAPP statute was passed by the Missouri state legislature in May 2004 and became effective August 28, 2004. RSMo Section 537.800 provides for an expedited motion to dismiss and a stay of discovery in actions “seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state.”

New York

A New York trial court applied the state’s anti-SLAPP statute to dismiss libel and related claims brought against a community newspaper and editorial-advertiser. Duane Reade, Inc. v. Patrick Clark and The Wave Publishing Co., No. 107483/03 (March 10, 2004, N.Y. Sup. Ct. N.Y. County). The court held that the statute applied to criticism of a proposed billboard, and the judge issued what appears to be a first-of-its-kind order under the statute, requiring the plaintiff not only to reimburse the defendant newspaper for its attorney’s fees, but also awarding the newspaper additional compensatory and punitive damages.

Oregon

In what is apparently the first use of the Oregon anti-SLAPP statute in a media case, the federal district court in Oregon granted an author’s motion to strike a complaint for libel and intentional infliction of distress. Card v. Pipes, Civil No. 03-6327-HO (D. Or. March 1, 2004). The court held that Oregon’s statute applied where “Plaintiff’s claims arise out of written statements presented in a place open to the public or public forum (website, newspaper) in connection with an interest of public concern (alleged political activism and anti-Israel bias in the college classroom).”

Utah

In Jacob v. Bezzant, No. 000403530, (Utah 4th Dist. Ct. April 2, 2004), the court applied Utah’s anti-SLAPP statute to dismiss defamation and related claims brought by a businessman against a small-town newspaper and its publisher. The lawsuit concerned a political editorial published by the newspaper in the midst of an election campaign in which the newspaper publicly disagreed with a position taken by the plaintiff in an earlier political advertisement. The court held that the plaintiff’s claims were legally defective and brought to interfere with the newspaper’s participation in the process of government. The court also held that the anti-SLAPP statute can be applied to lawsuits filed before its effective date (April 2001), because the statute contemplates accrual of a claim as the case progresses and because it is “remedial” and therefore an exception to the doctrine of non-retroactivity.
2. Access

Cameras in the Courtroom

A New York appellate court rejected a constitutional challenge to New York State’s statutory ban on televising court proceedings. *Courtroom Television Network LLC v. State of New York*, 2004 N.Y. Slip Op. 05386, 2004 WL 1382325 (N.Y.A.D. 1 Dept. June 22, 2004). In the first New York appellate court decision on the constitutionality of the ban, the court affirmed summary judgment to the state in a declaratory judgment action, holding that there is no federal or New York State constitutional right to televise court proceedings. The court summarily rejected the argument that the public has a right to observe trials on television without physically attending the proceedings. The New York Court of Appeals, the state’s highest court, has granted a petition for review.

The New Jersey Supreme Court amended the guidelines on cameras in its state courts. The court lifted a restriction on coverage of divorce proceedings, which had previously been prohibited along with several other types of proceedings that are still deemed too sensitive for television, audio or still photography coverage.

The Eighth Circuit Court of Appeals ended a religious organization’s attempt to film executions in Missouri, holding that “banning the use of video cameras and other cameras in the execution chamber does not burden any ... First Amendment rights.” *Rice v. Kempker*, 2004 WL 1532547 (8th Cir. July 9, 2004).

3. “Son of Sam” Laws

On October 15, 2003, the New Jersey Legislature passed a new “Son of Sam” law (see N.J.S.A. 52:4B-61 to 52:4B-70), repealing and replacing the prior statute (N.J.S.A. 52:4B-26 to 52:4B-33), which had been modeled after the New York law struck down by the U.S. Supreme Court in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991). Under the new law, anyone contracting to pay to a person convicted of a crime the “profits of a crime,” which include, *inter alia*, “assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, a crime,” (N.J.S.A. 52:4B-61, N.J.S.A. 52:4B-62(a); see also N.J.S.A. 52:4B-62(b)) or to pay other funds to a person convicted of a crime when such person is an inmate or on parole and when such funds exceed $10,000, is required to inform New Jersey’s Victims of Crime Compensation Board (the “Board”). Once the Board is advised of such a contract, or that such funds have been paid to a person convicted of a crime, it is directed to advise all known victims of the crime (N.J.S.A. 52:4B-62(c)), and may on the crime victims’ behalf seek provisional remedies from the court to preserve assets that exceed the first $1,000 obtained by the person convicted of the crime. See N.J.S.A. 52:4B-67, 52:4B-64. Under the new law, crime victims have three years after receiving notice of the availability of the funds to file suit seeking restitution against the person convicted of the crime. N.J.S.A. 52:4B-64.