LDRC 2001 REPORT ON
SIGNIFICANT DEVELOPMENTS

Articles on New Developments: Press Credentials in the New Media Age
Findings of the 2001-2002 50-State Surveys and Recent Developments

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INTRODUCTION

Part I of this year’s final LDRC Bulletin includes three articles relating to recent credentialing controversies. In a new trend, sports leagues have begun to use contract theories to limit the press’ intellectual property rights. The controversy is a variant of a problem explored earlier this year in the Bulletin of how right of publicity, misappropriation and commercial speech claims are encroaching on the editorial side of speech. Here, though, the sports leagues are seeking to impose control by contract. The contract, though, is something the law department probably never saw or negotiated. The contract is the credential hanging around the reporter’s neck.

Introduced by Hal Fuson, the articles explore the legal and practical issues surrounding the controversy.

- In Press Credentials and Sports Events: Applying Contract, Copyright, and Antitrust Law to Credentials in the New Media Age, David Bralow and John Gary Maynard III examine some of the complex legal theories raised in the recent credentialing cases, NBA v. New York Times and Morris Communications v. PGA. They look at the intellectual property background to these cases, and the legal frameworks that might be employed to determine the enforceability of unilateral contractual limitations in press credentials.

- In Baseball’s Brush Back Pitch to the Media, Dale Cohen discusses how sports reporters responded to Major League Baseball’s proposed credentials seeking to control information rights, offering some cautionary lessons for future disputes.

- In Press Credentials and the First Amendment, David Heller looks at cases setting out how First Amendment standards apply to press credentials, an issue that may be looming as a second front in the credentials dispute.

The new trend is as widespread as it is troublesome. In addition to the high profile disputes involving the NBA, PGA and Major League Baseball, discussed in the accompanying articles, disputes have flared up in other leagues. In 1997, the NFL and the Florida Times Union battled over proposed press credentials that would have limited the newspaper’s right to use Jacksonville Jaguar game photos on the paper’s web site. In February 2000, NASCAR added a new clause to its media credential request form for the Daytona 500 stating that “NASCAR is and shall be the sole owner of any and all copyrights and proprietary rights worldwide . . . created from images, sounds and data arising from or during any

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1 See LDRC Bulletin 2001 No. 2 “A New Battleground in the Clash of Ownership and Free Expression: The Expanding Definition of Commercial Speech.”

2 See D. Noack, “NFL Caves on Online Press Restrictions” Editor & Publisher Aug. 23, 1997 at 34 (reporting that the NFL ultimately backed down).
NASCAR event.” And this year the University of Oregon threatened to pull credentials from media that would not follow new rules limiting the use of football game highlights.4

There is even an international dimension to the credentials controversy. Earlier this year, England’s Football League offered journalists credentials which sought to unilaterally ban reporters from sending photographs, statistics, score updates, and other game data to any person for any reason. Moreover, these new credentials went even further, seeking to impose a contractual requirement that “an article must not be presented in such a way that it would damage the integrity or reputation of the Football League, the FA Premier League, Clubs their players or officials.” 5

Sports has become a ripe battleground as teams and leagues develop their own websites to commercially exploit game content and information – competing, from their perspective at least, with news organizations. The ultimate victim, though, may be the public. If the leagues succeed, then the enhanced access that a press credential provides may come at the price of publishing newsworthy information whenever and where ever a publisher deems fit.

Part II of the Bulletin reviews the significant developments of the past year in the law of libel, privacy and related law. Top on the list of privacy law developments is the Supreme Court’s decision in Bartnicki v. Vopper 6 – a decision that led to a nationwide sense of relief in the journalistic community. In Bartnicki, the Court had before it a substantive newsgathering and publishing matter that posed the fundamental and recurring question whether the press could be punished for publishing information obtained unlawfully, albeit not through the efforts or encouragement of the publisher. It was the Court’s first substantive opinion in a media privacy case since Florida Star v. B.J.F7 was decided twelve years ago. The heart of the decision was the straightforward principle from Florida Star and Smith v. Daily Mail Publishing8 that absent a governmental interest of the highest order a prohibition on the publication of truthful information cannot satisfy constitutional standards.

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3 See D. Poole, “NASCAR making a power grab,” The Charlotte Observer Feb. 4, 2000; and A. Aamidor, “SPORTS: professional sports attempt to control use of images by media,” The Quill May 1, 2001 (reporting that the new clause was removed after members of the National Motorsports Press Association threatened to boycott the event).

4 See AP’s report “University of Oregon punts plan to limit sports coverage” (Aug. 9, 2001) available through www.freedomforum.org.

5 See J. Morgan, “League’s new restrictions on press shown red card,” Press Gazette May 17, 2001 (archived at Press Gazette online at <www.pressgazette.co.uk/>); J. Morgan “Row between leagues and press settled in extra time,” Press Gazette Aug. 9, 2001 (archived at Press Gazette online at <www.pressgazette.co.uk/>). The credentials were rejected by the Football Writers’ Association and other reporter groups, but in the summer the two sides reached an agreement giving several concessions to the league. Although the content restrictions were dropped, the sports reporters agreed that news reports during a match can only be published at four set times and that statistics can only be published at the end of the match. Any publication of real time reports and statistics can only be published under license from the league.

6 121 S. Ct. 1753 (2001).


8 443 U.S. 97 (1979)
As much as Bartnicki was a relief, the year also saw a troubling development regarding the protection for speech that can be deemed “commercial.” In Procter & Gamble Co. v. Amway Corp., a Lanham Act and disparagement case based on the repetition of the false rumor that Proctor & Gamble is involved in Satanism, the Fifth Circuit found that although Proctor & Gamble is a public figure and the rumor a matter of public concern, if the defendants’ motivation in spreading the rumor was substantially economic their speech would be commercial speech and entitled to no protection under the First Amendment.

The Fifth Circuit’s troubling decision was invoked by a New York federal district court in WWFE v. Bozell, a libel case against a non-profit media watchdog group that claimed, in essence, that the WWF’s television wrestling programs inspired child viewers to violence. The court held that plaintiff sufficiently pled that defendant’s speech was commercial because it was made in fundraising materials. As such, according to the decision, the speech would not be subject to the actual malice fault standard, because commercial speech is sufficiently durable to withstand a lower level of scrutiny.

Another area of doctrinal and practical concern to the media is right of publicity/misappropriation. The Ninth Circuit appeared to rein in the bourgeoning right of publicity under California law by reversing a $3 million damage award to actor Dustin Hoffman over the use of an altered photograph of him from the movie “Tootsie” in a fashion article. The Ninth Circuit held that the use of the photograph in the magazine article was fully protected by the First Amendment – it was not commercial speech and there was no clear evidence of actual malice to justify the award.

A different Ninth Circuit panel, however, reinstated a right of publicity claim in another case involving use of a photograph for both commercial and editorial purposes. Downing v. Abercrombie & Fitch. The court held that the use of the photograph illustrating editorial content in a clothing company’s subscription magazine was not protected by the First Amendment because the photograph functioned as “window-dressing” for sales of the defendant’s products and therefore did “not contribute significantly to a matter of public interest” – a factor not mentioned by the Hoffman panel.

Contrasting Andy Warhol’s images of Marilyn Monroe to drawings of The Three Stooges on T-shirts, the California Supreme Court weighed in on the issue by announcing a new test to determine the extent to which non-commercial works bearing celebrities’ images are protected by the First Amendment. Comedy III Productions, Inc. v. Saderup. Under the decision, non-commercial images may be subject to right of publicity claims if they lack significant creative elements.

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11 265 F.3d 994 (9th Cir. Sept. 13, 2001).

In *Felsher v. University of Evansville*, the Indiana Supreme Court reversed a troubling appellate court decision that held that the University of Evansville as a corporate entity could maintain an action for misappropriation.

One the libel front, while there were no major doctrinal developments, there were several significant appellate reviews in media libel trials. Three jury verdicts for plaintiffs were overturned on appeal on actual malice grounds. *Wynn v. Smith*, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001) (reversing $3.6 million award on basis of faulty actual malice instruction and remanding for new trial); *Campbell v. Citizens for an Honest Government, Inc.*, 255 F.3d 560 (8th Cir. 2001) (reversing $598,000 award for lack of actual malice and failure to prove falsity); and *Belo Kentucky, Inc. d/b/a WHAS-TV v. Kentucky Kingdom Amusement Co.*, 28 Media L. Rep. 2345 (Ky. App. 2000) (reversing and remanding $2.75 million award in part on actual malice grounds and for a faulty instruction on damages.)

Also noteworthy was the result in *Wells v. Liddy*, a case tried under the negligence standard. Following a deadlocked jury trial on whether G. Gordon Liddy had libeled a Watergate-era secretary by suggesting that she was then part of a call girl ring that operated out of the Democratic National Committee headquarters, the court granted Liddy judgment as a matter of law. The court held that Liddy was not negligent in relying on a source known to have credibility problems where he undertook further investigation to corroborate facts given by the source and other neutral third parties previously relied on the same source for the same information.

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INTRODUCTION: IMAGES TO PROTECT

By Harold W. Fuson, Jr.*

Let’s start with Britney Spears. She earned about $35 million last year and isn’t yet old enough to drink in Iowa. She is the goddess of millions of teens, or so I am told, and the salvation of the record industry. While she is, I think, a living, breathing human being, she is also a manufactured commodity, a boxcar full of marketing concepts cleverly concealed beneath a flat belly and a protuberant chest.

What, you may ask, does this have to do with libel? Britney and her marketing machine have successfully propagated an image that must be violently at odds with reality. It is a creation from whole Lycra, whether benign or malignant is beyond the present scope. In my experience with libel plaintiffs, they claim to use the blunt instrument of libel law to clean unfairly tarnished images, but most of the time they are attempting through lawsuits to flatten their paunches and hoist their chests.

Libel plaintiffs might be much better advised to spend their money on Britney’s press agents or on a good plastic surgeon. For one thing, they wouldn’t have to deal with the members of the LDRC’s Defense Counsel Section. Sometimes, though, press agents and plastic surgeons just aren’t up to the job, and the only available resort is to the law. As a means of propagating blue smoke and falsity, libel law is of diminishing value, thanks in part to the work of the LDRC and things like anti-SLAPP statutes. At the same time, the value of a carefully airbrushed image is growing along with the rest of the information economy. Just ask Britney.

When the LDRC was formed in 1980, as its name reflects, libel was viewed as the most important legal threat to the media’s ability to present clear, complete and accurate pictures of the world around us. Other legal threats existed, of course: prior restraints (which we thought – prematurely it seems -- were settled by Nebraska Press and New York Times), actions for invasions of privacy (then seldom used but much discussed), search warrants and subpoenas (handy weapons to chill overly eager journalistic pursuit); trespass claims, closed courtroom doors and other barriers to a full picture of government action (despite a huge amount of legislative capital invested in the Freedom of Information Act and similar state laws); and, even, occasional copyright or other intellectual property-based shots across the bow.

All of these threats, including libel, are with us still, though their market shares ebb and flow with time. Each in its own way represents a means that can be used by the government or by private entities, with government support through statute or common law development, to shape the images transmitted by the media. Such images in turn help form the pictures in our heads, to use Walter Lippmann’s phrase, that dictate our actions as citizens. The law isn’t the only factor that influences the images the media

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transmit – indeed there are many others of greater weight – but it is the factor that members of the media defense bar have taken a blood oath to watch over and guard against abuse. Whatever else may undermine the clarity, completeness and accuracy of the pictures in our heads, we must do our best to protect those pictures from legally sanctioned distortion.

All of which brings us at last from Britney to the true center of American life: baseball. What could be more clear, complete and accurate than the image formed by nine men arrayed around the God-given perfect dimensions of an American major league baseball field? Could it be that some would attempt to distort this mystical harmony through the machinations of contract and intellectual property law? Yes, Virginia, they would and they are. And while the bridge between the “southern violators” and Sammy Sosa may seem a long one, both Commissioner Sullivan and Commissioner Selig have tried to use the law for the same end: to exalt a preferred vision of reality over a clear, complete and accurate one. Sullivan’s legal tool was a common law action for libel. Selig and his colleagues at Major League Baseball tried to use contractual provisions printed on press passes.

Yes, baseball and Commissioner Selig are benign and well-meaning, while in the rearview mirror of history Commissioner Sullivan appears malignant and bigoted (though not in the eyes of many of his contemporaries, including the jury’s). But as defenders of the media’s ability to transmit reality as it really is and not as a villain or an entrepreneur thinks it should be, we have to be alert to whatever means are used to thwart full and unfettered images. In the LDRC BULLETIN: 2001:2, issued earlier this year, a siren was sounded about the risks to those honest images posed by expansive and doctrinally disorderly legal theories of misappropriation, right of publicity and related “commercial” claims. But we need to pay just as close attention to the legal theories ably discussed by our BULLETIN contributors in this issue as well. Whether for image or economics – and are they not in the end often the same thing – those who would use the law to burnish and maintain image are reaching out to a wider legal arsenal.
PRESS CREDENTIALS AND SPORTS EVENTS: APPLYING CONTRACT, COPYRIGHT, AND ANTITRUST LAW TO CREDENTIALS IN THE NEW MEDIA AGE

By David Bralow and John Gary Maynard III

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V. CONCLUSION
Introduction

The ongoing debate between sports leagues and the media over who owns the rights to the content generated by the sporting event coverage, especially on the Internet, has changed direction. While the ownership rights of sports promoters and the media was previously defined by intellectual property law, sports leagues recently altered the landscape using a classic sports maneuver – misdirection. Instead of focusing on the Copyright Act or the Lanham Act, sports leagues began using contract theories to restrain the media’s ability to fully capitalize on its sports coverage. But it was not your standard contract. It was something news management probably did not review. The law department probably never saw it. There were no negotiations. The “alleged” contract was hanging around the reporters’ neck -- the credential. And the sports team maintained that by accepting the benefits of enhanced access to the event, the news organization accepted unilaterally imposed terms restraining the use of the information.

There were variations to this theme. In some instances, some print news operations received letters offering credentials with Internet or use limitations listed as conditions for receiving the credentials. The sports editor or photo chief may have signed the letter to receive the credentials without really considering the consequences. As such, according to the sports franchise, the news organization agreed to the conditions and must be bound by that agreement. Typically, those conditions involved the sports franchise limiting use of editorial content to news reports alone or limiting the time and manner in which facts could be published. In some extreme cases, the credential granted the sports league ownership of all copyrights in the photographs taken by a news photographer who received credentials.

The purpose of this article is to review the underpinnings of intellectual property and contract law that provide the framework for the dispute. Thereafter, this article will address some of the defenses that have been proposed to combat both the perceived and real restrictions on access and use of information.

I. The Question of Intellectual Property Ownership: The Copyright of Sporting Events and Misappropriation Theories

Historically, sports teams and franchises have asserted, almost by fiat, the proposition that the sports promoter “owns” the underlying sporting event. They have done so through a variety of devices, beginning with the idea that the event was subject to protection either under the Copyright Act or some “sweat of the brow” theory. The assertion of copyright ownership, however, has not been successful for sporting teams.

A. Sporting Events Do Not Qualify as “Original Works of Authorship”

Section 201 of the Copyright Act provides that ownership of a work protected by the Copyright Act vests initially in the author or authors of the original work. 17 U.S.C.A. § 201 (West Supp. 2000). Section 102 in turn identifies those works that are protected by the Copyright Act. Specifically, Section 102(a) provides that copyright protection subsists in “original works of authorship fixed in any tangible medium of expression . . .” 17 U.S.C.A. §
102(a) (West Supp. 2000). The Section further provides eight categories of copyright subject matter, including literary works, musical works, and dramatic works.

While the eight categories are not exhaustive, case law reveals that a sporting event does not fall within the purview of Section 102. Section 102(a) lists eight categories of works of authorship covered by the act, including such categories as “literary works,” “musical works” and “dramatic works.” The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.” NBA v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997). “To the extent that courts have considered the question, most courts have concluded that a sports game itself is not copyrightable.” Hoopla Sports & Entertainment, Inc. v. Nike, Inc., 947 F. Supp. 347, 354 (N.D. Ill. 1996).

Perhaps the most compelling rationale as to why sporting events are not copyrightable is that copying by competitors is a necessity if the sport is to remain competitive and interesting to fans. “If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering.” NBA, 105 F.3d at 864. See also Prod. Contractors, Inc. v. WGN Cont’l Broad. Co., 622 F. Supp. 1500, 1503 (N.D. Ill. 1985) (holding that “a parade itself, including its production and promotion, is not a work of authorship entitled to copyright protection”).

B. Broadcasts of Sporting Events are Subject to Copyright Protection

In 1976, the Copyright Act was amended to insure that simultaneously-recorded transmissions of live performances and sporting events would be protected by the Copyright Act. The legislative history indicates that the amendment was specifically aimed at sporting events. “The bill seeks to resolve, through the definition of ‘fixation’ in section 101, the status of live broadcasts – sports, news coverage, live performances of music, etc. – that are reaching the public in unfixed form but that are simultaneously being recorded.” Copyright Act, H.R. No. 94-1476, 94th Cong., 2d Sess. (1976) 46, 52, reprinted in Act of Sept. 22, 30, 1976, Pub. L. No. 94-553, 1976 U.S.C.C.A.N. (90 stat.) 5659, 5665. The House Report also makes clear that it is the broadcast and not the underlying sporting event that is the subject of copyright protection. “When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes ‘authorship’.” H.R. No. 94-1476 at 52, reprinted in 1976 U.S.C.C.A.N. at 5665.

C. Ownership of the Broadcast: Control of the Broadcast vs. Control of the Underlying Event

Because it is the broadcast of the event that is subject to copyright protection, the next key issue becomes who owns the copyright in the broadcast. Case law subsequent to the 1976 copyright amendment, suggests that ownership rests jointly in those entities that control the underlying event as well as those entities that contribute to the actual broadcast of the event.
In Nat’l Ass’n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982), various entities, including the National Association of Broadcasters (“NAB”), filed an action challenging the distribution of cable royalty fees by the Copyright Royalty Tribunal.¹ The NAB contended that the Tribunal awarded too much to the athletic teams. The NAB argued that it is only the efforts of the broadcaster that create a copyright interest at all. While the court declined to alter the award, it expressly noted that the NAB contributed copyrightable elements to the broadcast.

Anyone who has ever watched ABC’s Monday Night Football, for example, knows that the commentary of the announcers and such effects as instant replay in slow motion add immensely to the quality of a sports telecast. Similarly, there is little doubt that the efforts used in juggling programs and compiling a broadcast day constitute a copyrightable interest under the Act. Id. at 378.

The reason the court declined to alter the award, however, centered upon the effect of the contribution. “[T]he work of the television stations in broadcasting sports events and compiling broadcast days has minimal market value because ‘the public tunes in sports broadcasts mainly to see the sports performance, not the activities of the director and the cameraman.’” Id. at 379. While this case is not directly on point because it involves the unique aspects of Section 111, the fact that the court recognized the copyright interests of the NAB is significant. It suggests that a copyright to the broadcast of a sports event is owned jointly by various entities.

Section 101 of the Copyright Act defines a “joint work” as a “work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C.A. § 101 (West Supp. 2000). Section 201, in turn, provides that the copyright to a “joint work” vests in the co-authors. 17 U.S.C.A. § 201 (West Supp. 2000). As a co-author, each entity has full rights in the copyright subject to the right of the other accounting. NAB suggests that absent an agreement, both the team and the broadcaster owns a portion of the rights in the broadcast.

D. Misappropriation: A Separate Theory of Ownership

As noted above, prior to the 1976 amendment, broadcasts of sporting events were not specifically subject to copyright protection. Despite this fact, however, case law prior to 1976 did recognize that sports promoters or club owners did have an identifiable and protected property right. Specifically, club owners had the right to control news relating to their sport

¹ The Copyright Royalty Tribunal is a governmental agency whose function is to make an annual distribution of royalty fees paid by cable television operators for their retransmission of certain copyrighted programming. Section 111 of the Copyright Act requires cable operators to pay royalties to the creators of copyrighted program material that is used by the cable systems. 17 U.S.C.A. § 111 (West Supp. 2000). Because it is impractical to require every cable operator to negotiate directly with every copyright owner, the Act requires the cable operators to obtain a copyright license and periodically pay royalty fees into a central fund. Id. The Tribunal then distributes the funds to the various copyright holders. Id.
events for a reasonable time following the game.

In *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (D. Pa. 1938), the defendant, a radio station with the call letters KQV, broadcast a play-by-play description of the Pirates’ baseball games without the consent of the Pirates. KQV announcers obtained their information about the games from station employees positioned at vantage points outside the Pirates’ field. The Pirates, who had licensed their radio rights to NBC, sought an injunction. Relying upon a theory of unfair competition, the court granted the injunction. The trial court stressed that the Pirates had created the game, acquired the ball park and paid the players. Accordingly, the Pirates had a property interest in the news relating to the sports event.

The Athletic Company has, at great expense, acquired and maintains a baseball park, pays the players who participate in the game, and have, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise . . . . [B]y reason of its creation of the games, its control of the park, and its restriction of the dissemination of news therefrom, [the Athletic Company] has a property right in such news, and the right to control the use thereof for a reasonable time following the games. *Id.* at 492.

A similar result was reached 17 years later. In *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (N.Y. Sup. Ct. 1955), the defendant, Fass, was an independent “newsgatherer.” Fass listened to radio and television broadcasts of New York Giants games. Without consent from the Giants, Fass simultaneously teletyped reports of the games to radio stations across the country for immediate rebroadcast. In enjoining Fass from continuing his practice, the court stressed that the Giants had not only created the game, but also controlled access to the game, thereby giving rise to a protected property right. *Id.* at 777.

These cases suggest that control of the underlying event, *i.e.*, creation of the game and control of access to the event, provide one with a protected interest in the broadcast, or publication of the event or even some news relating to the event.

Both of these cases follow *International News Serv. v. Associated Press*, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211 (1918). The Supreme Court in that case restrained INS from copying the facts in AP wire stories and transmitting rewritten stories based on those facts on its own service. *Id.* (Copyright law was not at issue because the stories were completely rewritten. It is a basic copyright principle that facts are not protected – only the expression of those facts are subject to protection.) The INS Court held that if INS was allowed to copy “hot-news,” AP would have no incentive to continue pursuing its own investment in gathering the news. *Id.* The Court reasoned that INS should be restrained to protect AP’s investment. *Id.*

Based on this misappropriation theory, sports owners might have felt confident that they owned, or at least could exercise some control over the reuse of, the content arising from the sporting event. The Second Circuit, however, undermined this theory in *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). In that case, the NBA wanted to prevent Motorola from sending
real-time basketball scores to wireless beeper subscribers. The NBA asserted that it had intellectual property rights to those scores. Relying on the 1918 INS case, the NBA maintained that the Court should protect these scores as “hot-news.” Id. at 843. Instead of following the logic of the INS case, the Motorola Court held that this “hot-news” theory was inapplicable to “real-time” scores of basketball games. Id. The court relied on cases that held that parades, football games and other public events are not copyrightable. See, e.g., Prod. Contractors, Inc. v. WGN Continental Broad. Co., 622 F. Supp. 1500 (N.D. Ill. 1985) (Christmas parade is not a work of authorship entitled to copyright protection). It emphasized that scores were facts, available to the world at large, and not subject to protection. While not expressly relying on the First Amendment, the Motorola Court was concerned with protecting the public’s right to know the facts arising from a sporting event.

While severely limiting non-copyright protection, the Motorola Court did not wholly reject the INS “hot-news” theory. It narrowed its application to circumstances where: (1) the sports promoter generates information at some cost or expense; (2) the value of the information is extremely time-sensitive; (3) the defendant’s use of the information would constitute “free-riding;” (4) the defendant is a direct competitor in the primary service or product; and (5) free-riding would reduce the incentive of the promoter or threaten the existence of the product or service. 105 F.3d at 845, 852.

In Motorola, the Second Circuit believed that “directness” in competition needs to be narrowly drawn to the primary market. 105 F.3d at 853 n. 8. In that regard, direct competition does not exist between the basketball league and Motorola. The Second Circuit observed an NBA game created three different information products. The first product is “generating the information by playing the games; the second product is transmitting live, full descriptions of those games.” 105 F.3d at 853. The final product is the real-time transmittal of facts. The Court observed there were no direct effects on the first and second markets – producing basketball games for live attendance and licensing broadcasts of those games. And there was no evidence of any “free riding on the third” – the collection and retransmission of strictly factual material about the games – where defendants were expending their own resources to collect purely factual information. Id.

In Morris Communications Corp. v. PGA Tour, Inc., 117 F. Supp. 2d 1322 (M.D. Fla. 2000), a District Court in Florida followed this blueprint on when the “hot-news” exemption would apply. In January 1999, the PGA stated that reporters would receive credentials only if they agreed that all "scoring information [appearing onsite may be provided on the Internet] no sooner than 30 minutes after the actual occurrence of the shots." Id. at 1325. Later, the PGA relaxed its 30-minute requirement but prohibited any syndication of the real-time scores. The PGA admitted that the regulation was designed to give The PGA Tour – and its official website – a limited exclusivity.

The restriction directly affected Morris. Since 1996, Morris published golf information on its Internet news sites. Its most popular feature was the publication of real-time golfer scores, especially during the preliminary tournament rounds – when television coverage is nonexistent. Real-time scores are posted contemporaneously with the actual pace of competition. These
scores are collected by tournament volunteers, communicated to a central location, and posted on a leader board. Because of the popularity of the Morris website, Cable News Network/ Sports Illustrated purchased this real-time feature from Morris. By the time the PGA Tour imposed non-syndication Internet restriction, Morris’ coverage extended to all professional golf tournaments promoted by the PGA Tour.

The United States District Court refused to reject the “hot-news” theory out of hand. It held that Motorola was different because anyone could collect the scores during an NBA game by merely sitting in the stands or paying attention to the play-by-play. PGA Tour, Inc., 117 F. Supp. 2d at 1328. Morris, however, could not gather the real-time scores without the use of the PGA’s leader board or the use of its own observers with radio/telephone at each hole. The Court refused to grant Morris’ preliminary injunction because “it would be implicitly authorizing some degree of free riding without the benefit of what evidence may be produced at trial.” Id. It explained:

A limited threat of free riding does not necessarily give rise to a “hot-news” property right because, as the Motorola Court noted, free riding only becomes detrimental to competition when “the ability of other parties to free-ride on the effort [ ] of the defendant would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. Motorola, 105 F.3d at 852. Without a more complete factual record before it, however, the Court cannot presently determine the extent to which Defendant’s incentive to produce and operate RTSS [the leader board] would be undermined if Plaintiff were allowed to free-ride on its investment. Similarly, while the reasonableness of Defendant’s rules prohibiting unauthorized use of wireless communications devices on the golf course might affect a determination regarding the [ ] anticompetitiveness of Defendant’s conduct, that too will require a more complete record than is currently before the Court.

Id. at 1328-29.

If anything can be taken from the PGA Tour decision, it is that some courts might still be willing to accept the “hot-news” misappropriation theory. However, at this moment the breadth of the theory is still to be determined. In particular, the direct competition element is very elastic.

In PGA Tour, the court was far more lenient than the Motorola court on the proximity of competition prong. It appeared willing to accept the directness of competition between newspapers and the PGA on the provision of factual leader board information. Apparently, the

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2 The use of radio/telephones is forbidden by PGA Tour rules and credentials. Morris demonstrated that the PGA makes it impossible to exercise independent enterprise to collect leader board scores. Notwithstanding this evidence, the court wanted a full record before it prior to making a decision.
“hot-news” exemption will depend, similar to antitrust cases, on the exigencies of the definition of the market and the tension that derives from free riding versus an apparent acceptance of the idea that facts are not protected under any circumstances.

The result is uncertainty. Sports franchises have attempted to respond to that uncertainty by using contractual based theories that will be explored in the next section.

II. Contract Theories of Unilateral Imposition of Restrictive Terms

Because case law on the binding effect of unilaterally imposed conditions in credential agreements is almost nonexistent, it is important to review other areas where unilateral conditions are imposed. The applicability of unilateral conditions has been discussed primarily in the law of bailments, transportation, theatre, and shrinkwrap licenses. The modern view appears to be that, provided the user manifests his assent, the user is bound by the terms of contract. Assent can be implied by conduct – *i.e.*, accepting the benefit of the ticket with knowledge of the additional unilateral conditions. Extrapolating in the credential area, use of the credential by a news organization that knows the restrictive terms on those credentials will more than likely represent assent to those conditions.

A. Historical Perspective on Travel Tickets

In determining whether the terms and conditions on the back of a passenger ticket were binding, courts have asked whether the ticket is a mere check entitling one to be carried from point A to point B or whether the ticket purports to be a contract stating the rights of the parties. For a good discussion of the history surrounding this analysis, see Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11 (2d Cir. 1968). There, the court concluded: “[T]he thread that runs implicitly through the cases sustaining incorporation is that the steamship line had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights.” *Id.* at 17. As the First Circuit subsequently stated:

Beginning almost a century ago with the case of *The Majestic*, 166 U.S. 375, 17 S. Ct. 597, 41 L. Ed. 1039 (1897), courts have struggled to divine standards by which to determine whether steamship passengers are to be held bound by "boilerplate" conditions located in the fine print of adhesion contracts of passage. Although some discernible standards have begun to emerge in the past two decades, this is still largely a case-by-case determination. Differing circumstances may render the same ticket binding on one passenger in one case, yet invalid as against another passenger in another case. The basic inquiry is whether, and to what extent, a passenger, who in almost all cases does not actually bargain for a particular term or condition of a contract of passage, but who nevertheless accepts or signs the ticket before embarkation, is bound by the fine print of the ticket.

Recent cases reflect that courts examine the entire ticket to answer the question: Does the contract reasonably communicate to the passenger the existence therein
of important terms and conditions which affect legal rights?


In Silvestri, Judge Friendly phrased the test in terms of whether the company has "done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." 388 F.2d at 17; see also Shankles, 722 F.2d at 863-64.

Finally, the U.S. Supreme Court upheld the enforceability of a choice of forum provision contained on a non-negotiated form travel ticket. The Court stressed that the lack of bargaining did not automatically render the clause unenforceable. Rather, the ultimate question was whether it would be fundamentally unfair to enforce the provision. Finding that it did not violate fundamental fairness, the Court enforced the contract. _Carnival Cruise Lines v. Shute_, 499 U.S. 585, 592-94, 111 S. Ct. 1522, 1527-28, 113 L. Ed. 2d 622, 629-31 (1991).

B. Bailment Cases also Contribute Idea of Reasonableness

The determinative issue in bailment cases is whether the terms were or could have been known before the start of the relationship, _i.e._, would it be reasonable for the user to believe that such terms were contained on the back of the claim ticket. _See United States Fid. & Guaranty Co. v. Slifkin_, 200 F. Supp. 563, 568 (N.D. Ala. 1961) (“The usual reasoning in these cases is that neither the nature of the transaction nor the appearance of the identification check warrant an assumption that a reasonable man would expect the document to contain special contract terms”). Those cases refusing to enforce the terms have stressed that the notice of the terms — the ticket — came after the bailment had already been formed. As one court has stated:

When plaintiff received his receipt he had already parked his automobile and deposited his money. The contract of deposit was complete. This is so whether there was an express consent to the deposit consisting of the continuing offer by the defendant to receive a deposit of automobiles and plaintiff’s acceptance of that offer by parking his car and depositing his money in the meter or a consent by defendant implied under the circumstances. There is no evidence in this case that defendant had any sign on display in its lot which purported to limit its liability or change its legal position from depositary to merely a lessor of space (known to the customer) before he parked his automobile and paid his money.

_Gauthier v. Allright New Orleans, Inc., 417 So. 2d 375, 376 (La. Ct. App. 4th Cir. 1982) (citation omitted). Another court noted,

Consequently, a bailee relying upon an agreement to cut down the full measure of
its common-law responsibility for damages for negligence is bound to clearly show that the bailor, with complete understanding that such was to be the agreement, gave assent thereto. Under the circumstances here, it will not be inferred that the plaintiff, when it entered into the new contract with defendant for the processing of the film, intended to give assent to the incorporation therein of the liability limiting provisions accompanying the former sale transaction. That transaction had been completed, and, by virtue of the defendant's express statement, the matter of the consideration for the processing of the film was reserved for a future contract.


The defense of unconscionability might also prevent the formation of a unilateral contract. In one of the few cases concerning unilateral conditions imposed on a reporter by a credential agreement, a Delaware federal court held that such agreements may be unconscionable, at least with respect to personal injury liability. Hallman v. Dover Downs, Inc., 1986 U.S. Dist. Lexis 15708 (D. Del. Dec. 31, 1986). In Hallman, a reporter was injured when he fell from the stands after a wood rail broke. The reporter sought to recover from the track owner, who defended the claim by referring to a release that the reporter had signed to obtain press credentials. The credential also had the same release language.

When discussing the release, the Court observed:

Plaintiff had no choice in this action. He was required to sign liability releases prior to entering the defendant's race track. The release includes a statement that “we have each inspected the track premises, know the risk and dangers inherent in ....” But plaintiff could not enter the race track to perform his job as a reporter before signing the waiver. Nor could he enter the premises for the purposes of inspection. . . . Plaintiff was in a classic “Catch-22,” situation because he had no choice but to sign the release to perform his job, even though he could not inspect the race premises.

The Court continued:

The release takes unfair advantage of the media that defendant wants to have at their track. The terms of the waiver were not explained by defendant to the media and the waivers are signed as a routine manner after waiting in line to enter the track.

The context of the case is important. The court realized that it would violate public policy to release the track from personal injury liability under the circumstances. Whether a court would have similar sympathy in a credentials contract that adjusts ownership rights or restricts the use of information is much less clear. Furthermore, particularly troublesome to the Hallman court was the fact that the release from injury did not bear a reasonable relationship to the risks involved. While a reporter might willingly release the track owner from injuries that arise from standing on the speedway, the risk of injury from a rotted wooden railing was not one that a
reasonable person would expect.

The common thread then in *Hallman* and the other bailment and travel unilateral contract cases is that if the term on the unilateral contract is commonly imposed or is one in which a person would reasonably have notice, it will be enforceable.

**C. Shrinkwrap Agreements and Online Terms & Conditions.**

The enforceability of unilateral contracts is also supported by the current trend to accept shrinkwrap agreements. Courts in two early cases refused to enforce shrinkwrap licenses. *See Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988). The *Step-Saver* opinion was analyzed under the U.C.C. and the court concluded that the parties’ conduct did not support enforcement of the terms and conditions contained on the box housing the software. The *Vault* opinion concluded that the shrinkwrap license was unenforceable as a contract of adhesion under Louisiana law, but failed to provide an analysis on the issue of adhesion.

The most recent opinion, however, found that a shrinkwrap license was enforceable. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). Judge Easterbrook specifically rejected the argument that the terms of the shrinkwrap were unenforceable because they had not been discussed until after money was exchanged. Rather, the terms became enforceable when the user used the software. The Court analogized to theater tickets:

To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995) (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

*ProCD, Inc. v. Zeidenberg*, 86 F.3d at 1451.

Two recent cases provide a different highlight to the enforceability issues surrounding online contracts. In *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), aff’d, 248 F.3d 1173 (9th Cir. 2001), Ticketmaster sought to enjoin Tickets.com’s commercial use of factual information obtained by Tickets.com through the use of electronic devices such as spiders or web crawlers from Ticketmaster’s website. Among other theories, Ticketmaster contended that Tickets.com’s use of the information violated the terms and conditions of the website and therefore constituted a breach of contract. The terms and conditions expressly prohibited the commercial use of the information provided.
Unimpressed with this claim, the court spent little time dismissing it. The determinative factor was the lack of agreement between the user of the website and Ticketmaster. “However, unlike certain other interactive internet programs . . ., the user [was] not required to check an ‘I agree’ box before proceeding” to use the website. Id. at *1. Thus, the Court concluded, “[t]he contract theory lacks sufficient proof of agreement by defendant to be taken seriously . . .” Id. at *5.

In Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000), however, the result was different but the analysis the same. Like the Ticketmaster case, in Register.com the defendant used software to obtain factual information from another’s website. The defendant then used that information to solicit potential customers. Unlike the Ticketmaster case, the Court found that the defendant had breached the terms and conditions of the other’s website and therefore entered a preliminary injunction. The determinative factor was that even though the defendant was never asked to check an “I agree” box before proceeding to use the website, the defendant admitted to being aware of the terms and conditions of the website. Thus, because the terms paragraph ended by stating that “[b]y submitting this query, you agree to abide by these terms,” the court concluded the defendant had “manifested its assent to be bound by Register.com’s terms of use, and a contract was formed and subsequently breached.” Id. at 243, 249.

As these cases indicate, in order for an online agreement to be enforceable, the user must clearly manifest his or her assent to be bound by the terms. In fact, this requirement was incorporated into the Uniform Computer Information Transactions Act (“UCITA”). Under Section 112 of UCITA, a user manifests assent when the user “intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.” UCITA § 112(a)(2)(2000). Equally important, in order for the assent to be binding, the user must be informed of the terms and conditions. Thus, UCITA also requires that the conduct manifesting assent must occur after the party has an opportunity to review the terms of the contract. See Utica § 112 (2000).

III. Copyright Preemption Defense to Contract Formation

The ticket, bailment and shrinkwrap cases indicate that unilateral contracts that purport to restrict rights or limit damages under certain circumstances may be enforceable. In general, if the individual or organization accepts the benefits of access while aware of the restrictions, most courts have concluded that the restrictions are valid. There is a persuasive argument, however, that enforcing contractual rights governed by state law runs afoul of 17 U.S.C.A. § 301 (West Supp. 2000), which states that state causes of action are preempted when such restrictions affect rights granted under the Copyright Act.

While copyright preemption may block the assertion of contractual rights, much depends on judicial discretion and interpretation of the contract. If a court determines the contract is one that merely permits access to facilities or involves other non-intellectual property restrictions, it could enforce the provisions, even if it has an ancillary restriction on the ability to

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3UCITA has been adopted by Maryland and Virginia which enacted versions last year.
use intellectual property. If a court determines that the provisions are really attempting to assert control over rights that are governed by the Copyright Act, preemption follows. In any event, courts have been reluctant to find that a contract is preempted. Indeed, there are some courts that follow a hard line policy that “contract claims are generally not preempted.” *Lipschpr v. LPR Publications, Inc.,* 266 F.3d 1305 (11th Cir. 2001); *ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447 (7th Cir. 1996).

Section 301 states that “all legal or equitable rights that are [the] equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.” 17 U.S.C.A. § 301(a) (West Supp. 2001). This provision creates a two-prong test for preemption.

First, state law claims are barred when those claims “vindicate legal or equitable rights that are the equivalent to one of the bundle of exclusive rights already protected” by copyright law. To avoid preemption under the equivalency test, the “state claim must protect rights which are qualitatively different from the copyright rights. The state claim must have an ‘extra element’ which changes the nature of the action.” *Selby v. New Line Cinema Corporation,* 96 F. Supp. 2d 1053, 1057 (C.D. Ca. 2000) (quoting *Del Madera Prop. v. Rhodes & Gardner, Inc.,* 820 F.2d 973, 977 (9th Cir. 1987)). Second, state law claims are barred when the work falls under the type of works protected by the Copyright Act. *See Motorola,* 105 F.3d at 847. The equivalency prong looks at the five rights granted in Section 106 and determines whether the right that the plaintiff seeks to protect or enforce is coextensive with one of those rights. \(^4\) 17 U.S.C.A. § 106 (West Supp. 2000).

**A. NBA v. New York Times**

The preemption argument was the cornerstone defense position that *The New York Times* asserted in the lawsuit with the NBA. In this case – which settled shortly after a motion to dismiss was denied – the National Basketball Association presented 1999 credentials to reporters and photographers who covered the playoff games. On the back of the press pass were two new provisions. First, the NBA credential limited the use of photographs, films, tapes, drawings, and player interviews to only “news coverage.” Second, the credential stated that acceptance constituted an agreement by the bearer and his or her news organization to abide by the limitation.

The *New York Times* photographer – as well as just about every other newspaper’s reporter and photographer – accepted these credentials without question. The paper covered the games, wrote its stories and posted the pictures on a website where it offers to sell readers the Basketball Collection, featuring five photographs of New York Knicks and other NBA players, including Patrick Ewing and Rik Smits during the playoffs. The *Times* offered to sell the collection for $900 to non-subscribers and $801 to subscribers. It offered to sell the individual

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\(^4\) Section 106 defines the rights as: (1) right to reproduce; (2) right to prepare derivatives; (3) right to distribute copies to the public for sale or transfer of ownership; (4) right to perform the work publicly; and (5) right to display.
photographs for $195 and $185, respectively.

The NBA and its licensing arm, NBA Properties, Inc. sued for breach of contract (the credential agreement), stating that The New York Times had agreed – as a condition to getting into the press areas of the games – to only use these photographs for news coverage. According to the complaint, by selling the NBA collection, The Times unlawfully profited from its breach of the agreement in a non-news marketing endeavor.


In Motorola, the court held that the NBA’s claim that it owned the actual scores was preempted by the Copyright Act – even though the scores were not copyrightable works and the NBA claimed ownership under state law. The Court observed:

Adoption of a partial preemption doctrine – preemption of claims based on misappropriation of broadcasts but no preemption of claims based on misappropriation of underlying facts – would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable. It is often difficult or impossible to separate the fixed copyrightable work from the underlying uncopyrightable events or facts. Moreover, Congress, in extending copyright protection only to the broadcasts and not to the underlying events, intended that the latter be in the public domain. Partial preemption turns that intent on its head by allowing state law to vest exclusive rights in material [ ] that Congress intended to allow.

105 F.3d at 849. Similarly, the court in Harper & Row, observed that most copyrightable works contain elements that are not protected, but held that preemption bars state law claims based on the unprotected elements as well as the copyrightable elements. 723 F.2d at 200.


In Selby, an author sought to enforce an implied contract for the protection of a script idea that he submitted to a movie studio. Although the studio rejected the idea, it produced a movie that involved similar themes of time travel. The author sued for the fair value of the script.

The Court rejected the claim, stating that it believed that the analysis of whether the right
in question is “infringed by [a] mere act of reproduction, performance, distribution or display” is determinative. 96 F. Supp. at 1061. In ruling that the claim was preempted, the Court observed:

Here, plaintiff’s claim for breach of implied-in-fact contract alleges only that defendants promised to compensate him and give him appropriate screen credit ‘if his ideas, or any of them, were utilized by defendants to produce and distribute a theatrical motion picture.’ Defendant’s alleged promise not to ‘use’ plaintiff’s ideas does not prohibit any conduct beyond that prohibited by the Copyright Act.

Id. at 1061-62. Hicinbothem and Wolff were decided on the same logic.

Similarly, in American Movie Classics Co., AMCC sued Turner for breach of a license agreement granting AMCC exclusive rights to show ‘classic’ movies at specific times. After Turner started its own classic channel, AMCC sued for breach of the agreement when Turner aired some of the movies during the “exclusive” times. The court held that agreement’s exclusivity provision does not constitute an “extra element” to avoid preemption. AMCC simply seeks to enforce the performance right under the Copyright Act. 922 F. Supp. at 931.

Finally, in Baltimore Orioles, the players’ association sued for misappropriation of name and likeness for the broadcast of the sporting event. Even though courts had previously ruled that the actual sporting event was not protected by copyright, see Section 1, the Court held that because the fixed broadcast was protected, the misappropriation claim was preempted.

While these cases supported The New York Times’ position, in fact, the weight of authority is that contractual claims are not preempted. Simplistic as it sounds, these courts tend to believe the contract, itself, provides the “extra element” sufficient to survive preemption. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc., 991 F.2d 426 (8th Cir. 1993) (breach of contract not preempted because it creates restriction on data processing that would not otherwise exist); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990) (no preemption because contract rights were not equivalent to exclusive rights under the copyright laws); Acorn Structures v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988) (reversing district court’s holding that breach of contract claim was preempted); Katz Dochermann & Epstein, Inc. v. HBO, 1999 U.S. Dist. LEXIS 3971, No. 97 Civ. 7763 (TPG), 1999 WL 179603, at *4 (S.D.N.Y. March 31, 1999)(holding that the implied-in-fact contract claim was not preempted because the claim sought to enforce a promise to pay for use of plaintiff’s ideas, regardless of any subsequent rights plaintiff may have acquired under the Copyright Act); Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425, 438-41 (S.D.N.Y. 1996) (holding that contract claim was not preempted because the claim contained the extra element of a promise by the defendant); Brignoli v. Balch Hardy & Scheinman, Inc., 645 F. Supp. 1201, 1204-06 (S.D.N.Y. 1986) (holding that plaintiff’s breach of contract claims, including a breach of confidentiality agreement, were not preempted because they involved “extra elements”); Smith v. Weinstein, 578 F. Supp. 1297, 1307-08 (S.D.N.Y. 1984) (holding that, while any claim that rested not on the actual breach of the contract but rather on unauthorized copying was preempted, the breach of contract claims focusing on rights such as confidentiality and payment for ideas were not
preempted); see also 1 Nimmer § 1.01 [B][1] [a]; but see Arpaia v. Anheuser-Busch Cos., 55 F. Supp. 2d 151 (W.D.N.Y. 1999) (holding that the plaintiff’s claim of breach of implied contract was preempted where the complaint stated that the claim was based on the defendant’s alleged use of the copyrighted works).

Lennon v. Seaman, 63 F. Supp. 2d 428 (S.D.N.Y. 1999), is instructive. In this case, Yoko Ono Lennon sought to enforce a non-disclosure agreement with a household employee. The employee distributed photographs and other depictions of the Lennons in several works. In an attempt to restrain future publications, Yoko asserted her rights under the non-disclosure agreement. The Court held that such claims were not preempted because they involved rights that were not the equivalent to those protected under copyright laws. Id. at 438.

The Lennon case is difficult to reconcile with cases like Selby. In the latter, the Court focuses on the restraint on publication. In the former, it focuses on a duty of confidentiality. The net result is the same, a restriction on the publication rights of an author. While preemption may be an available defense in some cases, it is worth noting that The New York Times failed in its attempts to have the Court dismiss its action based on copyright preemption. That court denied the motion without an opinion.

IV. Antitrust Defenses to Contracts

Antitrust law provides another basis of defense to unilateral contract formation. Several news organizations have attacked unilateral contracts purporting to regulate intellectual property rights as a form of monopolization or attempted monopolization prohibited by Section 2 of the Sherman Act.

A. Sherman Act Principles

The Sherman Act provides private parties with two methods of challenging anticompetitive conduct. Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7 (West Supp. 2001). First, Section 1 prohibits concerted activity that results in an unreasonable restraint on trade. 15 U.S.C.A. § 1 (West Supp. 2001). An example of a Section 1 violation is an agreement between two competitors to fix prices. Id. The second method, under Section 2, pertains to unilateral anticompetitive activity designed to either acquire or maintain a monopoly in a particular market. 15 U.S.C.A. § 2 (West Supp. 2001). Under Section 2, a party is prohibited from using unreasonable business methods to monopolize or attempt to monopolize a particular market. Id.

1. Elements of a Section 2 of the Sherman Act Claim

The Supreme Court has identified the elements of a Section 2 claim as “the possession of monopoly power in the relevant market and . . . the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778, 786 (1966). To obtain relief under Section 2, a private party must allege and establish all of these elements. Three steps are required.
First, the relevant market must be defined; it consists of both a product and a geographic market. The relevant product market includes those goods or services that are reasonably interchangeable in use. In other terms, the product market includes those goods and services that directly compete or are otherwise valid substitutes. The ability of consumers to distinguish between different products is often cited as a litmus test. Jefferson Parrish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 39, 104 S. Ct. 1551, 1572, 80 L. Ed. 2d 2, 39 (1984). The geographic market is defined as the area of “effective competition” wherein a purchaser can practically find alternative sources. The relevant geographic market “take[s] into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistent [ ] with cost and functional efficiency.” Grinnell, 384 U.S. at 589, 86 S. Ct. at 1713, 16 L. Ed. 2d at 793.

Second, the existence of monopoly power in the relevant market must be established. Monopoly power is defined as the ability to raise prices or exclude competition in a particular market. Id. at 571, 86 S. Ct. at 1707, 16 L. Ed. 2d at 787. Monopoly power may be shown by proof of sufficient market share or by other evidence that indicates an ability to raise prices or exclude competition. Significantly, the inability of the others to enter a particular market or the uniqueness of a particular product is evidence of monopoly power. Jefferson Parrish, 466 U.S. at 17, 104 S. Ct. at 1561, 80 L. Ed. 2d at 17.

Finally, the simple possession of monopoly power is not prohibited by Section 2. The prohibition attaches to its use or maintenance where such action “has impaired competition in an unnecessarily restrictive way.” Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467, 482 (1985). It must be either acquired or maintained in an unjustified manner.

2. Conceptual Markets in a Credential Case

To frame an antitrust defense to the unilateral credential contract, two relevant markets must be defined. First, the sporting event, sponsored by the promoter, constitutes a unique product market (“the event market”). In other words, the NBA, NFL and even the PGA Tour represents a unique form of athletic competition for which there is no substitute. The second product market is the publication market of the media (“the publication market”). In the PGA Tour case, Morris identified this subsequent market as the publication and dissemination of real-time information. In the The New York Times case, it would be the sale of photographs involving sports figures. These markets pursue either advertising or consumer dollars from those who want to follow sporting events, obtain photographs of those events or otherwise obtain or benefit from the content news media creates.

For the Sherman Act claim to have viability, the promoter must have monopoly power in the Event Market. In most professional sports, it is easy to make a case that the event promoter is a natural monopolist. The promoter is the only source of that event or league. For example, if one accepts the principle that NASCAR auto racing does not constitute a price-sensitive alternative to NFL football, a finding of monopoly follows easily. However, if you define the market more broadly, as all televised sporting events or all auto racing or all racing involving powered vehicles, it becomes more difficult to find a monopolist.
That is why in the theoretical antitrust claim against the sports promoter, there will be significant expert analysis on relevant primary markets. In every antitrust case, market definition becomes a determinative factor. As the market is defined broadly, the possibilities of a successful Section 2 claim decrease.

The argument for the promoter as a monopoly begins with the realization that through the issuance of credentials to news organizations, the promoter controls access to the sporting event. Additionally, the promoter controls the number of events, thus having the power to limit output. Under these circumstances, it is not hard to construct an argument that a sports promoter has monopoly power for the particular event market.

It is also clear that the promoter would not have a natural monopoly over the downstream publication market. This market is open to a potentially unlimited number of competitors. Nonetheless, the use of credential agreements to restrict news organizations from these publication markets could be characterized as an attempt to eliminate or unduly restrict the most competent competitors, or an attempt to monopolize.

B. Refusals to Deal and Monopoly Leveraging

The facts of most credential cases create two types of potential monopolization claims: (1) unilateral refusals to deal/essential facilities and (2) monopoly leveraging. Claims based upon refusals to deal may proceed under one of two tests: the intent test and the essential facilities doctrine. The intent test draws upon the prohibition that “business is free to deal with whomever it pleases so long as it has ‘no purpose to create or maintain a monopoly.’” Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979). Significantly, this test requires more than just an anticompetitive intent: “what should matter [most] is not the monopolist’s state of mind, but the overall impact of the monopolist’s practices.” Id. at 860. For example, the intent test has been applied to find that a publisher that printed the only newspaper in a community violated Section 2 when it refused to accept advertisements from customers that advertised on radio stations that competed with it for advertising revenues. Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951). More recently, the intent test was applied by the Supreme Court to invalidate a ski company’s decision to terminate a long-standing marketing arrangement with its competitors. See Aspen Skiing Co. 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). The Court characterized the ski company’s action as a “decision by a monopolist to make an important change in the character of the market.” Id. at 604, 105 S. Ct. at 2858, 86 L. Ed. 2d at 481. The lack of any competitive justification for this change compelled the Court to conclude that a violation of Section 2 had occurred and further note that the “[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.” Id. at 601, 105 S. Ct. at 2856, 86 L. Ed. 2d at 479.

The argument in the credential case is that a decision to place new restrictions on the use of information has no legitimate competitive purpose in the Event Market. The theory would be that the rational sports promoter would encourage the widest dissemination of information about the event to encourage additional fan response. Contrary to the logical reaction, the credential
restrictions constitute an attempt to eliminate competition and thereby create a monopoly in the separate Publication Market.

Moreover, this restriction is compelled by the threat of denying news organizations access to the events. In this sense, the actions implicate the essential facilities doctrine. Such a claim is based upon the assertion that that access to a particular facility is essential to competition in a particular market and therefore must be available to all competitors. The claim requires proof of four elements: (1) control by a monopolist of an essential facility or resource serving the monopolist’s market, (2) a competitor’s inability to practically or reasonably duplicate the essential facility, (3) the denial of the use of the facility to a competitor, and (4) the feasibility of providing access to the facility. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

The theory will be that the sporting event is an essential facility to coverage of the event for publication in the Publication Market. The sports promoter therefore has run afoul of its obligations because “the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on nondiscriminatory terms.” *Id.* at 1132.

In *Weinberg v. Blackhawk Hockey Team, Inc.*, 274 Ill. App. 3d 637, 653 N.E. 2d 1322 (Ill. App. 1995), plaintiff produced a hockey guide that he sold outside the stadium on nights that the hockey team played. The Blackhawks, which produced a competing program, denied the plaintiff credentials to attend home games, practices, press conferences and post-game interviews.

Analyzing the four factors to demonstrate an essential facility, the Court held the Blackhawks had exclusive control over credentials to the hockey games and practices, access to players and coaches, access to the press box and press conferences. The Court found the existence of these factors combined with the published quote of the Assistant Director of Public Relations that the Blackhawks do not "want to set aside credentials for a publication that is conceivably competing against" the Blackhawks publication were sufficient to plead the monopolization claim.

Equally applicable is a monopoly leveraging claim. That claim was also used in the Blackhawk case. Leveraging, in a nutshell, is the use of monopoly power in one market to monopolize or attempt to monopolize another market. For example, the Supreme Court has held that a theatre’s use of monopoly power in some cities cannot be used to obtain exclusive movie distribution rights in other cities where it faces competition. *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 931, 92 L. Ed. 1236 (1948).

Additionally, it has been held that the linking of patented products with unpatented products in a volume rebate was an improper use of the legal patent monopoly to enhance the sales of products facing competition. Federal courts have disagreed as to whether a monopoly leveraging claim requires a showing of attempted monopolization or actual monopolization of the second market. Compare *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) with *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991).
C. Antitrust Claim in Morris Communications, Inc. v. PGA Tour

Morris filed a lawsuit against the PGA Tour in Florida seeking to invalidate contractual restrictions that prohibited the resale of information derived from the PGA leader board under these theories. Morris’ claim, distilled, was that the PGA Tour’s contract constituted an unlawful attempt by the PGA to use its monopolistic control over access to the real-live tournament to hinder competition in the real-time Internet market (monopoly leveraging). Morris asserted that the PGA unlawfully seeks to extend its monopoly power by restraining the dissemination of information that it cannot own. See Morris Communications Corp. v. PGA Tour, Inc., 117 F. Supp. 2d 1322 (M.D. Fla. 2000).

The PGA Tour responded by stating that these restrictions were necessary to make certain that The PGA Tour could recover the value of its investments in developing the Leader Board system, which it estimated at $26 million. Without such exclusivity, The PGA Tour contended “free-riders” would appropriate their product and it would not have the incentive to produce the Tour scoring system. The result, it argued, would be that the quality of its goods and services would be threatened. Under this theory, a rational business entity would impose such restrictions for the purpose of recovering investment. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 483 n. 32, 112 S. Ct. 2072, 2091 n. 32, 119 L. Ed. 2d 265, 287 n. 32 (1992).

V. CONCLUSION

While conflicts between sports promoters and the media over content are not new, the legal framework for resolving the latest conflicts remains to be developed. The early conflicts in the 1930’s and 1950’s were defined by intellectual property law, ultimately resting on the equitable principle that competitors should not be able to exploit “hot news” developed at the expense by others, i.e., no free-riding.

More recently in the 1990’s, the Second Circuit in NBA v. Motorola, while not abandoning the “hot news” theory, declined to apply it to real-time dissemination of game facts. The decision limited the ability of sports promoters to employ intellectual property theories to obtain exclusive ownership of the underlying facts of a sporting event even though new technologies have created markets for such information. It is probably not surprising, therefore, that sports promoters are now attempting to use press credentials as a form of unilateral contract to obtain additional rights to sports information.

The courts in NBA v. New York Times and Morris v. PGA were in the position to determine the enforceability of unilateral contractual limitations in press credentials. It was hoped that in the course of reaching a judicial determination, these courts could assist in bringing some clarity to how contract, copyright, antitrust, and First Amendment principles apply to the New Media age. The New York Times case settled, demonstrating that economic, content-sharing relationships may be the better way to resolve all disputes. Morris v. PGA, however, is ongoing and may, for better or worse, step into the precedential void.
MAJOR LEAGUE BASEBALL’S BRUSH BACK PITCH TO THE PRESS

By Dale Cohen *

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Shortly before the opening of the 2001 baseball season – March 2001 for the uninitiated - Major League Baseball (“MLB”) began the process of issuing media credentials for the new season. According to MLB, before media organizations could receive press passes, they would have to agree to a new set of “Terms and Conditions.” The new terms contained numerous restrictions on usage of game-related content, ranging from prohibitions on real time usage of statistics and photographs to restrictions on the distribution of content on the internet or for commercial purposes. While MLB claimed that the new credential was necessary to protect its intellectual property rights, media companies viewed the credential as a thinly-veiled attempt to protect MLB’s newly launched website, mlb.com, and MLB’s ambitious e-commerce plans.

News organizations universally rejected MLB’s proposed credential. Most notably, the Associated Press Sports Editors organization (the “APSE”) issued an advisory urging its members not to accept the new credential agreement. Media attorneys and sports editors contacted MLB and their local teams protesting various terms and threatening not to cover MLB games unless the proposed Terms and Conditions were withdrawn or substantially modified. Bowing to this pressure, MLB instructed teams to permit media organizations to cover their games temporarily without executing the new credentials. MLB also began the process of negotiating a new credential with the APSE and several attorneys representing its members.

After several weeks of negotiations, a new set of Terms and Conditions was agreed upon between APSE and MLB. Slight modifications in the draft followed as other news organizations weighed in. The resulting credential agreement, executed by most of the media organizations that cover major league baseball, can best be characterized as a compromise, designed to preserve the status quo on the numerous difficult legal issues discussed elsewhere in this Bulletin. When the parties could not agree on the most controversial issues – primarily relating to intellectual property rights – they simply preserved their arguments for a future date in court. Significantly, as of this writing, MLB has not filed any such action against a media company.

Close analysis of the Terms and Conditions and the negotiations that led to agreement may yield valuable insight for news organizations that face similar efforts by sports leagues, event promoters or other organizations that seek to resolve intellectual property conflicts through unilateral imposition of contract terms. (A copy of the 2001 “Credential” appears at the end of this article). Some of the terms in the MLB Credential may provide a basis for compromise in such disputes since MLB has already established a precedent by accepting these terms. The flipside, of course, is that the credential may be used against news organizations in some circumstances as well. In any event, a closer look at key terms is warranted and follows:

“Commercial” Use of Content

According to MLB, its primary concern is the unauthorized “commercial use” of photographs and other content relating to its games. Paragraph 2 of the initial version of the credential therefore prohibited the use of “any account, description, picture . . . or other information concerning” baseball games for any purpose other than “news coverage.” MLB cited several instances of “commercial” use it intended to prohibit with this provision: sale of photographs (particularly enlarged prints) to the public and use of game images in advertisements or on t-shirts,
posters, etc. to promote newspaper sales and broadcast ratings. MLB repeatedly contends that “commercial” use of these images violates its intellectual property rights and those of its players.

The APSE and others countered that: 1) the news organizations own the intellectual property rights to the images in question and that MLB was seeking to usurp the copyright owner’s rights via contract; 2) existing case law supports the news organizations’ view regarding promotion of news coverage; and 3) the restriction to “news coverage” was unduly restrictive and vague. The debate about this paragraph quickly became the linchpin of the entire negotiation. MLB’s determination to prevent “commercial exploitation” was apparently based upon its New York-based executives’ pique over certain newspapers’ well-promoted sales of their archival baseball photographs.

The negotiators eventually overcame this impasse by agreeing to preserve the issue of photo sales for future litigation. MLB agreed to add a clause permitting the credential-holder to use its content for any “First Amendment-protected purposes” – an extremely broad scope - in exchange for the last sentence of paragraph 2, which confirms that the credential does not authorize the holder to violate MLB’s intellectual property rights. In essence, this compromise returned this dispute to its rightful place, a court of law deciding the scope of the parties’ intellectual property rights and First Amendment freedoms, and blocked MLB’s effort to reduce the dispute to a matter of contract law.

The parties reached a similar agreement with respect to the use of photographs for promotional purposes. In paragraph 7, MLB grants credential holders the right to use photos of the games in reprinted news pages for any purpose, “provided that such use is not likely to create, or does not actually create, confusion in the minds of the trade or public that” these materials are sponsored or endorsed by MLB. The incorporation of standard Lanham Act and unfair competition language regarding customer confusion simply preserves the status quo. Several courts have found that typical newspaper use of this type of promotion is not likely to create any confusion. *See, e.g.*, *Montana v. San Jose Mercury News*, 40 Cal. Rptr. 639, 23 Media L. Rep. 1920 (Ct. App. 1995); *Namath v. Sports Illustrated*, 48 A.D.2d 487, 1 Media L. Rep. 1843 (N.Y. App. 1975). Therefore, this issue is probably closed, at least for MLB and its players (who are defined as part of the MLB Entities in the agreement). However, MLB did once again add a sentence to the end of paragraph 7 preserving its intellectual property claims regarding commercial use of photographs for purposes other than reprinted news pages.

**Internet Restrictions**

The initial version of the MLB credential prohibited the use or transmission of photographs, video or audio in any media while the relevant game was still in progress. The credential further prohibited the transmission of any information about a baseball game more than once every half-inning of play. MLB contended that these restrictions were necessary to protect mlb.com and MLB’s broadcast licensees from unfair competition.

After lengthy discussion of misappropriation case law, and the interests of a variety of print, broadcast and web media, MLB conceded that its proposal was over broad. Eventually, the negotiators agreed that credential holders could display up to seven photographs of any game in
progress. In addition, it was agreed that the general prohibition on video and audio would apply only to materials obtained at the game. The credential thereby preserves the media’s right to obtain such materials elsewhere - from a licensor or over the airwaves - and to use those materials in real-time subject to the constraints of their license or intellectual property law. Most sports editors and media counsel agreed that, with these changes, paragraph 4 of the Credential would not present any serious problem for their operations.

As for real-time transmission of text accounts of the game, paragraph 3 of the Credential does prohibit real-time pitch-by-pitch accounts which are more frequent than every half-inning of play, except to report on the occasional and significant historic event. While this provision could interfere with certain websites’ offerings, MLB steadfastly refused to relent on this point, arguing real-time play-by-play webcasting – for example, espn.com’s Gamecasts – should be a licensed activity. Media organizations which disagree can either refuse to execute the Credential or abide by the half-inning restriction.

**MLB’s Right to Purchase Photos**

MLB’s initial version of the Credential permitted MLB to license all photos taken pursuant to the Credential at the news organization’s actual cost. This provision, which was universally condemned by media organizations, was designed to provide MLB and mlb.com with the best baseball photographs available at a very low cost. After much heated discussion, MLB once again relented. Paragraph 7 of the Credential provides instead that MLB shall have the right to purchase prints and license photographs “at the best financial terms available to third parties” for “news coverage purposes only.” Since many of the photos likely to be selected are already available through resale by organizations such as AP, Newscom and Corbis, this provision probably does little to affect the status quo. Concerned news organizations should note, however, that highly proprietary or embargoed images should not be affected by this provision, since MLB can only license photos on “terms available to third parties.”

**Conclusion**

The MLB credential saga demonstrated several things that may be helpful to news organizations facing similar tactics by sports leagues, event organizers or other organizations, that try to resolve intellectual property conflicts through imposition of a restrictive press credential.

First, reporters, editors and their lawyers need to carefully review the terms and conditions of press credentials. Various sports editors’ swift recognition of the problem with the MLB Credential helped avert a crisis. Negotiations regarding credentials should not be conducted at the eleventh hour unless absolutely necessary since the imperative of covering the news event may alter the negotiations.

Second, particular attention should be paid to terms that would restrict the press to “news coverage” or similar parameters. Although some editors may believe these vague restrictions appear innocent, they are specifically designed to limit the press’ own intellectual property rights. In addition, Internet related restrictions will likely be a prominent feature in most future credentials.
given the increasing scope of most sports leagues and promoters’ web marketing activity. The press will need to carefully weigh whether such conditions unduly impede news coverage.

Finally, the MLB saga demonstrates that the press can exert leverage by threatening not to cover events under such conditions, obtaining provisional access pending a full negotiation over the terms. While the balance of leverage between sports leagues and the press will continue to be tested in the New Media age, in the near term, the press should insist upon preserving the status quo wherever possible. The First Amendment and intellectual property interests at stake deserve thoughtful consideration, not casual draftsmanship. These matters should be decided, if necessary, by courts applying precedent and reason, not contract law.
AMENDED AND RESTATED TERMS AND CONDITIONS OF CREDENTIALS FOR 2001 MAJOR LEAGUE BASEBALL REGULAR SEASON HOME GAMES ("GAMES")

Each individual or entity signing for or using a credential, and his/her/its employers (each signer, user and employer, a "Bearer"), agrees to the following:

1. Each Bearer attending one of the Games (each, a “Game”) using a credential represents that such Bearer is acting on a specific assignment for a newspaper, or for a press, news or photographic service.

2. The use of any account, description, picture, photograph, video, audio, reproduction, or other information concerning the Games (the “Game Information”) other than for news coverage of, or magazines, books or stories about, the Games, or for First Amendment-protected purposes, is prohibited, except (a) with the prior written consent of the Baseball Office of the Commissioner or (b) as specifically licensed by Paragraph 7 below. Nothing in these terms and conditions authorizes or allows Bearer to violate the MLB Entities’ trademark, copyright and other proprietary rights.

3. While a Game is in progress, Bearer shall not transmit or aid in transmitting any Game Information on a play-by-play or pitch-by-pitch basis, more frequently than once every half-inning of play (except to report on the occasional and significant historic event), or such other longer period as Bearer has agreed to refrain from such transmission except (a) this limitation shall not apply to internal transmissions between the Bearer attending the Game and such Bearer’s employer, or (b) with the prior written consent of the Baseball Office of the Commissioner.

4. While a Game is in progress, Bearer shall not transmit, display, aid in transmitting or displaying any video, audio, pictures, photographs or other non-text based accounts or descriptions of Games (“Non-Text Accounts”) that Bearer obtains at that Game in any media, except (a) this limitation shall not apply to internal transmissions between the Bearer attending the Games and such Bearer’s employer, or (b) with the prior written consent of the Baseball Office of the Commissioner. The foregoing limitation shall not preclude the on-line transmission or display of up to seven still pictures or photographs of any Game during its progress; provided, however, that under no circumstances may Bearer display any more than seven still pictures or photographs of any Game during its progress regardless of whether Bearer obtained such pictures or photographs at the Game.

5. The Major League Clubs are the exclusive owners of all trademarks, copyrights, and other proprietary rights in their names, logos and uniform designs.

6. Bearer assumes all risks incidental to the performance by the Bearer of Bearer’s services in connection with the Games and assumes all risks incidental to the Games, whether occurring prior to, during or subsequent to the actual playing of the Games, including, but not limited to, the risk of being injured by thrown bats, or fragments thereof, and thrown or batted balls, and agrees that the Baseball Office of the Commissioner, Major League Baseball Enterprises, Inc., Major League Baseball Properties, Inc., Major League Baseball Properties Canada Inc., MLB Advanced Media, L.P., MLB Advanced Media, Inc., MLB Online Services, Inc., Baseball Television, Inc., the American and National Leagues and their constituent Major League Clubs, and their respective owners, shareholders, partners, agents, officers, directors and players and other employees (collectively, the “MLB Entities”) shall not be liable for injuries or loss of personal property or equipment resulting from such causes.
PHOTOGRAPHS: The credential confers on Bearer a limited, non-exclusive and non-transferable license to take photographs of the Games, and to allow the entity that engaged the Bearer to take the photographs to use such photographs only for news coverage of, or magazines, books or stories about, the Games, other editorial purposes, and reprints of news pages from such entity’s publications, provided that such use is not likely to create, or does not actually create, confusion in the minds of the trade or public that Bearer or its reprints or any elements therein, or the items on which they are reprinted, are sponsored or endorsed by, or associated or affiliated with, any of the MLB Entities, or that any of the MLB Entities licensed Bearer to use their trademarks or copyrights.

In exchange for the access granted by the credential, the MLB Entities shall have the right to purchase prints of any published photographs taken by the Bearer in connection with the credential, at the best financial terms offered to third parties, and such MLB Entities shall be licensed at no additional charge to use the photographs for news coverage purposes only. The MLB Entities may not distribute reproductions of the photographs to others or license others to reproduce the photographs. Except as specifically licensed in the first sentence of this Paragraph, the MLB Entities maintain that separate consent is required to transmit, offer to sell, or sell any photographs featuring their respective trademarks, names, logos, uniform designs, copyrights or other proprietary rights for commercial purposes, including in third party advertisements or promotions, or on apparel, cups, posters, prints, T-shirts or other consumer products.

The credential is not transferable and may be revoked at any time without cause.

While within the ballpark, Bearer shall, at all times, be subject to the direction and/or supervision of the Club and its designated agents.

Bearer shall obtain all necessary licenses, consents or releases permitting the use of any party's proprietary material, including, but not limited to any party's copyrights, trademarks, rights of publicity, rights of privacy or other proprietary or personal rights, however denominated, included in any photograph taken or other material obtained in connection with the credential. The Bearer is solely responsible for determining which licenses, consents and releases shall be obtained. Bearer shall indemnify, defend (if requested) and hold harmless the MLB Entities against and from any and all liability, loss, damage or expense (including reasonable attorneys’ fees and expenses) against third party claims arising out of or relating to: (a) Bearer's use of any Game Information taken or obtained in connection with the credential, including, without limitation, any claim that any use of such Information infringes any third party’s copyrights, trademarks, rights of publicity, rights of privacy, or other proprietary or personal rights, however denominated; (b) Bearer's acts or omissions; (c) the presence on the premises of any cameras, wires, cable or other equipment brought thereon by Bearer; and (d) Bearer's breach of any term of the credential.

With respect to any claim that might give rise to liability of the Bearer as an indemnitor, the MLB Entities shall: (a) have the right to fully participate in the litigation of such claim with counsel selected by Bearer and approved by such MLB Entities at the sole expense of the Bearer; and (b) not be obligated, without their consent, to participate in any settlement of such claim.

In the event that the name or likeness of any individual using this credential is included in any broadcast, telecast, photograph, film, video or other media taken in connection with the Games, such individual grants the MLB Entities the non-exclusive, transferable, perpetual right and license to use (and to sub-license the use of) such name and likeness in any media worldwide whether now known or hereafter devised.
13. The rights and privileges granted to Bearer shall automatically terminate if any term of this credential shall be breached.

14. Bearer acknowledges receipt and review of, and agrees to be bound by, these terms and conditions.
PRESS CREDENTIALS AND THE FIRST AMENDMENT

By David Heller*

* David Heller is a staff attorney with the Libel Defense Resource Center. LDRC Legal Fellow Sherilyn Hozman assisted in the research for this article.
The sports credentialing controversy raises questions about the ownership and control of information generated by sports events – and about how journalists can report on these events. A separate credentialing controversy may loom over the threshold question of who qualifies for press credentials in the first instance. Although the controversies are separate, they share a common root. Just as the web is a driving force behind sports leagues’ efforts to control intellectual property, the web is also creating a technological environment where everyone with a computer is a potential publisher. Internet reporters, both experienced and self-styled, are now competing for limited space at places and events, raising questions about the standards for access if not for journalism itself.1

This article reviews cases that have considered the credentialing process and the First Amendment. The First Amendment is, of course, implicated when government entities and officials decide whether and how to credential journalists. The First Amendment is generally not implicated when private sponsors issue credentials to events at private facilities, though in some instances there may be sufficient state action for First Amendment rights to attach. See p. 35 and n. 7, infra. To the extent web journalists press their claims for credentials in court, a familiarity with these cases is both practical and interesting.

The law on credentialing, though, is sparse. For the most part, the credentialing process has been used primarily as a ministerial way to recognize members of the working press in order to provide them with enhanced access to places and events as agents of the public at large. Credentialing also serves as an administrative method to account for practical considerations when giving the press access, such as spatial limitations, security, and orderly process.

Some of the first cases to consider the First Amendment implications of press credentials involved “alternative” newspapers. In Strasser v. Doorley, 309 F. Supp. 716, 729 (D. R.I.), aff’d in part, rev’d in part, 432 F.2d 567 (1st Cir. 1970), a Providence, Rhode Island weekly paper published by “a group of young people with a life style unique to the norms of society” – at least according to the court – claimed it was wrongly denied press credentials by the city’s Commissioner of Public Safety. On the facts, the court found that the plaintiffs failed to comply with the city’s longstanding, but unpublished guidelines, requiring verification of the identity of the applicant and his or her service to the publication. The court recognized that using press credentials to regulate access raised First Amendment concerns, but in so far they were issued ministerially, the lack of written guidelines did not violate the First Amendment.

That same year an alternative California paper brought a similar challenge over the denial of a police-issued press pass that would allow access to crime and accident scenes. Los Angeles Free

1 See, e.g., American Journalism Newslink, Media Access: Online Journalists Find It’s Not Easy to Get Press Passes, June 2000 <http://ajr.newslink.org/ajrobriejun00.html>. For example, Salon.com, one of the best known online magazines, had to “fight,” in the words of its managing editor, to get access to presidential primary buses, Congress and the White House, and still occasionally has trouble gaining access to arts events and movie screenings. Id.
Under current policy, the LAPD issues credentials to full-time reporters and documented freelance reporters who state a need to cross police and fire lines. Policy available at <www.lapdonline.org>.

Without passing specifically on the legitimacy of denying press passes to people with felony convictions, the court noted that under reasonable standards the paper, as a member of the press, would be entitled to credentials, but the same standards might make certain individuals on the staff ineligible to carry a pass. (“For example, Defendants might well devise a standard that, inter alia, denies a pass to a 15-year old employee.”) See also Watson v. Cronin, 384 F. Supp. 652 (D. Colo. 1974) (finding no constitutional violation where a reporter with two felony convictions was denied press credentials by the Colorado Press Association).

Press, Inc. v. City of Los Angeles, 88 Cal. Rptr. 605 (Ct. App. 1970), cert. denied, 401 U.S. 982 (1971). At the time, the Los Angeles Police Department only issued passes to full-time beat reporters. Freelancers, part-time reporters, reporters who did not regularly cover police, fire and crime news, representatives of specialized publications such as trade papers, financial papers, or college newspapers were not eligible for credentials. Plaintiffs were denied passes because they did not regularly gather and report “hard core police-beat and fire news.” The court found the restriction was reasonable and did not arbitrarily discriminate against plaintiff since “regular coverage of police and fire news provides a reasonable basis for classification of persons who seek the privilege of crossing police lines. Id. at 610.

On the other hand, if denial of a press pass is arbitrary or content-based, the First Amendment is violated. In Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971), the publisher of an alternative newspaper in Davenport, Iowa successfully challenged the city’s refusal to issue it a police press pass. The police department denied the paper credentials because it determined that the paper was not “established” and because two members of the paper had felony drug convictions. While recognizing the legitimate interest in using press credentials to control physical access to crime scenes, the court found that the city could only issue such credentials according to publicly available standards that were narrowly drawn and reasonable.

The government cannot require reporters to file financial disclosure statements to obtain press credentials. Lewis v. Baxley, 368 F. Supp. 768, 1 Media L. Rep. 2525 (M.D. Ala. 1973). The court struck down as unconstitutional on its face a portion of an Alabama statute that would have required reporters covering state government to file a “statement of economic interest” in order to obtain press passes to press galleries, press rooms, the floor of the legislature, and press conferences by government officials. The requirement was part of a new ethics statute for state officials. The state defended the financial disclosure requirement for press credentials on two grounds. First, that it would protect the public from “improperly influenced news” and second, that it would protect the public from “surreptitious lobbying newsmen.” As to the first, the court found that not only was this not a compelling government interest, but it was “an interest with which the government may not constitutionally concern itself at all.” Id. at 779. As to the second, assuming arguendo that such lobbying by reporters even existed, the statute was not narrowly tailored to meet the government’s interest. “The state may regulate lobbying and lobbyists as such, but the state may not require disclosure from occupational groups virtually at random upon the theory that one or more members may be lobbyists.” Id.

2 Under current policy, the LAPD issues credentials to full-time reporters and documented freelance reporters who state a need to cross police and fire lines. Policy available at <www.lapdonline.org>.

3 Without passing specifically on the legitimacy of denying press passes to people with felony convictions, the court noted that under reasonable standards the paper, as a member of the press, would be entitled to credentials, but the same standards might make certain individuals on the staff ineligible to carry a pass. (“For example, Defendants might well devise a standard that, inter alia, denies a pass to a 15-year old employee.”) See also Watson v. Cronin, 384 F. Supp. 652 (D. Colo. 1974) (finding no constitutional violation where a reporter with two felony convictions was denied press credentials by the Colorado Press Association).
There are four Congressional press galleries organized by medium: 1) the print reporters gallery; 2) the television and radio correspondents gallery; 3) the press photographers gallery; and 4) the periodical press gallery. The accreditation rules for each are available at <www.senate.gov/galleries>.

Lewis was decided the year after the Supreme Court issued its decision in Branzburg v. Hayes, 408 U.S. 665 (1972) and the district court directly connected the credentialing issue to the larger principle articulated in Branzburg, that “freedom to publish news, without some protected ability to gather it, would render freedom of the press an unduly gossamer right.” Lewis at 775.

A leading case on the credentialing process is Consumers Union of United States, Inc., v. Periodical Correspondents’ Association et al., 365 F. Supp. 18, 1 Media L. Rep. 2534 (D.D.C. 1973), rev’d on other grounds, 515 F.2d 1341, 1343-46 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976). Consumer Union is an unusual media versus media dispute. While clearly articulating the First Amendment issues at stake, the case was ultimately found to be nonjusticiable.

Consumer Union, publisher of Consumer Reports magazine, claimed the magazine was arbitrarily denied credentials and it sought a declaratory order that it be admitted to the Periodical Press Galleries of Congress. The main defendants were a group of veteran Washington journalists who formed the Executive Committee of Correspondents. Congress had delegated to the committee the task of credentialing periodical journalists covering Congress. Periodical Press Gallery credentials conferred certain privileges such as special seating, use of telephones and typewriters, access to the Senate Presidents’ Room and the House Speaker’s Lobby to arrange interviews, and, most significantly, the exclusive permission to attend on-the-record daily press conferences held by the Senate leadership and the Speaker of the House. In addition, membership also greatly facilitated access to press conferences at the White House and administrative agencies.

In 1972, the Executive Committee denied Consumers Reports credentials on the grounds that it was not “owned and operated independently of any industry, business, association, or institution,” as required by Rule 2 of the Rules Governing Periodical Press Galleries.” Id. at 22. Essentially the committee found that the magazine was primarily an advocacy group for consumer interests, and that “if any advocacy group’s publication is admitted, it might be difficult in all fairness to deny admission to union publications, house organs of corporations, foundation publications, university magazines, etc.” Id. at 22. But the district court found little consistency to this standard when the committee had credentialed such publications as Automotive News, Banking Industry Magazine, Drug Topics and Drug Trade News, Food Processing & Marketing, Investment Dealer’s Digest, Leather & Shoes Magazine, Pacific Shipper, and Western Stamp Collector.

Outlining the First Amendment issues at stake the court noted:

The press must be free to criticize officials and to discuss public affairs with impunity. Halfway measures will not protect this precious freedom. A free press is undermined if the access of certain reporters to facts relating to the public’s business is limited merely because they advocate a particular viewpoint. This is a dangerous and self-
defeating doctrine.

[T]he elimination of some reporters from an area which has been voluntarily opened to other reporters for the purpose of news gathering presents a wholly different situation. Access to news, if unreasonably or arbitrarily denied by congressional action or publishers meeting under congressional auspices, constitutes a direct limitation upon the content of news, as recognized in *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

*Id.* at 25-26.

The district court concluded that the exclusion of a publication from the galleries could only be sanctioned under carefully drawn rules that would provide for an adequate and impartial review when a publication is excluded.

The D.C. Circuit reversed, holding that the controversy was nonjusticiable. 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). Although “mindful” of the First Amendment issues raised, the court found that the defendants were “acting by virtue of an express delegation of authority as aides or assistants of Congress. If their actions would have been immune from inquiry under the Speech or Debate Clause had they been performed by Members of Congress, the same immunity would attach to appellants.” *Id.* at 1350.5

5 The decision also includes some interesting historical background.

When Congress first convened in 1789, “the Legislative as well as Executive sittings of the Senate were held with closed doors” (1 Annals of Cong. 16 (1789)), but the House of Representatives admitted the press to the floor so they might report the debates of the House (1 Annals of Cong. 952-56 (1789)). In 1794, the Senate authorized limited access to its galleries by the public and in 1802 resolved that "any stenographer or notetaker, desirous to take the debates of the Senate on Legislative business, may be admitted for that purpose at such place, within the area of the Senate Chamber, as the President shall allot." (11 [7th Congress] Annals of Cong. 22 (1802 [1801-1802])). For a time thereafter, reporters were permitted on the floors of the Senate and House. This privilege apparently was abused with considerable frequency by journalists importuning Members on behalf of various claims before Congress. (Cong.Globe, 32d Cong., 2d Sess. 52 (1852)). For that reason and the growing congestion on the floors, both Houses finally enacted rules permanently removing the press from the floors of Congress. Press galleries above the floors were eventually established and in 1888 the Senate (Cong.Directory, 50th Cong., 1st Sess. 160 (1888)), and 1916 the House (53 Cong.Rec. 1214 (1916)), entrusted their management to a Standing Committee of Correspondents.

Regulations governing the management of the galleries, now separated into the Press Galleries, Radio and Television Correspondents' Galleries, Periodical Press Galleries, and Press Photographers’ Gallery, are promulgated by Congress, which retains the right of final approval of applications for admission to the galleries. The House and Senate Periodical Press Galleries are governed by identical rules published in the Congressional Directory and signed by the Speaker of the House of Representatives and by the Chairman of the Senate Committee on Rules and Administration. 515 F.2d at 1343-44.
Two years later, the D.C. Circuit court revisited the credentials issue – this time with respect to applications for White House press passes that are not covered by legislative immunity. *Sherrill v. Knight*, 569 F.2d 124, 3 Media L. Rep. 1514 (D.C. Cir. 1977). In this case a veteran journalist who was credentialed by the House and Senate press galleries was denied a press pass to the White House for unidentified “security reasons.” The record established that there were no written standards for issuing White House credentials, but that reporters accredited to the House and Senate would generally be issued White House credentials, subject to a Secret Service security check. *Id.* at 126. In this case, the reporter failed the security check because thirteen years earlier he was arrested and fined for assaulting a press secretary, allegedly after a heated dispute over the accuracy of one of the reporter’s articles. 6

It was assumed that the reporter would otherwise qualify for a White House press pass. Thus the specific issue before the court was what due process rights are required under the First Amendment when a reporter is denied a pass for security reasons. On this point, the court recognized that the security of the President, and the President’s family and staff, are compelling interests. Nevertheless the court held that there should be some procedural due process, including that the government provide notice of the reasons for the denial of a press pass, provide an opportunity to respond to these reasons, and provide a final statement giving the reasons for denial. *Id.* at 130.

Ten years later, *Sherrill* was cited to prevent New York’s private race track authority from selectively limiting the press pass of a racing publisher. *Stevens v. N.Y. Racing Association*, 665 F. Supp. 164, 14 Media L. Rep. 1641 (E.D.N.Y. 1987). The publisher was issued a restricted press pass prohibiting him or his paper’s photographers from taking pictures in the paddock area, allegedly because he was too pushy, flamboyant, and a general nuisance who made himself bigger than the events he was covering. As an initial matter, the court held that the private race association was a state actor – and thus subject to the First Amendment – because it was highly regulated, economically intertwined with the state and authorized by law to issue press passes. 7

On the merits, the court held that the restriction was content-based as demonstrated by the complaint that plaintiff reporting “made himself bigger than the event.” Defendant’s claim that plaintiff was a nuisance was found to be pretextual. Accordingly, “the first amendment prohibits government from restricting a journalist's access to areas otherwise open to the press based upon the content of the journalist's publications.” *Id.* at 175 citing *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977).


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7 See also Ludtke v. Kuhn, 461 F. Supp. 86, 4 Media L. Rep. 1625 (S.D.N.Y. 1978) (New York City’s involvement with Yankee Stadium, including its lease arrangement with the Yankees, was sufficient state action to bar club from excluding female sports reporter from Yankee Stadium locker room).
1999), cert. denied, 528 U.S. 1179 (2000), the D.C. federal courts again applied the legislative immunity principle to dismiss a claim by a reporter who was denied credentials to the Periodical Press Gallery. Plaintiff was the owner and sole reporter for Federal Information News Syndicate (FINS), a biweekly Internet news publication on federal legislation and policies. The committee members denied plaintiff credentials because FINS was distributed by e-mail for free, plaintiff did not receive a salary from FINS, and he did not earn his livelihood as a journalist. The D.C. Circuit affirmed dismissal of the complaint, finding the dispute “nonjusticiable.” The court reaffirmed that although there could be other, arguably better ways, to issue credentials, the committee’s decisions are unreviewable—at least absent an allegation of bad-faith denial. The decision therefore gives Congress absolute deference as a constitutional prerogative to the reasonableness and process for issuing credentials, but leaves open to challenge a content-based denial which might not be covered by immunity.

The most recent case involved a sports fan’s website. Smith v. Plati, 56 F. Supp. 2d 1195 (D. Colo. 1999), aff’d, 258 F. 3d 1167 (10th Cir. 2001). Plaintiff, a licensed attorney proceeding pro se, publishes a website called Netbuffs.com covering the University of Colorado football team (the “Buffaloes”) and other university sports. Plaintiff alleged that while he was initially allowed to photograph and interview players and coaches, and obtain other documents for use on his site, he was later “arbitrarily and capriciously” denied access to information about university sports programs by the Office of Athletic Media Relations (as well as being subject to a false arrest while “newsgathering” at the university). The plaintiff did not formally request to be credentialed but rather sought an order declaring that he be recognized as “media” and “press.”

The complaint was apparently not a model of clarity. Moreover, in his brief plaintiff simply argued that there is “some sort of right to newsgathering” and “some sort of protection against arbitrary and even malicious giving of access to some but denial to others.” 258 F. 3d at 1177-78. The district court dismissed this portion of the complaint for failure to state a claim and the Tenth Circuit recently affirmed. While the result in the case may be due to plaintiff’s sloppy draftsmanship, neither court showed sympathy for the underlying merits. Without citing any authority, the district court reasoned that the University and its Media Relations Director were simply “doing business when they provide access to information or special privileges to some and not to others. They are not required to ‘do business’ with Smith.” Id. at 1206. Moreover, the court was notably uncomfortable with determining whether or not plaintiff was a journalist.

More fundamental, however, is the question of who is entitled to recognition as “press” in the first place. One commentator suggests the Supreme Court has denied members of the press special privileges under the First Amendment because

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9 With respect to plaintiff’s claims the Tenth Circuit anoted that “we cannot accord him the advantage of the liberal construction of his complaint normally given pro se litigants because he is a licensed attorney.” 258 F. 3d at 1174.
“according the press special rights presents the insolvable problem of determining who qualifies as ‘the press.’” The Supreme Court, 1977 Term, 92 Harv. L. Rev. 174, 179 (1978). Furthermore, “any meaningful definition of the press would involve the state in choosing among media representatives in a potentially unconstitutional manner.” Id.

Id. at 1203.

Affirming, the Tenth Circuit found that plaintiff cited no “precedent establishing the right of access he seeks,” specifically finding plaintiff’s request for a mandamus order directing the Media Relations Director to give plaintiff the same access as other reporters to be judicially unworkable. 258 F. 3d at 1178-79.

**Conclusion**

To date the fight by websites to qualify for credentials has taken place mostly outside the courtroom, as websites seek to establish their journalistic bona fides and find an audience. Whether the Netbuffs case marks the beginning of a second hot front in the credentials dispute – this one concerned with the difficult threshold question of who is a journalist in the New Media Age – remains to be seen. The better reasoned cases applying the First Amendment to the credentialing process have held, in general, that while the press may not be entitled to special access, once the government issues press credentials the standards must be reasonable, viewpoint neutral and provide for some due process.\(^\text{10}\) The public sphere may be the best place to test and resolve disputes over who is or is not a journalist. To the extent questions are litigated, old media press credential cases contribute the idea of reasonableness, viewpoint neutrality and due process – salutary concepts applicable to yesterday’s “alternative” press as well as today’s.

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A. FINDINGS OF THE LDRC 50 STATE SURVEY 2001-2002: MEDIA LIBEL LAW

1. Defamatory Meaning

Examples of Defamatory and Nondefamatory Speech

Defamatory


The Third Circuit in Tucker v. Fischbein, 237 F.3d 275, 283, 29 Media L. Rep. 1161 (3d Cir.), cert. denied, 122 S. Ct. 43 (2001), held that accusing plaintiffs of bringing a $10 million lawsuit against rapper Tupac Shakur because his lyrics “damaged their sex life” were capable of a defamatory meaning under Pennsylvania law because the statements implied plaintiffs were “insincere, excessively litigious, avaricious, and perhaps unstable” as well as hypocritical in light of their seeming willingness to make their own sex life a matter of public record in the pursuit of monetary gain.

The D.C. Circuit Court of Appeals found that an article in the New Republic magazine reporting that Republican activist Paul Weyrich “snapped,” erupted in a “volcano of screaming,” “froth[ed] at the mouth,” and dispatched a letter “questioning [loyalty] and implying that [an individual] was unfit for marriage” was capable of the defamatory meaning that Weyrich was highly volatile, irrational and unsound, and “odious, infamous, or ridiculous.” Weyrich v. New Republic Inc., 235 F.3d 617, 627, 29 Media L. Rep. 1257, 1263 (D.C. Cir. 2001).

A New York district court held that statements by a media watchdog group criticizing the “WWF Smackdown” wrestling show for inspiring children viewers to copy the show and arguing that this led to the death of four children was defamatory. World Wrestling Federation Entertainment v. Bozell, 142 F. Supp. 2d 514, 29 Media L. Rep. 1929 (S.D.N.Y. 2001).

Nondefamatory

The following terms were found not to be defamatory: “paranoia” when used in the popular rather than clinical sense, Weyrich v. New Republic Inc., 235 F.3d 617, 29 Media L. Rep. 1257 (D.C. Cir. 2001); “militant,” Idema v. Wager, 120 F. Supp. 2d 361 (S.D.N.Y. 2000); “bum,” Kennedy v.

The Seventh Circuit continued to afford a significant degree of protection to expressions that are mere “name-calling” or rhetorical hyperbole. For example, a Forbes magazine report that plaintiff engaged in “sharp dealing” was nothing more than an “uncharitable opinion” and “Illinois does not attach damages to name-calling” and other rhetorical hyperbole. Wilcow v. Forbes, Inc., 241 F.3d 552, 557, 29 Media L. Rep. 1410 (7th Cir. 2001). The terms “stiffing” and “rob” to characterize plaintiff’s use of banking rules similarly did not imply illegal conduct. The author of the decision, Judge Frank Easterbrook, a notable proponent of law and economics theory, also opined that the magazine’s reference to plaintiff’s “greed” was simply non-actionable, because “sedulous pursuit of self-interest is the engine that propels a market economy.”

An article that alerted the readers to a disputed issue by using the introductory phrase “increasingly ugly dispute tinged with charges of Anti-Semitism” was not defamatory because it did not imply that the subjects were, in fact, anti-Semitic. Nat’l Assoc. of Gov’t Employees v. BUCI Television Inc., 118 F. Supp. 2d 126, 130-31 (D. Mass. 2000). Rather, this statement merely cautioned the readers to carefully interpret the statements from both sides. Id.

An editorial cartoon depicting a judge in a jail cell could not reasonably be interpreted as factual or defamatory. Ferreri v. Plain Dealer Publishing Co., 756 N.E.2d 712 (Ohio App. 2001). Similarly, a host of statements made during a political campaign describing Gennifer Flower’s statements about her relationship with Bill Clinton as “trash,” “crap,” and “garbage,” were mere rhetorical hyperbole, Flowers v. Carville, 112 F.Supp. 2d 1202, 1211, 28 Media L. Rep. 2352 (D.Nev. 2000), as were the words ‘thief’ and ‘liar’ directed at a political foe, Rosenaur v. Scherer, 88 Cal. App. 4th 260, 280, 105 Cal. Rptr. 2d 674, 688 (2001).

An op-ed piece on CNN’s withdrawn Operation Tailwind story that opined that the CNN story was false and that plaintiff was a source for the CNN report, could not reasonably be understood as meaning that plaintiff committed war crimes. Van Buskirk v. N.Y. Times Co., 28 Media L. Rep. 2525 (S.D.N.Y. 2000).
**Of and Concerning**

The First Circuit reviewed at length whether the “of and concerning” rule is constitutionally required in libel actions against non-governmental entities or employees, or is merely a creature of state common law in such settings. *Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 26-30, 29 Media L. Rep. 1113, 1115-1118 (1st Cir. 2000). The court expressed doubt as to it being constitutionally required in such cases, but found it ultimately a question for the U.S. Supreme Court to answer. The plaintiff, the sole Isuzu dealer in Puerto Rico, brought libel and related claims against Consumers Union based on an article in *Consumer’s Reports* criticizing the safety of the Isuzu sports utility vehicle. Relying on Puerto Rico law, the court affirmed dismissal of the defamation claims on the ground that the article and other statements about Isuzu were not “of and concerning” the plaintiff.

In a long running case marked by three favorable defense decisions reversed on appeal, an Oklahoma appellate court reversed a jury verdict in favor of a broadcaster finding, *inter alia*, that the trial judge improperly instructed the jury regarding the of and concerning requirement. *Malson v. Palmer Broadcasting Group*, 18 P.3d 359, 2001 OK CIV APP 10 (Okla. Ct. App. 2000) (*Malson III*). At issue was a 1993 broadcast reporting that plaintiffs’ company was illegally dumping toxic wastes. The trial court initially granted summary judgment to the broadcaster, a decision the Oklahoma Supreme Court reversed finding material issues of fact regarding negligence. *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940 (1997) (*Malson I*). The co-plaintiff husband, who was mentioned in the broadcast, died during the pendency of the case. The trial court then granted summary judgment to the broadcaster on the wife’s claims since she was not mentioned in the broadcast and she did not have a significant role in the company. The appellate court reversed and remanded for trial, finding issues of fact whether the broadcast harmed her reputation. *Malson v. Palmer Broadcasting Group*, 1998 OK CIV APP 68, *; 963 P.2d 13 (*Malson II*). After a one week trial in 1998, the jury returned a verdict in favor of the broadcaster.

The appellate court found that the trial court erroneously instructed the jury that “Virginia Malson cannot recover for defamatory statements, if any, that KFOR-TV made about her husband, Glenn Malson, or about M&M Drum Company.” The court held that the instruction violated the decision in *Malson II* that it was a jury question whether references to plaintiff’s husband and their business harmed her reputation.

Defamation by Implication or Innuendo

The Texas Supreme Court in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), explicitly recognized a cause of action for “libel by impression.” Under the decision, impressions or implications arising either from an entire broadcast (or article) or discrete portions thereof may be actionable, even when all the facts in a piece are true or substantially true, when either the omission of additional facts or the juxtaposition of facts create a false impression. According to the Texas Libel Survey, the decision apparently spells the end of a line of cases, based on an earlier Texas Supreme Court case, *Randall’s Food Market, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995), which held that libel by implication did not exist when an article’s facts were substantially true. *See, e.g.*, *Green v. CBS Broadcasting, Inc.*, 29 Media L. Rep. 1321 (N.D. Tex. 2000) (citing *Randall* for proposition that Texas does not recognize libel by implication for true statements).

Two subsequent state appellate court decisions discussed *Turner*. In *Wheeler v. New Times, Inc.*, 49 S.W.3d 471 (Tex. App. 2001) (affirming summary judgment in favor of media defendant), the court described *Turner* as providing for liability “when a publication gets the details right but fails to put them in the proper context and thereby gets the story’s ‘gist’ wrong.” *Id.* at 475-76. The court characterized this as “the converse of the substantial truth doctrine which precludes liability for a publication that correctly conveys a story's ‘gist’ or ‘sting,’ although erring in the details.” *Id.*

Another appellate case gave *Turner* a broad reading. *Granada Biosciences, Inc. v. Forbes, Inc.*, 49 S.W.3d 610, 29 Media L. Rep. 2281 (Tex. App. 2001) (reversing summary judgment for media defendant). Plaintiffs sued *Forbes* for business disparagement. Even though plaintiffs had neither identified specific omissions or juxtapositions, nor identified any false meaning arising from the article “as a whole” that was separate from their complaints about specific statements in the article, the court found that their general allegation that “virtually in its entirety, the *Forbes* article is disparaging and false” was enough to raise a claim that the article “as a whole” was disparaging under *Turner*.

In *Fanelle v. LoJack Corp.*, 29 Media L. Rep. 1513 (E.D. Pa. Dec. 7, 2000), the federal district court discussed at some length the issue of libel by implication. The plaintiff had been arrested as part of an auto theft ring and his arrest was reported in the *Philadelphia Inquirer*. Plaintiff was later acquitted of auto theft charges. The defendant included a copy of the newspaper article reporting the arrest in a promotional brochure touting its anti-theft system. Plaintiff sued for libel and related claims alleging he was falsely portrayed as a criminal. The district court denied summary judgment. As to the libel by implication claim, the court opined that while the Pennsylvania Supreme Court had not yet addressed the issue, it would recognize a cause of action for defamation in a case where true facts are juxtaposed or facts are omitted in a way that gives rise to a defamatory implication.

Furthermore, in *Fanelle* the district court concluded that the elements of a libel by implication claim are the same as in a standard defamation claim, specifically declining to require that plaintiff prove that the defendant intended or endorsed the implication. *Id.* at 1517 n. 7. According to the
such a high threshold is [not] required or warranted in defamation-by-implication cases. An implication is no less defamatory when it is cloaked in literal truth; on the contrary, the patina of accuracy may exacerbate the harmfulness of a statement by making it more palatable and believable to the recipient.”

In Schoff v. York County, 761 A.2d 869, 872 (Me. 2000) (affirming dismissal of a defamation by implication claim against a source interviewed by the media) the Maine Supreme Court stated that under Maine law true statements can give rise to defamation claims if true statements are “phrased and arranged . . . in such a way as to give them a false and defamatory meaning” or if the speaker or publisher omits true information that if stated would dispel the defamatory sting. The court did not mention whether a plaintiff is required to show that the defendant intended to convey the false impression.

In contrast, in Worrell-Payne v. Gannett Co. Inc., 134 F. Supp. 2d 1167 (D. Id. 2000), the Idaho federal court stated with respect to a series of libel by implication claims that, assuming that Idaho recognizes defamation by implication, the plaintiff would have to demonstrate that the articles “are reasonably capable of sustaining the false implications” with “clear and convincing evidence from which a jury could find that the [newspaper] actually intended to convey the false impressions.” Id. at 1176-77.

And in Zakaib v. City of Cleveland, 2001 Ohio App. LEXIS 1779 (Ohio App. April 19, 2001), the court noted that the words “drug free” printed on boards used to board up plaintiff’s property reasonably could be understood as implying that plaintiff had been involved in the drug trade. But the court applied the innocent construction rule to hold the statement non-defamatory, since the literal meaning of the statement, that the property was drug free, was a reasonable construction.

**Incremental Harm / Subsidiary Meaning / Libel Proof Plaintiff**

In Ferreri v. Plain Dealer Publishing Co., 756 N.E.2d 712 (Ohio App. 2001), an Ohio appellate court applied the incremental harm doctrine to defamation claims by a juvenile court judge against The Plain Dealer. One article sued on reported, among other things, that the plaintiff was accused of publicly making false statements about judges and other court officials, had been accused of judicial misconduct and a violation of the Code of Professional Responsibility, and was generally combative, telling a court official to shut-up and asking another judge if he knew how to read. “Against this backdrop, the statement at issue – that appellant appeared before the administrative judge to argue about why he should hold on to several high-profile cases that belonged on another judge's docket – could not harm appellant's reputation in any way beyond the harm already caused by the other non-actionable statements in the article.” Id. at 723.

Acknowledging the similarities between the doctrines of incremental harm and libel proof plaintiff, a Connecticut state trial court recognized the incremental harm doctrine as a defense in Allan v. The Hartford Courant, et al, 2001 Conn. Super. LEXIS 732 (Conn. Super. Mar. 8, 2001) (citing
Jones v. The Globe International, Inc., 24 Media L. Rep. 1267 (D. Conn. 1995) which found Marla Maples’ former publicist, who had already been convicted of burglary, possession of stolen property and criminal possession of a weapon, and who admitted sexual-psychological fascination with women’s shoes; to be libel proof).

In Church of Scientology Int’l v. Time Warner, Inc., 238 F.3d 168, 176, 29 Media L. Rep. 1243 (2d Cir.), cert. denied, 122 S. Ct. 40 (2001), the Second Circuit examined the related “subsidiary meaning doctrine.” The court affirmed summary judgment in favor of Time magazine, an individual reporter and Time’s corporate parent in an action by the Church of Scientology over a 1991 magazine article entitled “Scientology: The Cult of Greed,” a highly critical report on Scientology which described it as “posing as a religion” but being “really a ruthless global scam,” and citing various instances of wrongdoing. The court affirmed that several statements complained of were not of and concerning plaintiff. As to others, the plaintiff failed to establish that the reporter entertained serious doubts or purposefully avoided the truth. Moreover, absent such proof, reporter’s alleged bias towards plaintiff was not probative of actual malice. The court also affirmed that remaining statements at issue were barred by the “subsidiary meaning” doctrine recognized in Herbert v. Lando, 781 F.2d 298, 312 (2d Cir. 1986) where the Second Circuit held “that when a ‘published view’ of a plaintiff is not actionable as libel, other statements made in the same publication are not actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held that there can be no recovery.” Distinguishing the subsidiary meaning doctrine from incremental harm, the court explained that the former bears upon whether a view was published with actual malice and thus is a question of federal constitutional law.

In Kennedy v. Southeastern Newspapers, 28 Med. L. Rep. 2519, 2523 (Ga. State Ct. 2000), the trial court found that a plaintiff with a lengthy criminal history, including convictions for assault and disorderly conduct, was libel proof, dismissing his claims as a matter of law.

Publication

The Washington State Supreme Court issued a ruling that raises questions about the extent to which Washington will continue to follow the intracorporate publication doctrine as set forth in Prins v. Holland-North Am. Mortgage Co., 107 Wash. 206, 181 P. 680 (1919), a case widely cited for the rule (followed in about a dozen states) that communications among employees of the same corporation cannot satisfy the “publication” element of defamation. Doe v. Gonzaga University, 24 P.3d 390, 397 (2001). Doe does not overrule Prins, but suggests that the bright-line immunity for intracorporate statements will not be applied where the corporate speaker is acting outside the scope of his or her employment. Doe does not make entirely clear whether intracorporate statements that are within the scope of the speaker’s employment are to be regarded as unpublished, or merely protected by a qualified privilege.

Group Libel
In Bujol v. Ward, 778 So. 2d 1175 (La. App. 5th Cir. 2001) the court affirmed dismissal of a defamation suit by half the members of a forty-six person police street crimes unit. The members sued over statements that the unit used excessive force on black suspects. The court found that the statements were not directed at any particular plaintiffs, citing Restatement (Second) of Torts, § 564A which recognizes a cause of action for group libel, only if: (a) the group or class is so small that the matter can reasonably be understood to refer to the member; or (b) the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member.

A Virginia trial court dismissed a “small group libel” claim by a police officer from a five person department over statements made about the department as a whole. Relying on New York Times v. Sullivan, the court held that there was no individual cause of action because the statements were an attack on the government and not the plaintiff. Dean v. Town of Elkton, No. CL00-11958, (Rockingham Cir. Ct. February 21, 2001).

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.

In Weyrich v. New Republic, Inc., 235 F.3d 617, 624, 29 Media L. Rep. 1257, 1260 (D.C. Cir. 2001), the court analyzed a number of alleged defamatory statements in a political magazine’s profile of a leading conservative activist to determine whether they stated verifiable facts. For example, the statement that plaintiff “‘began to suffer bouts of pessimism and paranoia,’” though pejorative, was not actionable, since “paranoia” was used “in its popular, not clinical, sense.” In a similar vein, a caricature of plaintiff leaning against guillotine with disembodied heads of conservative politicians at feet was not actionable. Id. at 621, 29 Media L. Rep. at 1258. However, the court found that “an article’s political ‘context’ does not indiscriminately immunize every statement contained therein.” Id. at 626, 29 Media L. Rep. at 1262. Specifically, anecdotes presented in quotation marks that described plaintiff’s temper – that he “snapped,” erupted in a “volcano of screaming,” and “frothed at the mouth” – were presented as verifiable facts, arguably making plaintiff appear “highly volatile, irrational, unsound and otherwise odious, infamous, or ridiculous.” Id., 29 Media L. Rep. at 1263.

In another case in the political context, punctuation conveyed that certain statements were the author’s own impressions and therefore not actionable. Flowers v. Carville, 112 F.Supp.2d 1202, 28 Media L. Rep. 2352, 2358 (D.Nev. 2000). For example, with respect to statements by former Clinton aide George Stephanopolous about Gennifer Flowers, the court found that “throughout his book Stephanopolous used italics and punctuation, such as question marks, to identify his personal thoughts and observations, thereby creating the impression that the statements are opinion and not assertions of objective fact.”

The Fourth Circuit affirmed a Maryland court’s holding that an Internet investor service’s
description of a financial newsletter as an “unpaid promoter” of stocks was not actionable because it was opinion based on clearly disclosed facts. *Agora, Inc. v. Axxess, Inc.*, 248 F.3d 1133 (*per curium*) (unpublished, table), 29 Media L. Rep. 1734 (4th Cir. April 9, 2001), aff’d, 90 F. Supp. 2d 697, 28 Media L. Rep. 2017 (D. Md. 2000). The district court also held that introductory statements by the defendant about “real reporting,” “mere puffery,” and “pseudo analysis” were merely “generalized, subjective valuations” and not factual statements that could form the basis for a defamation action.

The Ohio Supreme Court held that the state constitution’s separate and independent protection for opinion is not limited in its application to statements made by media defendants. *Wampler v. Higgins*, 752 N.E.2d 962, 29 Media L. Rep. 2377 (Ohio 2001). Ohio follows the four-part test for determining opinion popularized by *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), which is considered broader than the U.S. Supreme Court decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *See Vail v. Plain Dealer Publishing Co.*, 649 N.E.2d 182 (Ohio 1995). At issue in the *Wampler* case was a letter to the editor using the phrases “exorbitant rent,” “self-centered greed,” “astronomical figure,” “mindless corporation,” “blood of easy money,” and “ruthless speculator” to describe a local landlord. The trial court granted summary judgment on the ground that the statements were hyperbolic and nonactionable and an intermediate appellate court affirmed. The Ohio Supreme Court similarly affirmed holding that the *Vail* standard applied to the nonmedia defendant. The decision resolved a conflict created by one appellate court decision that held that *Vail* did not apply to nonmedia defendants or to media defendants republishing the opinions of nonmedia defendants. *Conese v. Nichols*, 1998 WL 107659 (Ohio App. 1998).

That a judge “has not and never will have the self-control, the evenness of temperament, the strict sense of fairness, the willingness to listen, the innate sense of dignity--indeed, any of the qualities that make a mere lawyer into a good jurist” and other editorial attacks were found to be protected opinion in another Ohio case. *Ferreri v. Plain Dealer Publishing Co.*, 756 N.E.2d 712 (Ohio App. 2001). According to the court, the editorial’s sarcasm and vivid rhetoric clearly signaled readers that the statements were “reflections, argument, thinking, hopes, belief and views.” *Id.* at 721.

However, in a case decided under Ohio’s election law, a court found that campaign material claiming that a candidate “is currently campaigning against industrial growth,” “actively campaigned” for a developer to rezone property and “stopped a referendum petition” was not protected opinion. The statements concerned specific, verifiable actions by the candidate and the material requested the reader to “Remember these facts when you vote.” *The Team Working For You v. Ohio Elections Commission*, 754 N.E.2d 273 (Ohio App. 2001).

In *Colon v. Town of West Hartford*, 2001 U.S. Dist. LEXIS 484 (D. Conn., Jan. 5, 2001), the district court held that a newspaper editorial criticizing a police officer was commentary on true, disclosed facts and therefore protected by the First Amendment, emphasizing that an editorial author

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1 Ohio Rev. Code Ann. § 3517.21(B)(10) (prohibiting false campaign statements made with actual malice).
“is constitutionally permitted to use exaggeration, hyperbole, ridicule, sarcasm, stylistic touches and figurative expressions to embellish disclosed facts.” Id. at *11-12. Similarly, an op-ed column in a trade publication accusing plaintiff of being hostile to labor was a statement of opinion and not hard news. *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580, 582-83 (D.C. 2000).

The U.S. District Court for the Northern District of Illinois issued several decisions upholding the opinion defense. One unusual case had a reporter suing a company he reported on for accusing him of questionable newsgathering tactics. *Skolnick v. Correctional Med. Servs.*, 132 F. Supp. 2d 1116, 1128, 29 Media L. Rep. 1561 (N.D. Ill. 2001). Plaintiff had co-authored several articles published in the *St. Louis Post Dispatch* that criticized the defendant company’s business of providing health care services in prisons. After plaintiff’s articles were published, the defendant, among other things, had its attorney, Thomas Yannuci, send a 21-page letter of complaint to the newspaper putting it on notice that the plaintiff was “dishonest, fraudulent, and deceitful.” The court found these and other statements accusing plaintiff of inaccurate reporting to be matters of opinion and hyperbole rather than statements of fact.

The Northern District of Illinois also applied the opinion defense in *Bogosian v. Board of Educ. of Community Unit Sch. Dist.* 200, 134 F. Supp. 2d 952, 957 (N.D. Ill. 2001) (determination as to whether statement is capable of objective verification based on “totality of the circumstances”; mixed expressions of fact and opinion actionable if facts are subject to such verification); *Conseco Group Risk Mgmt. Co. v. Ahrens Fin. Sys.*, 2001 WL 219627, at *9 (N.D. Ill. 2001) (description of plaintiff’s actions as “irrational,” “very detrimental to clients,” and “unusual” steps that put clients “in a tough situation” were non-defamatory opinions stating defendant’s interpretation of plaintiff’s actions with subjective language); *Wynne v. Loyola Univ. of Chicago*, 741 N.E.2d 669 (2000) (memo that a professor “appeared to wheedle, persuade, nag, and domineer” for changes in education program, “began striking deals,” and molded the program “into her own view” were opinions).

Other statements found to be protected opinion: that plaintiffs were “implicated” and “involved” was too vague to imply criminal conduct, *Campbell v. Citizens for an Honest Government, Inc.*255 F.3d 560 (8th Cir. 2001); that plaintiff had been “less than honest,” *Abbott v. Harris Publications*, 28 Media L. Rep. 2642 (S.D.N.Y. 2000); that an individual was “suspected” of committing a crime, *Garrett v. Tandy Corp.*, 142 F.Supp.2d 117, 120-21 (D.Me.2001) (the statement’s uncertainty stops it from implying anything defamatory); that a judge was a “racist and bigot,” *In re Green*, 11 P.3d 1078 (Colo. 2000); checking off “poor” in the category of emotional stability on an employee’s evaluation since “the concept of emotional stability calls for a wide range of subjective judgment” and it “depends upon the observer’s point of view,” *Bianchi v. Commonwealth Childcare Corporation*, 12 Mass. L. Rptr. 312, 313-314 (Mass. Super. Ct. 2000).

In an interesting non-media case, the Nevada Supreme Court declined to extend the opinion defense to a handout distributed by parents that republished excerpts from a complaint filed against a school director and commented upon the validity of the lawsuit. *Lubin v. Kunin*, 17 P.3d 422 (2001). The handout, which was distributed to the press, referenced a complaint filed against the school director for child abuse, assault, battery, negligence, and other causes of action. The handout
included the following paragraph: “This is not a frivolous law suit there is an abundance of evidence as well as eye-witnesses. These parents never envisioned that anything of this nature could or would happen to their child. IT DID! It is time to protect our children.” Id. at 424. The court held that whether the statements were fact or opinion presented jury questions, reasoning that “the inclusion of a reference to the court pleading indicating that [plaintiff] was being sued for child abuse lent an ‘air of accuracy’ to the parents’ later statement that this child abuse ‘DID!’ happen.” Id.

3. Truth/Falsity

Substantial Truth

The 2001-2002 Media Libel Survey reports on several cases applying the doctrine of substantial truth to allegations of misconduct and descriptions of legal proceedings – common scenarios giving rise to libel claims.

In Barnett v. Denver Publ’g Co., Inc., 2001 Colo. App. Lexis 708 (Colo. App. 2001), the Colorado Court of Appeals held that the statement in a newspaper article that plaintiff was convicted in a “stalking incident” was substantially true where plaintiff pleaded guilty to misdemeanor harassment and the judge at the sentencing hearing stated that plaintiff’s activity “was almost stalking.” The court noted that “technical errors in legal terminology and reports involving violation of the law are of no legal consequence.”

In contrast, a newspaper article reporting that a doctor was “socked” by a malpractice verdict was not substantially true where the verdict was against the hospital and not the individual doctor, even though the article reported that “the hospital plans on pursuing Gupta for his alleged negligence in the matter.” Gupta v. The Lima News, 744 N.E.2d 1207 (Ohio 2000).

In a non-media case, a Kentucky appellate court reversed a $20 million verdict to a group of fired employees who were accused of stealing candy. Wal-Mart Stores, Inc. v. Stringer, et al., 1999-CA-000840-MR (Ky. App. March 9, 2001). The plaintiffs, former Wal-Mart employees, had been fired for eating “claims candy,” candy in broken packages that would regularly be donated to charities or given away. The plaintiffs claimed, among other things, that Wal-Mart defamed them by stating they were fired for theft. Reversing the jury award, the court held, as a matter of law, that Wal-Mart’s statement regarding the employees’ termination was true where the employee handbook stated that eating such candy without paying is “dishonest.”

Similarly, a Pennsylvania court held there was no meaningful distinction between whether the plaintiff’s employment was terminated for submission of an unauthorized petty cash voucher, or for theft of petty cash as stated by the defendant. Keeshan v. Home Depot, U.S.A., Inc., 2001 U.S. Dist. LEXIS 3607 (E.D. Pa. May 27, 2001).

Burden of Proof
In *Fanelle v. LoJack Corp.*, 29 Media L. Rep. 1513, 1521 (E.D. Pa. Dec. 7, 2000), the court held that a private figure plaintiff does not need to prove falsity in a case against a non-media defendant where the defamation involves commercial speech, even when the speech touches on a matter of public concern. At issue in the case was defendant’s use of a newspaper article in its promotional materials. The article accurately reported how police arrested members of an auto theft ring using defendant’s anti-theft auto tracking system. Plaintiff who was among the arrested was later found not guilty and he sued the defendant for implying he was a criminal. The court, without any analysis, simply described the use of the article as “garden variety” commercial speech that, under *Philadelphia v. Hepps*, 475 U.S. 767 (1986), is not entitled to heightened First Amendment protection. *Id.*

In *Campbell v. Citizens for an Honest Government, Inc.*, 255 F.3d 560 (8th Cir. 2001), a video producer created and released a video tracking a police investigation into the deaths of two teenage boys in Arkansas. In the video, two law enforcement officials were listed, among others, as “implicated” in the boys’ deaths and a subsequent cover-up. These two law enforcement officials sued for defamation. Reversing a trial verdict in their favor, the Eighth Circuit held that the two officers did not satisfy their required burden of proving falsity. The court noted that “it is debatable as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence” but concluded that plaintiffs failed to meet even the minimum preponderance of the evidence standard.

In *Belo Kentucky, Inc. d/b/a WHAS-TV v. Kentucky Kingdom Amusement Co.*, 28 Media L. Rep. 2345 (Ky. App. 2000) (reversing and remanding a jury award for plaintiff), the court advised that the proper instruction on falsity is whether the jury is clearly convinced that the particular statement was not substantially true.

### Inaccurate or Distorted Quotes

In *Collins v. Detroit Free Press*, 245 Mich. App. 27, 627 N.W.2d 5, 29 Media L. Rep. 1856 (2001), the court dismissed a claim based on an inaccurate quotation where it found that there was no material difference between the gist of the altered and actual statements. The newspaper quoted plaintiff, then a U.S. Congresswoman, saying “All white people, I don’t believe, are intolerant. That’s why I say I love the individuals, but I hate the race.” The paper later printed a correction, admitting that plaintiff actually said “I don’t like the race.” Citing *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), the court reiterated that even a deliberate alteration of a quote would not constitute actual malice “unless the alteration results in a material change in the meaning conveyed by the statement.” Here viewing the article in its entirety there was no difference in the gist of the two statements.

### 4. Fault

*Determination of Public Figure Status under Gertz*
In *Carr v. Forbes, Inc.*, 259 F.3d 273 (4th Cir. 2001), the Fourth Circuit held that a government contractor was a limited-purpose public figure because he “voluntarily injected himself into much of the public imbroglio” surrounding sewer and highway projects that were the subject of a magazine article, and because “his acts created much of the controversy discussed in the article.” The court relied on a two-part inquiry to determine whether a plaintiff is a limited-purpose public figure: (1) whether a public controversy gave rise to the defamatory statement and (2) whether the plaintiff’s participation in that controversy sufficed to establish him as a public figure within the context of that public controversy. The court noted that a “public controversy” is a legal term of art. It does not encompass “every conceivable issue of interest to the public.” Instead, it encompasses only those disputes that have received public attention because their ramifications will be felt by people who are not direct participants. To determine whether the plaintiff had thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status, the court applied a five-factor test, considering whether: (1) the plaintiff has access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the controversy; (3) the plaintiff sought to influence the resolution of the controversy; (4) the controversy existed before the defamatory statements were published; and (5) the plaintiff retained public figure status at the time of the alleged defamation. The second and third factors are the “heart” of this test, the court said.

In *George v. Fabri*, 548 S.E.2d 868 (S.C. 2001), an unsuccessful candidate for public office and his company sued his opponent for defamation over campaign materials that accused him of, among other things, business conflicts of interest. The South Carolina Supreme Court held that the candidate’s engineering corporation was a public figure where the individual public figure plaintiff had founded it, was its CEO and principal engineer, and stated that its reputation was “associated with his own reputation.” The court declined to apply what it termed “particularized tests” that other courts have adopted to determine whether a corporate plaintiff is a public figure, citing, e.g., *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898, 101 S. Ct. 266 (1980). Instead, the court concluded that, “given the purely political nature of the speech in this case, as opposed to the commercial nature of the speech involved in most cases with corporate defamation plaintiffs, we feel it is appropriate to look no further than the general test for public figure status as set forth by the Supreme Court in *Gertz.*” *George*, 548 S.E.2d at 879 n.10.

In denying summary judgment to a non-media defendant for statements made at a televised news conference, a Connecticut court held, without citation to any authority, that where there is conflicting evidence as to the nature and extent of the plaintiff’s participation in the controversy giving rise to the defamation, whether plaintiff is a public figure is an issue of fact for the jury. *Wilkinson v. Schoenhorn*, 2001 Conn. Super. LEXIS 1037 (Conn. Super. Ct. Apr. 10, 2001)

**Public Figure Status**

In a recent decision, a Georgia appeals court affirmed that Richard Jewell is a public figure for purposes of his defamation action against the *Atlanta Journal Constitution*. *Jewell v. Cox*
Enterprises, Inc., 2001 Ga. App. LEXIS 1153 (Ga. App. Oct. 10, 2001). While the court could envision situations in which news coverage alone would be insufficient to convert a private citizen into a public figure, here Jewell “should have known, and likely did know, that his comments would be broadcast and published to millions of American citizens searching for answers in the aftermath of the [Olympic Park] bombing. Clearly, his repeated comments regarding the adequacy of the law enforcement preparation, the appropriateness of the response to the bombing, and the safety of those returning to the park could realistically be expected to have an impact on the controversy’s resolution.” Id. at *29.


In contrast, an Ohio appeals court held that a prominent lawyer who had handled high profile cases, been involved in politics, serving as a precinct committee person for the Democratic Party, and on the central committee for the Democratic Party, and on the finance committee for two judicial campaigns, was nevertheless not a public figure in a libel action he brought over statements that he was a suspect in a highly-publicized murder. Gilbert v. WNIR 100 FM, 2001 Ohio App. LEXIS 2045 (Ohio App. May 9, 2001)

A plaintiff whose application to be a dog show judge was rejected by the American Kennel Club and who was later criticized in Dog News: The Digest of American Dogs for alleged discrepancies in her application was not a public figure according to a New York federal court. Abbott v. Harris Publications, 28 Media L. Rep. 2642, 2650 (S.D.N.Y. 2000).

Public Official Status

A number of cases held that former government officials retained public official status even after leaving public office. For example, a former Utah Senate Majority Leader, who retired three months before the alleged defamation, was still considered a public official and a public figure. Peterson v. New York Times Co., 106 F. Supp. 2d 1227 (D. Utah 2000).
Similarly, in Worrell-Payne, 134 F. Supp. 2d 1167, 1171-72 (D. Id. 2000) the court held that a former director of a local housing authority was a public official. The court noted that given the size of the housing authority, the services it was charged with providing, and the director’s role in providing those services, the plaintiff qualified as a public official despite leaving the position two years earlier. See also Revell v. Hoffman, No. CIV-99-637-C (W.D. Okla. March 3, 2001) (unpublished slip op.) (retired Associate Deputy Director of FBI); Martin v. Griffin, 2000 WL 872464 (Conn. Super. Ct. 2000) (former police officer was held to be a public official).


A South Carolina appellate court found authorities divided as to whether a school principal is a public official and therefore found it easier to conclude that an assistant principal is not a public official. Goodwin v. Kennedy, 552 S.E.2d 319 (S.C. Ct. App. 2001).

Application of Actual Malice Rule


The Nevada Supreme Court reversed a $3.3 million dollar award to casino owner Steven Wynn in Wynn v. Smith, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001). Wynn brought a defamation action against the author of an unauthorized biography of Wynn along with the publisher and publisher's principal. The action was not based on the contents of the book itself but rather on statements made in an advertisement for the book suggesting that a confidential Scotland Yard report revealed connections between Wynn and organized crime. The trial court granted summary judgment in favor of the author who had not written, edited or otherwise published the advertisement but had merely provided a copy of the Scotland Yard report to the publisher. The jury returned a verdict in favor of Wynn against the publisher and the publisher's principal. The Nevada Supreme Court affirmed the grant of summary judgment in favor of the author and reversed the jury verdict against the remaining defendants and remanded for a new trial on the grounds that the actual malice instruction was erroneous. The actual malice instruction given did not require the jury to find that
the defendants had entertained “serious” doubt about the accuracy of the Scotland Yard report but required only a finding of “doubt.” The Court held that the omission of language clarifying the degree of doubt effectively reduced the standard of proof.

In Campbell v. Citizens for an Honest Government, Inc., 255 F.3d 560 (8th Cir. 2001), a video producer created and released a video tracking a police investigation into the deaths of two teenage boys in Arkansas. In the video, two law enforcement officials were listed, among others, as “implicated” in the boys’ deaths and a subsequent cover-up. Reversing a verdict for plaintiffs, the Eighth Circuit held with respect to actual malice that the two officers “failed their burden of proving by clear and convincing evidence that [the producer], either himself or through [investigators and factual editors], had a high degree of awareness of probable falsity or entertained serious doubts as to the truth of the assertion.” The court found that the statements implicating the two officers came from multiple sources (distinguishing this case from that of Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989), where only one person could have substantiated the falsity or truth of the statement at issue) and that the plaintiffs had “failed to call any witnesses to disaffirm the statement that the eyewitnesses had implicated them.” The court reiterated the principles that failure to investigate alone does not support a finding of actual malice and that actual malice is not measured by the standard of a reasonably prudent person but instead is measured by the specific actions and knowledge of the defendant.

In Belo Kentucky, Inc. d/b/a WHAS-TV v. Kentucky Kingdom Amusement Co., 28 Media L. Rep. 2345 (Ky. App. 2000), a Kentucky appeals court reversed a $3.75 million jury award (reduced by $1 million by the trial court) to the owner of an amusement park based on a local television station’s news report about a roller coaster accident at the park. The court held that the trial evidence did not support a finding of actual malice regarding two of the station’s statements – that the roller coaster “malfunctioned” and that the park had “removed” the brake from the ride. Defendant did not entertain serious doubts as to the truth of these statements even when plaintiff had offered the station its interpretation that operator error cause the accident and the brake was simply not used. However, a third statement at issue, repeated in several broadcasts, that “state inspectors also think the ride is too dangerous” was knowingly false where the chief state inspector stated in the broadcast that the ride was basically safe. The entire award was reversed because the jury was erroneously instructed to return one combined damage award, without allocation as to the particular statements.

In Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 29 Media L. Rep. 1993 (9th Cir. 2001), the Ninth Circuit applied New York Times v. Sullivan standards to reverse a $3 million bench trial verdict to actor Dustin Hoffman on a right of publicity claim. Hoffman had sued L.A. Magazine for using an altered photograph of him from the movie “Tootsie” in a fashion article. The district court held that the article was “pure commercial speech” entitled to no First Amendment protection. Alternatively, even if First Amendment considerations applied, the district court found that the magazine acted with actual malice by knowingly publishing a false photograph that intentionally mislead readers that Hoffman posed for the picture. Reversing, the Ninth Circuit held that the use of the photograph in the magazine article was protected by the First Amendment and was not commercial speech. It then applied the actual malice requirement despite the cause of action (the
same approach the court used in *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997) where it treated that actor’s privacy, misappropriation and Lanham Act claims under libel standards. The court found no clear and convincing evidence that the magazine knowingly published a false statement of fact that Hoffman posed for the photograph.

In an interesting non-media decision, a Michigan appellate court “reluctantly” reversed a $150,000 jury award to a former state senator over an allegedly false and defamatory campaign brochure. *Faxon v. Republican State Comm.*, 624 N.W.2d 509, 29 Media L. Rep. 1417 (Mich. App. 2001). The brochure claimed, among other things, that plaintiff misused his legislative immunity to avoid a civil suit and a speeding ticket. For instance, with respect to the former, the brochure, under the headline “Ming, schming!,” claimed plaintiff sold an art collector a fake Ming Dynasty vase and then claimed he could not be sued because he was a state legislator. The plaintiff was nevertheless reelected. In reversing the verdict in his favor, the court found that there was no clear and convincing evidence of knowing falsity where the defendants relied on news articles to put together the brochure even where its characterizations differed in part from the news articles. In addition, defendants did not recklessly disregard the truth or falsity of their statements by not independently investigating the charges. The court then went on at length to discuss “how troubling we find the brochure and the absence of a legal remedy for this type of campaign defamation,” citing with interest proposals to create actions for “campaign slander” and proposals to regulate campaign advertising, but ultimately concluding that it lacked the “authority to change the well-defined constitutional scheme we apply in this case.” *Id.* at 514, 521, 523.

Another defamation case over campaign materials was dismissed on summary judgment. *George v. Fabri*, 548 S.E.2d 868 (S.C. 2001). At issue were campaign materials that claimed plaintiff would have business conflicts if elected and that he was endorsed by a racist organization. The South Carolina Supreme Court affirmed summary judgment for defendant, finding no evidence that defendant had subjective doubt about the truth of her statements. As to the standard for summary judgment, the court adopted as a matter of state law the holding of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986), that “clear and convincing evidence” of actual malice applies to summary judgment motions in defamation actions brought by public officials and public figures.

Also in the summary judgment context, the First Circuit in *Gray v. St. Martin’s Press*, 221 F.3d 243 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 770 (2001), affirmed dismissal, noting, in part, that “prejudice or limited knowledge on the part of a source may suggest caution but does not preclude reliance . . . while refusing to seek out decisive witnesses may be a mark of recklessness in some circumstances, [the author] already had multiple sources and was under no obligation to exhaust every possible witness before winding up her investigation. Even assuming she was careless and reached a mistaken conclusion, that is not enough for actual malice.”

In cryptic but disturbing dictum for media defendants, another First Circuit panel stated in *Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 27, 29 Media L. Rep. 1113, 1115 (1st Cir. 2000), that while public officials and public figures must show “actual malice” by clear and convincing evidence, “[s]omewhat less demanding regimes apply
where the plaintiff is a ‘limited purpose’ public figure.” The Court did not explain that remark, nor did it offer any supporting citation for that novel proposition.

The Second Circuit affirmed summary judgment in favor of *Time* magazine in *Church of Scientology Int’l v. Time Warner, Inc.*, 238 F.3d 168, 176, 29 Media L. Rep. 1243 (2d Cir.), cert. denied, 122 S. Ct. 40 (2001). At issue was a 1991 magazine article entitled “Scientology: The Cult of Greed,” a highly critical report on Scientology which described it as “posing as a religion” but being “really a ruthless global scam,” and which cited various instances of wrongdoing. Claims based on several alleged defamatory statements were dismissed because the plaintiff failed to establish that the reporter entertained serious doubts or purposefully avoided the truth. Moreover, absent such proof, the reporter’s alleged bias towards plaintiff was not probative of actual malice.

In *Tucker v. Fishbein*, 237 F.3d 275, 285-87, 29 Media L. Rep. 1161 (3d Cir. 2001), cert. denied, 122 S. Ct. 43 (2001), the Third Circuit affirmed summary judgment for the media defendants on actual malice grounds but reversed as to the non-media source, a lawyer for the estate of rapper Tupac Shakur. The plaintiffs, anti-rap advocate C. Delores Tucker and her husband William Tucker, sued *Time* and *Newsweek* magazines, individual reporters, and a source, alleging that defendants defamed them by mischaracterizing their loss of consortium claim against Shakur as one for loss of sexual relations. Although the characterization that plaintiffs were suing Shakur because his lyrics “damaged their sex life” made them look insincere, excessively litigious, avaricious, and perhaps unstable, plaintiffs offered no clear and convincing evidence that the media defendants knowingly misreported the claim even though an amended complaint against Shakur disclaimed recovery for harmed sexual relations. The complaint had been served on a corporate parent, but the court refused to impute actual knowledge to the media. On the other hand, the court reversed summary judgment in favor of the lawyer-source. A jury could find that he read the amended complaint and then knowingly mischaracterized it.

In *Nat. Assoc. of Gov’t. Employees v. BUCI Television, Inc.*, 118 F. Supp. 2d 126, 131 (D. Mass. 2000), the court granted summary judgment in favor of a reporter, finding that her “deliberate choice of one among many rational interpretations of an ambiguous statement does not create a jury question of actual malice.”

**Application of Actual Malice Rule in Commercial Speech Cases**

In *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), cert. denied, 122 S. Ct. 329 (2001), the Fifth Circuit held that the actual malice standard does not apply to claims brought by public figures based on false commercial speech alleged to have damaged corporate reputation under the Lanham Act § 43(a). Proctor & Gamble sued Amway for defamation, fraud, violations of the Lanham Act, Racketeer Influenced and Corrupt Organizations Act, and state law disparagement based on an Amway distributor’s repetition to his sales force of the false rumor linking Proctor & Gamble to Satanism. *Id.* at 542. The district court granted a judgment as a matter of law at the close of evidence in favor of Amway, holding, among other things, that Proctor & Gamble, a limited purpose public figure with regard to the Satanism matter, was required, but had failed to
prove actual malice. *Id.* at 567.

In reviewing the Lanham Act claim on appeal, the defamation claim having not been raised, the Fifth Circuit recognized that the speech at issue involved a matter of public concern. It held, however, that if the Amway distributor’s primary motivation for spreading the rumor was economic then the speech was commercial and not entitled to the same First Amendment protection as non-commercial speech. Specifically, the court held that Proctor & Gamble need not prove actual malice. As the court explained, once economic motivation is found, and other elements “are present to provide strong support that the speech is commercial, the speech is dropped to the less-protected status of commercial speech, and a suit may be successful against the speaker regardless of his knowledge of falsity.” *Id.* The court remanded for fact-finding as to the distributor’s motivation. *Id.* at 567.

The troubling analysis in *Procter & Gamble* was later cited by a New York court which likewise suggested that the actual malice standard does not apply in a public figure, this time in a libel case, if the challenged speech is “commercial.” *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001). Plaintiff sued a non-profit media watchdog group and an attorney who publicly blamed it for the deaths of four children who, they alleged, were killed by other children imitating wrestling moves learned from plaintiff’s wrestling programs. In denying defendants’ motion to dismiss claims for libel, the court found that the plaintiff had sufficiently alleged actual malice as an element of its libel claim. However, the court also cited with approval the holding in *Procter & Gamble* that defamatory statements about a public figure that constitute commercial speech are not be subject to the actual malice fault standard, because commercial speech is sufficiently durable to withstand a lower level of scrutiny. And it found that the plaintiff sufficiently alleged that the speech was commercial by pleading that the statements were made in fundraising materials.

**Private Figure Standard under Gertz**

According to the 2001-2002 *MEDIA LIBEL SURVEY*, 44 jurisdictions apply the negligence standard to private figure defamation cases under *Gertz*; New York applies a gross irresponsibility standard in matters of public concern, a standard which is higher than negligence but not as demanding as actual malice; four jurisdictions require actual malice in matters of public concern; and one jurisdiction requires actual malice in some circumstances.

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3 Alaska, Colorado, Indiana and New Jersey.

4 In Louisiana, private figure plaintiffs must establish actual malice in cases involving issues of public concern where defamation per se is not at issue. *Hebert v. La. Ass’n of Rehabilitation Professionals, Inc.* 657 So. 2d
Following a deadlocked jury trial on whether G. Gordon Liddy had libeled a Watergate-era secretary by theorizing that she was then part of a call girl ring that operated out of the Democratic National Committee headquarters, the court granted Liddy judgment as a matter of law. The court held that Liddy was not negligent in relying on a source known to have credibility problems where he undertook further investigation to corroborate facts given by the source and other neutral third parties previously relied on the same source for the same information. *Wells v. Liddy*, 135 F. Supp. 2d 668 (D. Md. 2001).

### Gross Irresponsibility

In *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 100, 29 Media L. Rep. 1129 (2d Cir. 2000), the Second Circuit, in an opinion by Judge Sack, held that the gross irresponsibility standard applies to private figure cases against non-media defendants over statements “arguably within the sphere of legitimate public concern.” At issue in *Konikoff* was what the court observed is the now common practice of businesses to commission investigative reports from lawyers to respond to charges of wrongdoing and then disseminate the report to shareholders, employees and the media. Here a report prepared for the defendant absolved it of wrongful appraisals, but it noted one possible exception regarding a property appraised by the plaintiff. The court found that the appraisal controversy was a matter of public concern, that defendant was not grossly irresponsible in preparing the report, and it was, indeed, reasonable to disseminate it to counter charges of wrongdoing.

In *Abbott v. Harris Publications*, 28 Media L. Rep. 2642, 2650 (S.D.N.Y. 2000), the court found that an article in *Dog News: The Digest of American Dogs* that questioned plaintiff’s honesty and accuracy in applying to be a dog show judge was a matter of public concern – and certainly of concern to the dog show community. Further there was no evidence of gross irresponsibility where the defendant received credible information from various sources, including several with excellent reputations.

### 5. Liability for Republication

*Communications Decency Act § 230*

The Washington State Court of Appeal held that § 230 provides immunity to web site operators in suits over user content posted on the site. *Schneider v. Amazon.com, Inc.*, 2001 Wash. App. LEXIS 2086, 29 Media L. Rep. 2421 (Sept. 17, 2001) (affirming dismissal of defamation and related claims against Amazon.com based on a third party’ review of plaintiff’s book posted to Amazon’s web site). The decision is a significant application of § 230 protections to web site operators in addition to service providers. *See also PatentWizard, Inc. v. Kinko’s*, 163 F. Supp. 2d 1069 (D. S.D. 2001) (applying § 230 to dismiss defamation claim against company that was alleged to have rented out computer and Internet access from which defamatory statements were published.

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Respondeat Superior

A California court held that the publisher and editors of a magazine were not vicariously liable for the defamatory statements of a freelance author. *D.A.R.E. America v. Rolling Stone Magazine, et al.*, 101 F.Supp.2d 1270 (C.D. Cal. 2000), *aff’d*, 270 F.3d 793 (9th Cir. 2001). The plaintiff, a nonprofit anti-drug organization, sued for defamation and injurious falsehood after it was discovered that freelance author Stephen Glass fabricated critical statements and quotations in an article he wrote about D.A.R.E. that was published in *Rolling Stone* magazine. The district court noted that the author’s knowledge was not imputed to the publisher because the author was not an employee of the publisher, and the publisher’s pre-publication efforts and fact checking were sufficient to defeat a claim of actual malice against the publisher itself.

Two Florida cases note that religious organizations generally cannot be held liable for defamation committed by an agent or employee when the substantive issues raised would require a court to excessively entangle itself in church policies, doctrines, and beliefs, contrary to the First Amendment. *Kond v. Mudryk*, 769 So.2d 1073 (Fla. 4th DCA Sept 13, 2000); and *House of God v. White*, 792 So. 2d 491 (Fla. 4th DCA Feb. 7, 2001).

6. Privileges

Fair Report

In *Wynn v. Smith*, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001), the Nevada Supreme Court declined to extend the fair report privilege to a confidential report of a Scotland Yard investigation. The Court held that “unauthorized or confidential investigatory reports do not qualify as an ‘official action or proceeding’ under the fair report privilege,” because the report was not generally available to the public and the policy purposes underlying the privilege accordingly did not apply. 16 P.3d at 429-430. The Nevada Supreme Court also declined to apply the fair report privilege to handouts describing a then pending lawsuit against the plaintiff which, the court found, presented a one-sided view of the action. *Lubin v. Kunin*, 17 P.3d 422, 427-428 (2001) (privilege only protects the “fair, accurate and impartial” reporting of official proceedings).

In *Uranga v. Federal Publications, Inc.*, 29 Media L. Rep. 1961 (Utah June 21, 2001), the Idaho Supreme Court addressed the state’s statutory fair report privilege (I.C. § 6-713) and found it did not create an absolute right to accurately republish a statement found in a court file that was “not used in an official or judicial proceeding, was never entered into evidence, and was not in a court pleading.”

In *Nix v. Cox Enterprises*, 545 S.E.2d 319, 29 Media L. Rep. 1283 (Ga. App. 2001), the court held that whether the fair report privilege applied was a question for a jury where the newspaper article accurately reported on civil litigation against the plaintiff lawyer but the article as a whole may have unfairly and inaccurately linked plaintiff to other lawyers accused of criminal violations.
Other cases in which the fair report privilege was found not to apply include: Bakhtiarnejad v. Cox Enters., 541 S.E.2d 33, 28 Med. L. Rep. 2494 (2000) (reversing entry of summary judgment and holding that there was a jury issue as to whether a newspaper’s report on arrest warrants fairly reported a police officer’s comments because officer testified in deposition that he informed the reporter that arrest warrants were based solely on the victim’s allegation); Maple Lanes v. News Media Corp., 751 N.E.2d 177 (Ill. App. 2001) (where article allegedly changed police officer’s actual quote thereby changing gist of statement); and Gupta v. The Lima News, 744 N.E.2d 1207 (Ohio App. 2000) (newspaper report of jury malpractice verdict was substantially inaccurate).

Privilege Applied

In Butler v. Hearst-Argyle Television, Inc., 49 S.W.3d 116, 29 Media L. Rep. 2210 (Ark. 2001), the Arkansas Supreme Court held that the fair report privilege applied to a media broadcast of a criminal defendant’s videotaped affidavit in which she alleged having a sexual relationship with a prosecuting attorney. The court adopted the “fair-report privilege” as formulated in the Restatement (Second) of Torts § 611 (1977) (“the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.”). The court noted that the privilege applies “even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false.” Id. (quoting Restatement (Second) of Torts § 611 cmt. a (1977)). Furthermore, the court applied the “substantial truth” doctrine when testing the accuracy of the reporting under the fair-report privilege. Under that doctrine, the literal truth is not necessary and substantial truth, also referred to as the “gist” or the “sting,” will suffice so long as it is accurately conveyed in the report. Because the televised report was a fair and substantially true account of official court proceedings, it was entitled to the fair-report privilege, and the trial court’s grant of summary judgment to the defendants was affirmed.

A Pennsylvania federal court held that the fair report privilege applied to a news report that a school bus driver refused to let students off his bus, and took students on a “drug crazed ninety minute ride home” because these statements captured the “gist” of the arrest report and a police statement. McMillian v. Philadelphia Newspapers, Inc., 2001 U.S. Dist. LEXIS 2893 (E.D. Pa. March 15, 2001) (noting that Pennsylvania follows Restatement (Second) of Torts § 611).

Similarly, in Kenney v. Scripps Howard Broadcasting Co., 259 F.3d 922 (8th Cir. 2001), the Eighth Circuit held that a television report that a woman kidnapped her minor grandchild was “at least a fair abridgement of the information contained in the official police documents,” and therefore was shielded by Missouri’s fair report privilege.

A newspaper’s erroneous report that plaintiff had been convicted of murder and firearms violations was protected by the fair report privilege because the alleged defamatory statements were
made verbatim by the police at a press conference. *Nelson v. Community Newspaper Co.*, 2000 Mass. Super. LEXIS 322, at *10-11 (Mass. Super Ct. July 21, 2000). The privilege also applied to statements in the article that plaintiff was “armed and dangerous” and was “holed up inside her home with guns and drugs” which were not made at the actual press conference, but rather in an interview with a police official in the immediate aftermath of the press conference. According to the court, such “reports of interviews of such officials whose job is to inform the public of the agency’s action and position, also qualify as ‘official’ for purposes of the fair report privilege.”

For the first time, a North Carolina appellate court recognized and applied a virtually absolute fair report privilege under North Carolina law. *LaComb v. Jacksonville Daily News Co.*, 543 S.E.2d 219, 29 Media L. Rep. 1595 (N.C. App. 2001). Affirming summary judgment for the defendant newspaper, the court held that a police blotter item reporting on plaintiffs’ arrest for delinquency was substantially accurate and thus subject to a virtually absolute fair report privilege for statements made in the course of judicial proceedings, including statements made in arrest warrants. To qualify for the privilege, a news report need not be a verbatim rendition of the official report. A “substantially accurate account” is sufficient to qualify for the privilege.

And in *Carson v. News-Journal Corp.*, 790 So. 2d 1120 (Fla. 5th DCA 2001), the fair report privilege was found to apply to news articles based upon information contained in public documents from Florida’s Bureau of Unemployment Compensation. The newspaper reports fairly summarized that plaintiff, an unsuccessful judicial candidate, had been discharged from prior legal positions for unsatisfactory work performance.

**Neutral Reportage**

In *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92 n. 11, 29 Media L. Rep. 1129 (2d Cir. 2000), the Second Circuit, analyzing New York’s gross irresponsibility standard, observed that it implies a form of neutral reportage protection. For instance, in an example offered by the court, even if the media were to rebroadcast a public official’s statements with actual knowledge that they were false and defamatory, such a broadcast could nevertheless be newsworthy and published in accordance with standards of responsible journalism and therefore protected by the gross irresponsibility standard.

**Judicial and Official Proceedings Privileges**

Two reported cases involved the interesting issue of whether and in what circumstances a lawyer’s out of court statements to the media about a case are covered by the judicial proceedings privilege.

A New York court held that the judicial proceedings privilege did not apply to a lawyer’s statements about his case made on radio and television programs. *World Wrestling Federation Entertainment v. Bozell*, 142 F.Supp. 2d 5114, 29 Media L. Rep. 1929 (S.D.N.Y. 2001) (denying motion to dismiss). The defendant lawyer appeared on a number of television and radio programs where he
discussed his representation of Lionel Tate, a 14 year old accused of murdering another child, and his “wrestling defense” argument in which he claimed his client was imitating moves seen on plaintiff’s television programs. The court found that his appearances on shows such as *Leeza* and *Dateline* were wholly unconnected to the murder trial.

In contrast, a Texas court held that an absolute privilege applied to a press release announcing and commenting on the filing of a lawsuit. *Dallas Independent School Dist. v. Finlan*, 27 S.W.3d 220 (Tex. App. 2000), *cert. denied*, 122 S. Ct. 342 (2001). The court held that the privilege for statements made by lawyers during litigation extends to statements made outside of court, including to the media, as long as the statement bears some relationship to the proceeding and is made to further the lawyer’s representation.

**Other Privileges**

A New York district court found that a “qualified privilege” protected a defendant who republished a translation of a news article originally published in a reputable foreign newspaper, when defendant had no substantial reason to doubt the veracity of the statement or accuracy of the translation service upon which it regularly relied. *Fabry v. Meridian VAT Reclaim, Inc.*, 29 Media L. Rep. 1821 (S.D.N.Y. 2000).

In *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 100, 29 Media L. Rep. 1129 (2d Cir. 2000), the Second Circuit, declined to apply the common law self-interest and common-interest privileges to the public dissemination of a corporate investigative report. While not holding that the privileges were unavailable, the court observed that the privileges have traditionally been tightly confined to cases where the statements were published to a limited group of private persons with an immediate relationship to the speaker. Broader application to publicly disseminated information “could have significant ramifications” and cover all defensive statements made to or even by the media “since members of the media share with their audience a common interest in the events of the day.”

7. **Discovery**

**Scope of Discovery**

A New Jersey appeals court issued an important ruling on the protections for anonymous speech on the Internet. In defamation suits over anonymous Internet postings, the court held that plaintiffs must satisfy a specific test – stricter than for surviving a motion to dismiss – before a court will order an internet service provider to identify the anonymous poster. *Dendrite International, Inc. v. John Doe No. 3*, 775 A.2d 756, 29 Media L. Rep. 2265 (App. Div. July 11, 2001). The plaintiff must show that (1) the complaint states a prima facie cause of action against the anonymous defendant; (2) it must produce sufficient evidence supporting each element of its cause of action; and (3) it must produce credible evidence of harm caused to it by the publication. This test was applied,
and disclosure was ordered, where the anonymous poster was alleged to be an employee of the plaintiff who violated the company’s confidentiality agreements by disclosing confidential information. *Immunomedics, Inc. v. Jean Doe*, 775 A.2d 773 (App. Div. July 11, 2001).

In *Tucker v. Fischbein*, 237 F.3d 275, 29 Media L. Rep. 1161 (3d Cir. 2001), *cert. denied* (Oct. 1, 2001), the court affirmed the district court’s denial of plaintiffs’ motions to compel the depositions of in-house counsel for two news magazine defendants. The plaintiffs argued that any attorney-client privilege was waived because in-house counsel reviewed stories in the regular course of business. The Third Circuit rejected that argument, holding that “reporters regularly consult with in-house counsel to discuss potential liability for libel [and such actions] do not thereby deprive those communications of the protection of the attorney-client privilege.” *Id.*

**Reporters’ Privilege (Shield Law)**

In *Jewell v. Cox Enterprises, Inc.*, 2001 Ga. App. LEXIS 1153 (Ga. App. Oct. 10, 2001), the court considered whether the Atlanta Journal-Constitution should be compelled to reveal its confidential law enforcement sources for articles on Richard Jewell and the Olympic Park bombing. The court reversed the trial court’s order compelling disclosure and remanded with instructions to balance plaintiff’s need for the information against First Amendment and public policy interests favoring confidentiality. The court held that as a party defendant, the newspaper was not protected from disclosure by either the First Amendment or the state shield law, but was protected by general discovery rules which require a balancing of the parties’ interests. On remand the trial court must require plaintiff to:

- specifically identify each and every purported statement he asserts was libelous,
- determine whether the plaintiff can prove the statements were untrue, taking into account all the other available evidentiary sources, including the plaintiff’s own admissions, and determine whether the statements can be proven false through the use of other evidence, thus eliminating the plaintiff’s necessity for the requested discovery.

*Id.* at *14-15

In *Ayash v. Dana Farber Cancer Institute*, the trial court entered summary judgment against The Boston Globe on defamation and related claims as a contempt sanction for The Globe’s refusal to disclose confidential sources allegedly relevant to the plaintiff’s non-libel claims against her former employer and a former Globe reporter. *Ayash v. Dana Farber Cancer Institute*, 2001 Mass. Super. LEXIS 109, at *4-6 (Mass. Super. Ct. April 4, 2001). An earlier order by the trial court to compel disclosure was vacated and remanded with instruction to the trial court to balance the First Amendment interests against the public interest in discovery of evidence. 706 N.E.2d 316, 320 (1999).
In *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000), Colorado’s Supreme Court held when a reporter or other newsperson is sued for defamation and relies upon a confidential source as a basis for a defense that the statements were not published with actual malice, the reporter will not be compelled to disclose the identity of the confidential source unless the court is satisfied that the evidence available at the time of publication demonstrates the probable falsity of the defendant’s statement.

Reversing an order that a non-party reporter disclose a confidential source to a libel plaintiff, a Minnesota appeals court held under the state’s shield law (§ 595.025) before a non-party reporter or news organization can be compelled to reveal a confidential source to a defamation plaintiff, the court must make specific factual findings on (1) the nature of the litigation; (2) the relevance to the action of disclosure; (3) the efforts made by the party seeking disclosure to obtain the information from alternative sources; and (4) whether there is a compelling interest in the information or source. *Weinberger v. Independent School District No. 622*, 2001 Minn. App. LEXIS 755 (Minn. Ct. App. June 22, 2001).

8. **Damages**

In *Belo Kentucky, Inc. d/b/a WHAS-TV v. Kentucky Kingdom Amusement Co.*, 28 Media L. Rep. 2345 (Ky. App. 2000), a Kentucky appeals court reversed a $3.75 million jury award (reduced by $1 million by the trial court) in its entirety – even when it found that plaintiff proved actual malice with respect to one statement at issue – because the jury was erroneously instructed to return one combined damage award, without allocation as to the particular statements.

The district court in New Hampshire opined that the standard on remittitur of damages is heavily deferential to the jury, even in First Amendment cases. *Howard v. Antilla*, 29 Media L. Rep. 1844, 1846 (D.N.H. March 30, 2001). In *Howard*, the jury found for the defendant reporter on a defamation claim but awarded $480,000 in damages for false light where plaintiff was wrongly identified as a felon. The damage award against the reporter whose article appeared in *The New York Times*, while “very generous,” was not so “grossly excessive,” “so high that it would be a denial of justice to permit it to stand,” or so “shocking to the conscience” as to warrant remittitur in the district court’s eyes. *Id.* at 1850. The judge opined that the damage award was undoubtedly influenced by the fact that the article carried a “particularly unsavory” false light, was “widely publicized throughout the world,” and was prominently featured in *The New York Times* “This was no suspect tabloid after all,” the court wrote, suggesting that the reporter should be penalized for the gravity of the forum in which she published. *Id.* at 1850-51. The ruling is on appeal to the First Circuit Court of Appeals.

**Special Damages**

In an issue of first impression in a media defamation case, the federal court in Utah held that loss of stock value is not “realized and liquidated damages” sufficient to constitute special damages. *Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 2001 WL 670927, at *3 (D. Utah March 26, 2001). The court also ruled that attorney’s fees and costs in bringing the action, absent other
damages, are insufficient to satisfy the special damages requirement under Utah law.

**Punitive Damages**

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. A Supreme Court decision this past year may spur the development of more concrete guidelines.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001) the Court held that *de novo* review is the proper standard for reviewing punitive damage awards. At issue in the case was a jury award of $50,000 in compensatory damages for Lanham Act violations and $4.5 million in punitive damages. The trial court found that the award of punitive damages was “was proportional and fair,” notwithstanding Cooper Industries’ argument that the punitive damage award was so grossly excessive as to violate the Due Process Clause. The Ninth Circuit affirmed, finding that the trial court was not compelled to reduce the punitive damages award. The Supreme Court vacated and remanded, holding that *de novo* review is the proper standard for reviewing punitive damage awards. The Court reiterated that the Due Process Clause of the Constitution bars “grossly excessive” punitive damages in light of the nature of the defendant’s conduct, the relationship between the penalty and the harm caused, and sanctions imposed in other cases for comparable misconduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In fact, the Court reasoned that conducting *de novo* review on appeal will flesh out and clarify these criteria, helping “to assure the uniform treatment of similarly situated persons that is the essence of law itself.”

According to the 2001-2002 MEDIA LIBEL SURVEY, eight jurisdictions do not permit punitive damages in defamation cases. Ten states impose statutory limitations on punitive damage awards and 15 states limit punitive damages through retraction laws.

In *Lyons v. Nichols*, 778 A.2d 246 (Conn. App. 2001), the court affirmed a bench trial award of $100 in nominal damages and $2,500 in punitive damages over a letter to the editor that accused the public official plaintiff of nepotism. The court found that the award of punitive damages was insufficient to satisfy the special damages requirement under Utah law.

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6 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.

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

proper even when there was no proof of actual damages because plaintiff proved actual malice and
the accusation of nepotism was libelous per se.

2001), the court noted that punitive damages cannot be awarded absent an award of compensatory
damages and reversed as erroneous a jury award of $10,000 in punitive damages and no actual
damages.

9. Criminal Libel and Slander

In *Ivey v. Alabama*, 29 Media L. Rep. 2089 (Ala. 2001), the Alabama Supreme Court held
that Alabama’s criminal libel statute, §13A-11-163, was unconstitutional because it did not meet the
actual malice requirements of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Garrison
v. Louisiana*, 379 U.S. 64 (1964). The court concluded that the statute “does not on its face state
that actual malice, as the term is defined in *New York Times* and *Garrison*, is required in a prosecution
for criminal defamation when the alleged victim is a public official or public figure. No Alabama case
law has determined actual malice to be the standard in a prosecution for criminal defamation. . .
. Thus, we must conclude that [the statute] does not comport with the clearly expressed constitutional
mandates of *Garrison*.”

A federal court struck down as unconstitutional a California statute (Cal. Penal Code §148.6)
which made it a misdemeanor to knowingly file a false allegation of misconduct against police
assumed without deciding that the statute only criminalized defamatory statements made with actual
malice, but concluded that by singling out police officers for heightened protection the statute
“impermissibly discriminates on the basis of the content of the speech which it criminalizes and,
therefore, facially violates the First Amendment.” *Id.* at 1246.

10. Procedural Matters

Retraction

In *In re Cable News Network and Time Magazine “Operation Tailwind Litigation,”* 106
F. Supp. 2d 1000, 1002 (N.D. Cal. 2000), the court found that California’s retraction demand statute
(Cal. Civ. Code § 48(a)) was applicable to a *Time* magazine article, even though the statute does not
expressly refer to magazines and its legislative history suggests that the statute was intended “to
protect the purveyors of breaking news.” While the court expressed sympathy for the plaintiffs’
argument that the retraction statute should not apply to *Time*, it concluded that, since the article was
“inextricably intertwined” with a related television broadcast, it should apply the retraction statute
to both publications. *Id.* Having found that none of the plaintiffs had alleged a sufficient retraction
demand, the court dismissed the claims of all but the single plaintiff who was found to have
adequately alleged special damages. *Id.*
Statute of Limitations

In *Shively v. Bozanich*, 85 Cal. App. 4th 363, 102 Cal. Rptr. 138, 29 Media L. Rep. 1618 (Cal. App. 2d Dist. 2000), *review granted*, 20 P.3d 1084 (Cal. 2001), the appellate court held that the discovery rule applied to toll the statute of limitations on a defamation action against a non-media defendant even though the alleged defamatory statements had been republished in mass media. On March 21, 2000, the California Supreme Court granted review, superceding the appellate decision. The court has not yet rendered its decision.

Two New York court decisions held that the single publication rule applies to Internet publications. *Firth v. State*, 706 N.Y.S.2d 835 (Ct. Claims 2000), 731 N.Y.S.2d 244 (App. Div. 2001); *Van Buskirk v. N.Y. Times Co.*, 28 Media L. Rep. 2525 (S.D.N.Y. 2000). In *Firth*, a non-media case, the court held that the statute of limitations began to accrue when a publication was made available on the Internet, observing that “in the absence of some alteration or change in form its continued availability on the Internet does not constitute a republication acting to begin the Statute of Limitations anew each day.” *Firth*, 706 N.Y.S.2d at 843. In *Van Buskirk*, the same rule was applied with the court noting that “now that Internet publishing has been added to the ‘modern methods’ of widespread publication, Internet publishers also should receive the single publication rule’s protection.” *Id.* at 2526.

Another New York court ruled that the statute of limitations begins to run when books are shipped to stores and not the “official publication date” which is “merely a publishing industry term of art for the date when publicity events for a book commence. *Rothlein v. W.W. Norton & Co.*, 712 N.Y.S. 2d 278, 29 Media L. Rep. 1023 (Sup. Ct. N.Y. Co. 2000).

In *Flowers v. Carville*, 112 F. Supp. 2d 1202, 28 Media L. Rep. 2352 (D. Nev. 2000), the court refused to apply the continuing violation exception to the statute of limitations where plaintiff alleged that former Clinton Administration officials James Carville and George Stephanopoulos were continuously defaming her. The court held that separate and distinct defamatory statements are not to be viewed as a continuing tort for statute of limitations purposes, analogizing from the observation that “where defamation cases involve similar discrete acts of republication of the same material, most courts have rejected the continuing violation theory adopting instead the single publication rule.” *Id.* at 1210, 28 Media L. Rep. at 2357.

Summary Judgment


In another case by a candidate for office, a Tennessee appellate court reversed summary
judgment in favor of a newspaper, requiring no heightened proof of actual malice. *Beavers v. Lebanon Democrat Newspaper*, 29 Media L. Rep. 1058 (Tenn. App. 2000). The court found that a sufficient issue of material fact existed as to whether the article was published with actual malice on no more than the fact that the article referred to allegations against plaintiff as “rumors.”

In *Murray v. Holnam, Inc.*, 542 S.E.2d 743 (S.C. Ct. App. 2001), the South Carolina Court of Appeals held that in private figure cases summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if different inferences or conclusions may reasonably be drawn from the facts.


**Jury Selection and Instructions**

The Florida Libel Survey reports that this year the Florida Supreme Court approved amendments to the state’s Standard Civil Jury Instructions, No. SC00-1805, 2001 WL 223389 (Fla. March 9, 2001), making important additions to three model instructions for defamation cases (4.1 – 4.3). These revisions attempt to refine the instructions as to material falsity, actionable opinion, and the “different effect” test.

**Expert Witnesses**

In *Belo Kentucky, Inc. d/b/a WHAS-TV v. Kentucky Kingdom Amusement Co.*, 28 Media L. Rep. 2345 (Ky. App. 2000), the court held that it was not error for a trial court to allow a journalism expert to give evidence in an actual malice case. While acknowledging that a finding of actual malice cannot be based solely on an expert’s opinion that the defendant deviated from accepted journalistic practices, the court found that such testimony could assist the jury in “understanding circumstantial evidence of actual malice.” *Id.* at 2350.

**Independent Appellate Review**

The Supreme Court held that the determination of the constitutionality of an award of punitive damages is subject to de novo appellate review. *Cooper Industries v. Leatherman Tool Group*, 121 S. Ct. 1678 (2001) (appellate courts must conduct a “thorough, independent review” of the lower court’s determination).

**Jurisdiction**
In *Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060, 28 Media L. Rep. 1875 (D. Haw. 2000), a federal district court extended *Gordy v. Daily News, L.P.*, 95 F.3d 829 (9th Cir. 1996), to hold that a New York newspaper with only two subscriptions in Hawaii and no newsstand sales had sufficient contacts to satisfy the purposeful availment prong for invoking personal jurisdiction in Hawaii courts. The plaintiff, a Hawaii resident, filed a defamation complaint in state court against the *New York Post* and one of its columnists over an article noting that plaintiff who “lived in Hawaii,” and claimed to be the illegitimate daughter of Marilyn Monroe, may have illegally collected the Social Security benefits of Monroe. Defendants removed the case to federal court on diversity grounds and then moved to dismiss for lack of personal jurisdiction or in the alternative, improper venue. Defendants also sought transfer to New York under 28 U.S.C. § 1404. The limitations period had already run in New York at the time the complaint was filed, which would have resulted in dismissal if the case was transferred. The court denied the motion, noting that the plaintiff was harmed in Hawaii and the newspaper’s contacts with Hawaii were neither random nor fortuitous. Significantly, the court found the exercise of personal jurisdiction reasonable despite undisputed evidence that the newspaper sold only two copies by subscription in the State of Hawaii and had no newsstand sales. The court also determined that venue was proper in Hawaii and held that the defendants’ inconvenience did not warrant transfer of venue, as defendants could better afford the expense of litigating in a distant forum than the plaintiff.

In *Batzel v. Smith*, 2001 U.S. Dist. LEXIS 8929 (C.D. Ca. June 5, 2001), the court found it had personal jurisdiction over a Dutch based e-mail newsletter and its creator who republished e-mails he had received alleging that plaintiff owned stolen Nazi art. The court held that the act of sending the newsletter to California subscribers was “akin to sending newspapers” into the jurisdiction.

A Virginia federal district court took an extremely expansive view, finding it had jurisdiction over a Connecticut newspaper because the paper’s web site was accessible by Virginia residents. *Young v. New Haven Advocate*, No. 2:00CV0086 (W.D. Va. Aug. 10, 2001). The Fourth Circuit has accepted an interlocutory appeal on the issue to be heard in 2002.

A Texas federal district court ruled that it did not have jurisdiction over a Boston resident who posted an article on a “non-interactive” Internet bulletin board, and the Columbia University School of Journalism, which hosted the site. *Revell v. Lidov*, 2001 U.S. Dist. LEXIS 3133 (N.D. Tex. 2001). The court noted that the case “fits perfectly into the passive website extreme of the Zippo sliding scale” citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). The court also noted that even though members of the public could post articles and comments on the site and that this “may seem interactive in that information can be sent to the website, it is not truly interactive in that the site does not send anything back - there is no direct contact between the website, the people who send the information, or the people who read it.” *Revell* at *14.

In *World Wrestling Federation Entertainment v. Bozell*, 142 F.S.2d 5114, 29 Media L. Rep. 1929 (S.D.N.Y. 2001), the court held it had personal jurisdiction over a non-resident Florida attorney under New York’s long arm statute where the attorney “took advantage of New York’s
unique resources in the entertainment industry” by appearing in a fundraising video distributed in New York and appearing on television broadcasts based in New York.

In *Rothlein v. W.W. Norton & Co.*, 712 N.Y.S.2d 278, 29 Media L. Rep. 1023 (Sup. Ct. N.Y. Co. 2000), by contrast, there was no jurisdiction over freelance writer who had no office in New York and magazine offices were his actual place of business.

A reporter who prepared an allegedly defamatory news story in Washington D.C. was not subject to jurisdiction in Georgia because publication of the challenged article in the state was not relevant under the Georgia long arm statute and her only remaining contacts with the state – telephone calls – did not establish sufficient additional contacts to confer jurisdiction. *Weinstock v. Gannett*, 29 Media L. Rep. 2064 (Ga. Ct. 2001).

**Choice of Law**

In *Abadian v. Lee*, 117 F.Supp.2d 481, 28 Media L. Rep. 2425 (D. Md. 2000), a Maryland federal court hearing a defamation action by a state resident applied Virginia law because plaintiff had previously lived and worked there and likely suffered more damage there. The court acknowledged that the state follows the “significant relationship” test as formulated in the *Restatement (Second) Conflict of Laws* § 150 under which plaintiff’s domicile at the time of publication is usually the state with the most significant relationship. But the court noted that courts employ the *Restatement* rule using “a case-by-case balancing test.” 28 Media L. Rep. at 2428


In *Flowers v. Carville*, 112 F. Supp. 2d 1202, 28 Media L. Rep. 2352 (D. Nev. 2000), the court applied the law of the forum where no other state had an overwhelming interest in adjudicating the case. Plaintiff had been a Texas resident at the time of publication, an alleged defamatory book was published in New York, and an alleged defamatory interview was broadcast from Washington, D.C.

**Other**

The Eleventh Circuit in *Trujillo v. Conover & Co. Communications, Inc.*, 221 F.3d 1262, 1264-65 (11th Cir. 2000), held that it was an abuse of discretion to stay a defamation case pending the outcome of Bahamian litigation involving some of the same parties even where defendants contended the other litigation would establish the truth of the alleged defamatory statements at issue.

**11. Pertinent Statutes**
A federal court struck down as unconstitutional a California statute (Cal. Code § 47.5) which allowed law enforcement officers to bring defamation suits against citizens who knowingly make false complaints about their conduct. *Haddad v. Wall*, 107 F. Supp. 2d 1230 (C.D. Cal. 2000). The court found the statute unconstitutional on its face as a content-based regulation of speech.

12. **International Developments**

**Australia**

An Australian court rejected Dow Jones’ argument that in cyber-defamation cases, as a matter of law, jurisdiction should be based on the location of the web server rather than where the article is accessed. *Gutnick v. Dow Jones*, [2001] VCS 305 (Victoria Aug. 28, 2001) (exercising jurisdiction to hear a libel claim against Dow Jones based on online article about the Australian plaintiff allegedly accessed in Australia). On December 12, 2000, the Australian High Court granted Dow Jones leave to appeal the decision.

**England**

The Court of Appeal in *Grobbeelaar -v- News Group Newspapers* (2001) EWCA Civ 33, reversed a jury verdict in a libel case on the facts, one of the few times it has ever done so, holding that the verdict was so plainly wrong no reasonable jury could have reached it. The libel claim was based on a series of articles in *The Sun* tabloid accusing Bruce Grobbelaar, a well known footballer, of match fixing. At trial, *The Sun* relied on video and sound recordings covertly made of meetings between Grobbelaar and a former business partner in which Grobbelaar confessed to taking money for losing matches. Grobbelaar testified that he fabricated the confessions to gather evidence against his former business partner. The Court of Appeal found this explanation “quite simply incredible” concluding the jury’s decision was perverse and should be set aside.

In *Burstein –v- Times Newspapers Limited* [2001] 1 WLR 579, the Court of Appeal held that even though the newspaper had no defense to a libel claim it was entitled to introduce relevant evidence regarding the circumstances and background of the publication in mitigation of damages, such as claimant’s conduct provoking the libel. Thus even if there is no proper defense of justification (i.e. truth), the defendant can put in evidence directly relevant facts in mitigation of damages which otherwise would only have been admissible as part of a defense of justification.

In *Loutchansky -v- The Times Newspapers Ltd.*, (Dec. 5, 2001) the Court of Appeal reversed a trial court decision that had narrowly applied the new qualified privilege defense. The trial court had ruled that the test for the privilege was whether the publisher would be open to legitimate criticism if he failed to publish the information in question. The proper test, according to the Court of Appeal is “that of responsible journalism.” The court, though, affirmed a trial court ruling that declined to apply the “single publication rule” to the newspaper’s web archives. The court affirmed that the claimant, who had already brought suit over the hard copy articles, could also proceed with
claims against the archived web versions of the same articles even though more than one year had passed since publication.
1. False Light

Recognition

According to the 2001-2002 Media Privacy and Related Law Survey, 35 jurisdictions currently recognize the false light tort. In six of these jurisdictions, however, the tort has not been applied in the media context. Nine other jurisdictions have explicitly rejected the tort.

Significant Media Cases

In two media cases this past year, the federal district court in New Hampshire predicted that the state would expressly adopt the tort of false light. One case resulted in a $400,000 jury verdict for plaintiff on a false light claim, Howard v. Antilla, No. 97-543-M, 29 Media L. Rep. 1844 (D.N.H. March 30, 2001). The plaintiff Robert Howard, the chairman of two publicly traded companies, brought false light and defamation claims against a New York Times reporter who had published an erroneous rumor that he might in fact be one Howard Finkelstein, a convicted felon. Howard was deemed to be a public figure. The jury returned a verdict in favor of the reporter on the defamation claim, but found for Howard on the false light claim. The district court declined to modify the jury verdict for inconsistency. The court said the jury might reasonably have concluded that although the article did not endorse the truth of the rumor (and therefore did not support a defamation claim), the mere reporting of the rumor – with the implication that plaintiff “could be, or might be, Finkelstein, and that no one could say for sure” – placed the plaintiff in a false light that would be highly offensive to a reasonable person. The court defined the standard of fault as clear and convincing proof “that defendant either very well knew the article placed plaintiff in a false light that would be highly offensive to a reasonable person or, at a minimum, published the article with reckless disregard for whether it placed him in a false light.” 2001 WL 322025 at *3.

Earlier the New Hampshire district court in Douglas v. Pratt, No. 98-416-M, 2000 U.S. Dist. LEXIS 20935 (D.N.H. Sept. 29, 2000) opined that the New Hampshire Supreme Court would recognize the false light tort given its commitment to the protection of privacy rights, but here the court granted judgment on the pleadings, dismissing false light and defamation claims against the
Associated Press and a reporter where the complained of statements constituted opinions.

On a certified question from federal court litigation, the Tennessee Supreme Court affirmed that the state recognizes false light invasion of privacy as formulated in the Restatement (Second) of Torts § 652E. West v. Media General Operations, Inc., 53 S.W.3d 640, 29 Media L. Rep. 2454 (Tenn. 2001).

In M.G. v. Time Warner Inc., 89 Cal. App. 4th 623, 107 Cal. Rptr. 2d 504; 29 Media L. Rep. 1883 (Cal. Ct. App. 2001), the court affirmed the denial of a motion to strike a complaint under California’s anti-SLAPP law, Cal. Civ. Code § 425.16, finding that plaintiffs demonstrated a likelihood of success on their privacy claims. At issue was a Sports Illustrated article and related HBO broadcast that reported on sexual abuse of children by adult coaches and which published and broadcast a photograph of a little league team coached by a convicted molester. As to the false light prong, the court held that the article and the program could reasonably be interpreted as falsely reporting that some or all the players in the photograph had been molested by the coach thereby stating a claim.

In Moriarty v. Greene, 315 Ill. App. 3d 225, 732 N.E.2d 730 (1st Dist. 2000), the court held that expressions of a newspaper columnist’s opinions were not actionable as false light claims. Although the court recognized that “it is not necessary to be defamed to state a false light claim” the court went on to hold that “the similarities between defamation and false light claims may make certain restrictions and limitations for defamation equally applicable to false light claims . . . . This would include an opinion that allegedly placed the plaintiff in a false light.” However, statements by the defendant that the plaintiff, a therapist for a child in a custody battle, was disregarding her professional obligations to the child, could support a claim for false light invasion of privacy since this constituted a factual statement that a jury could offensive to reasonable persons.

Similarly the D.C. Circuit Court of Appeals reinstated, in part, false light claims over what the court found to be verifiable anecdotes. Weyrich v. The New Republic, Inc., 235 F.3d 617, 29 Media L. Rep. 1257 (D.C. Cir. 2001) (reversing grant of a 12(b)(6) motion). At issue was a magazine profile of leading conservative activist Paul Weyrich entitled “Robespierre of the Right – What I Ate at the Revolution” and that portrayed him as “emotionally volatile” and a “zealoted political extremist.” Most of the challenged statements were found to be protected political commentary. For example, while the term “paranoia” was used in a pejorative way to describe plaintiff, the term was used in its popular sense and did not imply a diagnosable medical condition. On the other hand, anecdotes presented in quotation marks used to illustrate plaintiff’s temper were presented as verifiable facts. The court also noted that because false light and defamation claims are so similar a plaintiff can only recover on one of the two theories based on a single publication but is free to plead both claims in the alternative. But although the torts are similar the court noted they are not identical, therefore “before finding that a statement is not actionable, because it is not reasonably capable of defamatory meaning, [a court] must also satisfy itself that the statement does not arguably place the appellant in a 'highly offensive' false light.” Id. at 628.

In several other cases false light claims were dismissed when the accompanying defamation
claim failed. The Nevada federal court dismissed false light and related claims brought by Gennifer Flowers against James Carville, George Stephanopoulos, Hillary Rodham Clinton, and Little, Brown & Company, the publisher of books by Carville and Stephanopoulos. *Flowers v. Carville*, 112 F. Supp. 2d 1202 (D. Nev. 2000). Flowers alleged that starting in the 1992 presidential campaign and continuing in later books and media appearances, the defendants conspired to defame and portray her in a false light. The court dismissed the false light claims finding they were based on the same facts as an accompanying defamation claim that failed. Similarly, in *Abadian v Lee*, 117 F. Supp. 2d 481, 489 n.6, 28 Media L. Rep. 2425 (D. Md. 2000), after the court dismissed libel claims over the publication of true facts, it also dismissed the false light claim, noting that the claim “may not stand unless [it] also meets the standards for defamation.”

In *Lucas v. Fox News Network, LLC*, No. 00-14519 (11th Cir. Jan. 16, 2001) (Georgia law) (unpublished opinion), the Eleventh Circuit held that the secret recording and broadcasting of the rituals of a controversial campus church group did not state a claim under any of the privacy torts because the church’s actions on the campus of a state university were “undoubtedly matters of public interest, whether the purpose of publishing those activities is to inform or entertain.” *Id.* at p. 5. *See also Nix v. Cox Enterprises, Inc.*, 545 S.E.2d 319, 29 Media L. Rep. 1283 (Ga. App. 2001) (dismissing privacy claim because “matters of public concern when at issue and disclosed cannot give rise to liability for an invasion of privacy against the news media or anyone else.”).

**Non-Media False Light Decisions**

An Illinois federal district court held that a corporation cannot sue for false light because a corporation has no personal right to privacy. *Austin Eberhardt & Donaldson Corp. v. Morgan Stanley Dean Witter Trust FSB*, 2001 U.S. Dist. LEXIS 1090 (N.D. Ill. Jan. 29, 2001). The court found that while the Illinois Supreme Court never had addressed this precise question, it “would hold that [the corporate plaintiff] failed to state a claim under Illinois law” based upon Illinois’ adoption of the Restatement’s definition of false light as well as decisions from other jurisdictions on this issue. *Id.* at *6.

An interesting situation was presented in *Fanelle v. LoJack Corp.* 29 Media L. Rep. 1513, 1522 (E.D. Pa. Dec. 7, 2000), where false light and related claims were based on the use of a newspaper article in a company’s promotional materials. LoJack, the manufacture of a car anti-theft device, included in its advertising and promotional materials a *Philadelphia Inquirer* article that detailed plaintiff’s arrest for auto theft and included his picture and name. The article was presented with other vignettes of stolen cars recovered with the LoJack system. Plaintiff was, in fact, later acquitted of all charges. The court denied summary judgment to defendant on the false light claim on the ground that a jury could find the promotional materials created the false impression that plaintiff is a criminal.

In contrast an Indiana appellate court dismissed false light and related claims growing out of a workplace prank in *Branham v. Celadon Trucking Serv., Inc.*, 744 N.E.2d 514 (Ind. Ct. App. 2001). Plaintiff’s false light claim was based on an unflattering and suggestive photograph taken of him by his coworkers which depicted him asleep while a partially dressed co-worker stood beside him.
in a suggestive fashion. The court found that the photograph was not false—it accurately portrayed plaintiff—nor did it imply that plaintiff was engaged in sexual conduct. Indeed the court’s decision led off with the sensible notion that “[t]he law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable.” Quoting Kelley v. Post Publishing Company, 327 Mass. 275, 98 N.E.2d 286, 287 (Mass. 1951).

One California federal court looking at California precedent held that where the gravamen of a complaint is a false statement of fact, only the defamation cause of action can stand and other causes of action, regardless of label, must be dismissed. Brooks v. Physicians Clinical Laboratory, Inc., 2000 WL 336546 *4 (E.D. Cal. 2000) (noting that the California Supreme Court stated that a false light privacy claim should be dismissed if it rests upon the allegedly false nature of a statement).

An Illinois appellate court held that qualified privileges can never apply to causes of action for false light. Poulos v. Lutheran Social Services of Illinois, Inc., 312 Ill. App. 3d 731, 728 N.E.2d 547 (1st Dist. 2000) (affirming jury award in false light case based on social worker’s recounting of allegations of sexual abuse by plaintiff that were known to be false). Without analyzing cases recognizing the availability of privileges in false light cases, the court simply reasoned that the scienter element in false light—which it found akin to actual malice—excludes qualified privileges which require, among other things, proof of good faith. “Good faith and actual malice cannot coexist. They are mutually exclusive.” Id. at 558. The court also held that the false light “publicity” element does not require communication to the public at large but could be satisfied “by establishing that false and highly offensive information was disclosed to a person or persons with whom a plaintiff has a special relationship”—in this case the plaintiff’s employer.

A number of other cases reiterated that the false light tort requires publicity, i.e., widespread dissemination, rather than mere publication within the meaning of defamation law. See Puchalski v. Sch. Dist. Of Springfield, 161 F. Supp. 2d 395 (E.D. Pa. 2001) (holding that disclosure to three people is insufficient publicity to sustain false light claim); Keating v. Bucks County Water & Sewer Auth., 2000 WL 1888770, at *15 (E.D. Pa. Dec. 29, 2000) (holding there was no publicity where defendants revealed plaintiffs’ names only to employees of district attorney’s office and to each other); Stenograph, L.L.C. v. Sims, 2000 WL 964748, at *5 (E.D. Pa. July 12, 2000) (dismissing false light counterclaim where defendant presented no evidence that the subject of telephone calls was communicated to others so that it could be considered a matter of public knowledge); and Alexandru v. West Hartford OB-GYN, 2000 Conn. Super. LEXIS 3291, (Conn. Super. 2000) (disclosure of medical records in deposition testimony is insufficient publicity to sustain false light claim).

The publicity element was satisfied where statements were widely communicated. See Galligan v. Edward D. Jones & Co., 2000 WL 1785041 (Conn. Super 2000) (SEC U5 Form stating that employee had made material misstatements to employer’s compliance officer, satisfied publication requirement for false light claim; information was substantially certain to become public knowledge); Grossman v. Computer Curriculum Corp., 131 F. Supp. 2d 299 (D.Conn. 2000) (statements to plaintiff’s customers sufficient to satisfy publicity element of false light claim).
2. Private Facts

Recognition

According to the 2001-2002 MEDIA PRIVACY SURVEY, 42 jurisdictions currently recognize a claim for publication of private facts. The tort has been specifically rejected in four jurisdictions.

Significant Media Cases

Two cases that went against media defendants had to effectively redefine “private” to do so.

The Idaho Supreme Court in Uranga v. Federated Publications, Inc., 2001 Ida. LEXIS 71, 29 Media L. Rep. 1961 (Utah June 21, 2001), reinstated a private facts claim based on a newspaper’s photographic republication of a 40-year old statement contained in a publicly available court file that accused plaintiff of homosexual conduct. The newspaper article, which otherwise did not mention plaintiff, recounted a high profile Idaho scandal from the 1950’s involving allegations of pedophilia and homosexual activity. The trial court granted summary judgment to the newspaper finding it had an absolute privilege under Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) and under the common law fair report privilege.

Reversing, the Idaho Supreme Court held that neither Cox Broadcasting nor the fair report privilege created an absolute privilege to publish information from a court file. The court emphasized that the statement was given by a defendant who pled guilty to morals charges and was therefore not used in a judicial proceeding, nor entered into evidence or a court pleading. As to the elements of the claim, the court found that although the allegations were contained in a public file, plaintiff raised sufficient issues of fact to avoid summary judgment as to 1) whether the publication of his name in the article was a matter of legitimate public interest; and 2) whether he had a legitimate expectation of privacy in the matter.

In M.G. v. Time Warner Inc., 89 Cal. App. 4th 623, 107 Cal. Rptr. 2d 504; 29 Media L. Rep. 1883 (Cal. Ct. App. 2001), the court affirmed the denial of a motion to strike a complaint under California’s anti-SLAPP law, Cal. Civ. Code § 425.16, finding that plaintiffs demonstrated a likelihood of success on their privacy claims, particularly for public disclosure of a private facts. At issue was a Sports Illustrated article and related HBO broadcast that reported on sexual abuse of children by adult coaches that published and broadcast a photograph of a little league team coached by a convicted molester. As to the private facts prong, the court held that 1) the disclosure of

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5 Nebraska, New York, North Carolina, and Virginia.
information connecting a person with sexual molestation was sufficiently offensive; 2) that the team photograph was “private”; and 3) that publication was not newsworthy. Discussing the right to privacy, the court described it as “the right to define one’s circle of intimacy” and thus even though the team photograph was distributed among family and friends it could still be considered private.

In *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 29 Media L. Rep. 1398 (Tex. App. 2001), the court affirmed summary judgment on a private facts claim against a television station that broadcast portions of a videotape secretly made by a school band director, allegedly to find out who was stealing students’ items from a locker room. Among other things, the tape depicted female students changing clothes. The videotapes were discovered in a garbage dumpster and given anonymously to the station. The court held that summary judgment was proper where the station did not air any portions of the tape depicting students in a state of undress. Moreover, the conduct of the band director was a matter of public concern. Lastly the court declined to recognize an action for negligent disclosure of private facts.

Several cases dismissed private facts claims based on disclosure of information in legal proceedings. In *The Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 737 N.E.2d 859, 28 Media L. Rep. 2569 (2000), in the context of terminating an impoundment order in a divorce case, the Supreme Judicial Court ruled that the husband, who had since been charged with murder of his wife, had no right to privacy in affidavits accusing him of spousal abuse. The Court also rejected the husband’s argument that “his right to privacy should not be ‘diminished’ or ‘transformed’ because the media thrust him onto the public stage after the death of his wife.” In *Jersevic v. WTCF/FOX*, 28 Media L. Rep. 2305 (Mich. App. 2000) (unpublished), the court affirmed summary judgment in favor of radio broadcaster on invasion of privacy and related claims based on reports discussing plaintiff’s sex life since such information related to a criminal trial and had become matters of public concern. In *Crumrine v. Harte-Hanks Television, Inc.*, 2001 WL 6012 (Tex. App.--San Antonio Jan. 3, 2001, pet. filed), the court affirmed summary judgment for a media defendant that published a report that plaintiff was a gay, HIV-positive police officer where the information was revealed in open court during a child custody dispute.

Likewise in *Green v. CBS Broadcasting, Inc.*, 29 Media L. Rep. 1321 (N.D. Tex. Dec. 20, 2000), the court granted the media defendant’s motion for summary judgment on a private facts claim where the allegedly private information had already been publicized in court proceedings. At issue was a *48 Hours* broadcast that interviewed a Texas lottery winner who alleged his wife was falsely accusing him of sexually abusing their daughter to obtain a greater portion of the lottery winnings in divorce proceedings. The spouse and minor daughter sued CBS, alleging defamation and invasion of privacy, the latter claim premised on the fact that the broadcast identified the child by her first name and showed the husband displaying a photograph of her. The court rejected the invasion of privacy claim based on publication of private facts since the matters disclosed were already in the public record based on the divorce proceeding and general community awareness.

While no cases in Puerto Rico directly address the private facts tort, in *Pérez v. Criado*, 2000 TSPR 92, a cause of action for damages was recognized under the general tort statute (art. 1802 of

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the Civil Code, 31 LPRA §5141) based on a newspaper’s repeated publication of grotesque pictures of a murdered political activist, which had been obtained illegally from the Coroner’s Office. The case also recognizes that a defendant may be liable for the emotional distress caused to the plaintiff, the decedent’s mother.

**Non-Media Private Facts Decisions**

The Eleventh Circuit in *Cash v. Smith*, 231 F.3d 1301, 1306 (11th Cir. 2000) affirmed the grant of summary judgment to a nonmedia defendant on the plaintiff’s claim arising from her supervisor’s alleged disclosure to coworkers of the plaintiff’s medical condition because the plaintiff herself “freely discussed her illness,” she did not treat the information as a private matter and could not claim that her privacy had been invaded. Similarly disclosure of medical records in deposition testimony in lawsuit initiated by plaintiff did not amount to offensive publicity or unreasonable publication. *Alexandru v. West Hartford OB-GYN*, 2000 Conn. Super. LEXIS 3291, (Conn. Super. 2000). *See also Ex parte The Birmingham News, Inc.*, 778 So. 2d 814 (Ala. 2000) (internal investigation of sexual harassment complaint did not create sufficient publicity to satisfy disclosure element of private facts claim).

3. **Intrusion and Related Causes of Action**

**Recognition**

According to the 2001-2002 M EDIA P RIVACY S URVEY, 44 jurisdictions recognize a claim for intrusion. 6 Two jurisdictions have explicitly declined to recognize intrusion; 7 in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort. 8

**Media Intrusion Decisions**

In *John Does v. Franco Productions*, 2000 WL 816779 (N.D. Ill. June 22, 2000), a group of college athletes sued several defendants, including two Internet Service Providers (“ISPs”), for intrusion and for eavesdropping under the Electronic Communications Privacy Act, 18 U.S.C. § 2511(a) (“ECPA”), after secretly recorded videotapes of plaintiffs in various states of undress were sold, through Internet sites hosted by the ISPs. The court dismissed the claims against the ISPs, finding that the CDA immunizes ISPs against liability for third party material, regardless of whether

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7 New York and Virginia.

8 Eighth Circuit opinion interpreting North Dakota law.
the ISPs acted as web hosts.

**Significant Non-media Cases**

An expectation of privacy is the touchstone of the tort and the pivotal issue in two non-media cases.

In *Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041 (D. Haw. 2000), the federal district court in Hawaii recognized the tort of intrusion based on allegations by a police department employee that in retaliation for a complaint of sexual harassment she was subject to police surveillance and illegal “wire trapping” of her pager. The warrantless monitoring of the pager (i.e. retrieving the phone numbers contacting the pager) constituted a per se intrusion, but factual issues remained as to whether the pager was owned by plaintiff or the police department and therefore whether a reasonable expectation of privacy existed.

In another claim based on surveillance, the Alabama Supreme Court held that an intrusion claim would not lie against a nonmedia defendant where the plaintiff should have expected an investigation regarding his workers compensation case, including surveillance. *I.C.U. Investigations, Inc. v. Jones*, 2000 WL 869595 ( Ala. 2000). After determining that the reason for the surveillance was legitimate, the court also considered whether the means used were “offensive or objectionable.” Because the plaintiff was videotaped from a public street while in his front yard, “any intrusion . . . was not ‘wrongful.’” *Id.* at *3. See also Peters v. Vinatieri, 102 Wn. App. 641, 9 P.3d 909 (2000) (videotaping in areas open to the public did not constitute actionable intrusion).

The Washington State Supreme Court held that an investigation into the private life of a student who was falsely accused of date rape supported a claim for intrusion. *Doe v. Gonzaga University*, 143 Wn. 2d 687, 24 P.3d 390 (2001). The court reinstated a $100,000 jury damage award that had been thrown out by the appellate court for not satisfying the highly offensive conduct element of the tort. According to the Washington Supreme Court this element was satisfied where the jury heard testimony that Gonzaga personnel had inquired into the intimate details of plaintiff’s sex life.

**Eavesdropping/Hidden Cameras/Other Forms of Surveillance**

According to the 2001-2002 MEDIA PRIVACY SURVEY, in addition to the Federal Wiretap Statute, 18 U.S.C. §2510 et seq., 52 jurisdictions have electronic eavesdropping statutes. In 39 of those jurisdictions, however, it is not a violation of the statute, as a general proposition, if one party...
gives consent to the recording.\textsuperscript{10} The other 13 jurisdictions require the consent of all parties, at least in delineated circumstances.\textsuperscript{11}

The Supreme Court delivered its long awaited decision in \textit{Bartnicki v. Vopper} on May 21\textsuperscript{st} near the end of the term. It was the Court’s first substantive opinion in a media privacy case since \textit{Florida Star v. B.J.F}\textsuperscript{12} was decided twelve years ago. Indeed, the Court returned to the same question posed there: whether, and in what circumstances, the media can be punished for publishing true and lawfully acquired information. And, significantly, the Court returned to the principle of \textit{Florida Star} to answer the question.

The specific question before the Court in \textit{Bartnicki} was whether the civil damages provision of the Wiretap Act (and its Pennsylvania analogue) could be applied to several media defendants and a source who disclosed the contents of a cell phone conversation. The defendants were not directly involved in the illegal interception, but they knew, or should have known, of its suspect origin. In a decision written by Justice Stevens, joined by Kennedy, Souter, and Ginsburg, with Breyer and O’Connor concurring, the Court ruled that applying the wiretap statutes to the defendants would violate the First Amendment. Without answering the broad question left open in \textit{Florida Star}, all six Justices agreed that there could be no liability where the defendants were not involved in the illegal interception and where the information they disclosed involved a matter of public concern.

The heart of the decision was the straightforward principle from \textit{Florida Star} and \textit{Smith v. Daily Mail Publishing}\textsuperscript{13} – absent a governmental interest of the highest order a prohibition on the publication of truthful information cannot satisfy constitutional standards. The fact that the wiretap statutes are content neutral laws of general applicability was of no constitutional significance in the Court’s analysis, although it was an issue (along with the strict/intermediate scrutiny framework) that preoccupied lower courts in this and the other wiretap cases that are pending in the Fifth Circuit and D.C. Circuit.

The government had offered two interests for the Wiretap Act’s application: deterring illegal interceptions and protecting the privacy of electronic communications. While the Court treated both, particularly the latter, with great seriousness, in the end neither could justify liability under the facts of \textit{Bartnicki}.

\begin{itemize}
\item \textsuperscript{10} Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
\item \textsuperscript{11} California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, Puerto Rico, South Dakota, and Washington.
\item \textsuperscript{12} 491 U.S. 524 (1989).
\item \textsuperscript{13} 443 U.S. 97 (1979)
\end{itemize}
It remains to be seen whether the Court’s invocation of the Florida Star/Daily Mail principle heralds a reinvigoration of the First Amendment defense in newsgathering cases following a decade in which lower courts routinely invoked Cohen v. Cowles Media14 to preclude media defendants from invoking the First Amendment as a defense in claims involving “generally applicable laws” — from trespass to intrusion to fraudulent misrepresentation.

A week after deciding Bartnicki, the U.S. Supreme Court granted certiorari in McDermott v. Boehner, 191 F.3d 463, 27 Media L. Rep. 2345 (D.C. Cir. 1999), and vacated and remanded, 121 S. Ct. 2190 (2001). In 1999, a divided panel of the Court of Appeals for the District of Columbia had ruled that Congressman McDermott could be liable for disclosing the contents of a cell phone conversation between fellow Congressman Boehner, former House Speaker Newt Gingrich and other House Republicans, concerning the House Ethics Committee’s investigation of Gingrich. McDermott was given the tape by a Florida couple who intentionally intercepted and recorded the call. The Court of Appeals found that McDermott indirectly participated in their illegal conduct and had “no firm First Amendment right to disclose information simply because the information was . . . legally acquired [by him].”

On remand, it would seem that Bartnicki now requires that the case be dismissed. Congressman McDermott was not involved in, nor did he encourage, the illegal interception, placing him in the identical position as the source in Bartnicki. And the contents disclosed were certainly newsworthy. But Justice Breyer’s concurrence in Bartnicki provides at least a thin reed of hope for the survival of the claim. Although the politicians’ strategy discussion captured on the recording is certainly newsworthy, it remains to be argued, at least, that their private call was not, in Breyer’s words, an “unusual matter of public concern” involving public safety as presented in Bartnicki.

The U.S. Supreme Court left standing the Fifth Circuit’s decision in another wiretap case, Peavy v. WFFA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), cert. denied, 69 U.S.L.W. 3318, 3383 (U.S. May 29, 2001) (Nos. 00-691, 00-849). The Fifth Circuit, applying the intermediate scrutiny standard, found that the Wiretap Act was constitutional as applied to a media defendant who may have encouraged a source to illegally intercept phone conversations. The court also held that the media defendants could be liable for disclosures of illegally intercepted communications to its attorneys, its own employees, or law enforcement officers.

The defendant television station used illegally intercepted cordless phone conversations to make notes and develop leads for a story about a public school district trustee. Because the station did not broadcast the conversations during its reports and because the reports appeared to be based on independent sources, the court found that the broadcast reports alone did not constitute an unlawful disclosure. On the other hand, the court rejected the station’s claim that it did not unlawfully disclose the information on the tape when the investigative reporter who first heard the tapes shared information about them with station employees. The station argued that a “corporation

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14 501 U.S. 663, 669 (1991) (“Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”).
cannot disclose information to itself.” The court, however, read the Act narrowly and found that the disclosures to station employees were prohibited because they did not fall within any of the Wiretap Statute’s specific exceptions.

The station also argued that it did not unlawfully disclose the contents of the taped conversations to its attorney when it consulted him for legal advice. It asked the court to recognize an implied “defense exception to disclosure liability” when a party shares information with his or her attorney to assist in the party’s defense. The court, however, rejected this argument because (1) the station did not disclose the information for the purpose of defending against Wiretap Act claims; and (2) the station did not need to disclose the tape’s contents to the attorney to obtain his legal advice on whether the interception violated the Act.

Other Media Eavesdropping Decisions

In Lucas v. Fox News Network, LLC, No. 00-14519 (11th Cir. Jan. 16, 2001)(unpublished), the court found that the media defendant was not liable under Wiretap Statute because it did not have a tortious purpose when it secretly taped members of a religious group during private a meeting; even if the defendant’s purpose was to cause insult and injury, as the plaintiffs claimed, this was insufficient to state a claim under the Act.

In John Does v. Franco Productions., 2000 WL 816779 (N.D. Ill. June 22, 2000), the court dismissed eavesdropping claims against two Internet Service Providers (“ISPs”) based on the sale and distribution of secretly recorded videotapes of plaintiffs in various states of undress through web sites hosted by the ISPs. The court found that plaintiffs failed to state a claim for eavesdropping because the ISPs did not endeavor to disclose intercepted communications and there is no cause of action under The Electronic Communication Privacy Act, 18 U.S.C. § 2702, for “aiding and abetting the intentional disclosure or endeavoring to disclose oral communications” as plaintiffs had alleged.

In Knautz v. Wilson, 28 Media. L. Rep. 2588 (M.D. Fla. Sept. 21, 2000), the court dismissed wiretap claims against a newspaper and broadcaster for disclosing the contents of phone conversations between plaintiff and a government informant since the taping was with the informant’s consent and therefore later use or disclosure does not violate the Wiretap Act. This is in accord with several non-media cases. See Sparshott v. Feld Entertainment, Inc., No. 99-0551, 2000 U.S. Dist. LEXIS 13789 (D. D.C. 2000) (finding defendant did not violate Wiretap Statute because he participated in conversations he taped and thereby consented to the recording); U.S. v. Joubert, 2000 U.S. App. LEXIS 21039 (9th Cir. 2000) (upholding trial court’s refusal to suppress evidence obtained through a wiretap because the wiretap was “consensual”); U.S. v. Potts, 2000 U.S. App. LEXIS 29790 (9th Cir. 2000) (finding evidence obtained through electronic monitoring exempt from warrant requirement because informant consented to the recordings); Goode v. Goode, 2000 U.S. Dist. LEXIS 3124 (D. Del. 2000) (upholding dismissal of plaintiff’s Wiretap Statute claims against defendant because defendant was a party to the conversations he taped and thereby consented to the recordings).
Significant Non-Media Eavesdropping Decisions

Three recent cases grappled with the question whether the unauthorized accessing of “stored” communications, such as e-mail, constitutes illegal eavesdropping. In Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035 (9th Cir. 2001), opinion withdrawn, 2001 U.S. App. LEXIS 191 (9th Cir. Aug. 28, 2001), a corporate vice president used an employee’s personal password to access and read the message board of another employee’s personal web site that was critical of the company. The site was configured to require user names and passwords that were only made available to some non-management employees. In its initial decision, the Ninth Circuit held that the employee stated a claim under the Wiretap Act and the Stored Communications Act. Departing from a number of prior cases that considered the issue, the court found that the statutes do not distinguish intercepted communications based on whether they are in transit or in storage, describing the distinction between the two for purposes of protection from interception as “irrational.” Id. at 1045.

In response to a pending motion for rehearing en banc, in August the Ninth Circuit withdrew its decision Konop, 2001 U.S. App. LEXIS 191 (9th Cir. Aug. 28, 2001), signaling that it will likely adopt the more prevalent authority that the Electronic Communications Privacy Act applies to e-mails in transit but not to those in storage. See, e.g., Fraser v. Nationwide Mut. Ins. Co., 2001 U.S. Dist. LEXIS 3241, at *27-30 (E.D. Pa. Mar. 27, 2001) (unauthorized retrieval of e-mail messages violates the Wiretap Statute only when it occurs during transmission; retrieving an employee’s stored e-mail message after transmission does not violate the Wiretap Statute); Hudson v. Goldman Sachs & Co., 725 N.Y.S.2d 318, 320 (N.Y. App. Div. 2001) (reversing summary judgment of claim under 28 U.S.C. §§ 2511, 2520 (1994) (“[t]he statute prohibits only intercepts that are contemporaneous with transmission, i.e., the intercepted communication must be in transit, not in storage”).


In a nonmedia case involving governmental eavesdropping, the Fifth Circuit in Kee v. City of Rowlett, 2001 U.S. App. LEXIS 4970 (5th Cir.), cert. denied, 122 S. Ct. 210 (2001), held that a family did not have a reasonable expectation of privacy at a funeral service for two murdered children. Law enforcement officers intercepted words and prayers directed to the two dead children by placing surveillance devices in a funeral urn near the grave sites. The children’s father and grandmother sued, alleging that the surveillance violated the Wiretap Statute because they had an expectation of privacy during the funeral. The Fifth Circuit, however, upheld summary judgment for the government, finding that the plaintiffs had not shown that the context of the communications should have been private. For example, the court noted that members of the media attended the service and that the plaintiffs did not take any affirmative steps to keep out unwanted individuals. The court also found that the plaintiffs had failed to show that the site was secluded by other graves, trees, or bushes. Because the plaintiffs did not show that they had taken “reasonable safeguards” or “common-sense precautions” to protect their privacy, the defendant’s conduct did not violate the Wiretap Statute.
Hidden Cameras Legislation

Virginia’s Interception of Wire, Electronic, or Oral Communications Act was amended to make it unlawful “to use a peephole or other aperture to secretly or furtively peep, spy or attempt to peep or spy into a restroom, dressing room, locker room, hotel room, motel room, tanning bed, tanning booth, bedroom or other location or enclosure for the purpose of viewing any nonconsenting person” who is nude or in a state of undress. Va. Code Ann. § 18.2-130(b) (Michie Supp. 2000).

Related Newsgathering Torts

Trespass

A Georgia appellate court reversed summary judgment in favor of a broadcaster in a “ride-along” case. Nichols v. Georgia Television Co., 552 S.E.2d 550, 29 Media L. Rep. 2179 (Ga. App. 2001). The trial court had dismissed plaintiffs’ trespass claim against a television station whose reporters, at the invitation of law enforcement officials, videotaped and later broadcast interviews from the scene of the execution of a drug-related search warrant by police. See Nichols v. Georgia Television Co., No. 99-A-6323-4 (Ga. Super. Ct. Aug. 14, 2000). The trial court found that where the damages alleged were “embarrassment and humiliation,” the trespass claim was an attempt to avoid the statute of limitations on libel. Reversing, the appellate court found that plaintiffs alleged and presented some evidence of a trespass sufficient to raise questions for the jury.

In Puerto Rico, the federal district court rejected the media’s First Amendment defense in a criminal trespass case, based on reporters entering federally owned property in violation of statute. United States v. Maldonado-Norat, 122 F. Supp. 2d 264, 264-66, 29 Media L. Rep. 1123 (D.P.R. 2000). The court held that because the First Amendment does not give reporters access beyond what is generally available to the public, the First Amendment also does not give reporters a constitutional right to trespass on federal land.

4. Misappropriation/Right of Publicity

Recognition

According to the 2001-2002 MEDIA PRIVACY SURVEY, 45 jurisdictions currently recognize the tort of misappropriation / right of publicity. In nine jurisdictions the courts have not yet had the

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opportunity to rule on the issue.\textsuperscript{16}

**Significant Media Decisions**

The Ninth Circuit handed down two arguably conflicting decisions regarding the scope and application of California’s right of publicity statute (Cal. Civil Code § 3344). In *Hoffman v. L.A. Magazine*, 255 F.3d 1180 (9th Cir. 2001), the court reversed a $3 million jury award to actor Dustin Hoffman based on *L.A. Magazine*’s use of an altered photograph of the actor from the movie *Tootsie* to illustrate an article on Spring 1997 fashions. The district court had found that the magazine piece “crossed over the line between editorial content and advertising” when it used the name and likeness of “truly one of our country’s living treasures, actor Dustin Hoffman.” *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999). Reversing, the Ninth Circuit held that although the magazine’s use of the photo was in part commercial, that was insufficient to render the use pure commercial speech subject to lower First Amendment standards. *Hoffman*, 255 F.3d at 1185. Instead, the court held use of the Hoffman photo in the article was “inextricably entwined” with expressive elements, subject to full First Amendment protection.

A different Ninth Circuit panel, however, reinstated a right of publicity claim in another case involving use of a photograph for both commercial and editorial purposes. *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. Sept. 13, 2001). Plaintiffs, seven 1960’s era surfers, sued clothing manufacturer Abercrombie & Fitch, for using their group picture in a subscription magazine published by the company that primarily showcases its products and also contains editorial articles. The court held that the use of the photograph was not protected by the First Amendment because the photograph functioned as “window-dressing” for sales of the defendant’s products and therefore did “not contribute significantly to a matter of public interest” – a factor not mentioned by the *Hoffman* panel.

The California Supreme Court also considered the extent to which non-commercial works bearing celebrities’ images are protected by the First Amendment. *Comedy III Productions, Inc. v. Saderup*, 21 P.3d 797, 29 Media L. Rep. 1897 (2001). Without the consent of plaintiff licensee, the defendant sold lithographs and T-shirts bearing the likenesses of The Three Stooges that he reproduced from his own charcoal drawings. The Supreme Court affirmed a damage award to plaintiff. Although finding that defendant’s non-commercial use was protected by the First Amendment, the court balanced that right against California’s statutory right of publicity, concluding that defendant’s work lacked significant creative elements. According to the court defendant’s undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that Saderup’s depictions were protected by the First Amendment, we cannot perceive how the right of

\textsuperscript{16} Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana, New Hampshire, 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.
publicity would remain a viable right other than in cases of falsified celebrity endorsements.” *Id.* at 811.

In *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000), the Sixth Circuit affirmed summary judgment dismissing an actor’s claim that a toy created under license and based on a character the actor-plaintiff played in the movie *Predator* violated his right of publicity. The court defined the right of publicity as “a creature of state common law and statute and originated as part of the common-law right of privacy.” *Id.* at 622. The court noted that although the plaintiff need not be a “national celebrity to prevail . . . a plaintiff must demonstrate that there is value in associating an item of commerce with his identity.” *Id.* at 624. Here the court concluded that plaintiff failed to prove a sufficient value in his likeness.

A New York federal district court granted summary judgment on a statutory misappropriation claim brought on behalf of a 15-year old young woman who appeared as a guest on the Sally Jesse Raphael show and identified herself as a prostitute. The court found that the appearance was part of a newsworthy program about prostitution among teenage runaways and therefore could not be actionable under New York’s misappropriation statute, N.Y. Civ. Rights Law §§ 50, 51. *Weber v. Multimedia Entertainment*, No. Civ. 06821, 2000 WL 526726 (S.D.N.Y. May 2, 2000).

Similarly, a New York appellate court affirmed dismissal of a statutory misappropriation claim based on allegations by plaintiff, Michael Costanza, that he was the inspiration for the character George Costanza on the television show *Seinfeld*. *Costanza v. Seinfeld*, 719 N.Y.S.2d 29 (1st Dep’t 2001). Among other things, the appellate court noted that the similarity of last names between plaintiff and the fictional character is not cognizable under New York’s statute and moreover that works of fiction do not fall within the scope of New York’s statute. *See also Rappaport v. Buske*, No. 98 Civ. 8990, 2000 WL 1224828 (S.D.N.Y. 2000) (isolated use of plaintiff’s name in promoting television show while contract talks with plaintiff were underway was not for trade or advertising).

In contrast, a New York district court granted summary judgment in favor of plaintiffs, members of the rap group “The Sugar Hill Gang,” against a beverage manufacturer and broadcaster, where the court found that their images and voices were used in promotional vignettes that served as advertising for Snapple and the Goodwill games. *Robinson v. Snapple*, 28 Media L. Rep. 2368 (S.D.N.Y. June 19, 2000).

**Significant Non-Media Misappropriation Decisions**

The Indiana Supreme Court reversed a troubling appellate court decision that held that the University of Evansville as a corporate entity could maintain an action for misappropriation. *Felsher v. University of Evansville*, 755 N.E.2d 589 (Ind. 2001), reversing, 727 N.E.2d 783, 28 Media L. Rep. 1792 (Ind. Ct. App. 2000). The intermediate appellate court held that while a corporation could not maintain an action for false light, private facts or intrusion, it could maintain an action under the misappropriation strand on the grounds that this strand is intended to protect a property interest. In so ruling, would have become the first state to allow a corporation to maintain an invasion of privacy action. The Indiana Supreme Court reversed, holding in line with established precedent that
a corporation cannot state a claim for invasion of privacy by misappropriation.

In *Fanelle v. Lojack Corp.*, 29 Media L. Rep. 1513 (E.D. Pa. 2000), the Court denied a motion for summary judgment filed by the manufacturer of a car security device. The plaintiff had been arrested in connection with a car theft that was thwarted with the aid of the defendant’s tracking device. A newspaper ran a story about the arrests that included a photograph of the plaintiff. Plaintiff was later acquitted in his criminal trial. The manufacturer, however, included the newspaper article in its promotional literature, suggesting that plaintiff was in fact a criminal to all who read the manufacturer’s brochure. The plaintiff sued under a variety of theories, including misappropriation. Finding little guidance in Pennsylvania law, the Court predicted that the Supreme Court of Pennsylvania would follow the majority rule that non-celebrities may sue for misappropriation of their likeness. On this basis, the Court allowed the appropriation claim to proceed to trial. *Id.*

5. Intentional Infliction of Emotional Distress

**Recognition**

According to the 2001-2002 MEDIA PRIVACY SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 38 have case law specifically dealing with the tort in the media context. In the remaining 16 jurisdictions, the courts have yet to address the application of the tort to the media context.

**Significant Media Cases**

A New York federal court reiterated that “New York courts have consistently held that a plaintiff may not maintain a separate claim for intentional infliction of emotional distress grounded in the same facts as a claim for libel. . . . It makes no difference that plaintiff’s libel claim is insufficient.” *Idema v. Wager*, 120 F. Supp. 2d 361, 270 (S.D.N.Y. 2000). In fact, the court noted that “it is nearly impossible in New York for a plaintiff to state a viable claim for intentional infliction of emotional distress.”

Another New York federal court dismissed intentional infliction of emotional distress claims against a publisher and author based on an article which, it was complained, suggested that plaintiff had committed war crimes. *Van Buskirk v. New York Times Co.*, 28 Media L. Rep. 2525 (S.D.N.Y. 2000). At issue here was an op-ed article published by the *New York Times* criticizing CNN’s...

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

18 Alaska, Delaware, Guam, Indiana, Iowa, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Tennessee, Vermont, Virgin Islands, West Virginia, and Wisconsin.
“Operation Tailwind” broadcast – later disavowed – which claimed that during the Vietnam war the U.S. military sought to kill American defectors using nerve gas. The court found that the article was an effort to disprove statements attributed to plaintiff suggesting that he had committed “war crimes,” not an accusation of such crimes. Therefore the article could not reasonably be described as outrageous behavior.

In *Cox Texas Newspapers v. Wootten*, 29 Media L. Rep. 2204 (Tex. App.--Austin July 26, 2001), withdrawing, 9 Media L. Rep. 1584, the court held that a newspaper’s publication of photographs of plaintiff’s deceased wife in an article about the funeral business, while unauthorized, was not outrageous conduct. The court opined that “taking pictures of a dead body is not intolerable.”

In contrast, although the court does not specifically label the cause of action, a Puerto Rico court held that plaintiff had a cause of action against a newspaper under a general tort statute (art. 1802 of the Civil Code, 31 LPRA sec. 5141) based on allegations that the defendant repeatedly published grotesque autopsy photographs of a murdered political activist, which had been obtained illegally from the Coroner’s Office. *Pérez v. Criado*, 2000 TSPR 92.

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

A plaintiff’s claim that the defendant leaked a letter she wrote to the press was insufficient to state a claim because “even if true, such conduct could never rise to the level of outrageousness required to sustain a claim for intentional infliction of emotional distress as a matter of law.” *Smith v. School Dist. of Philadelphia*, 112 F. Supp. 2d 417, 427-28 (E.D. Pa. 2000).

In another Pennsylvania case, the court refused to allow plaintiff to amend his complaint to add an intentional infliction of emotional distress claim on behalf of a corporation since it cannot suffer emotional distress. *Marchese v. Umstead*, 110 F. Supp. 2d 361, 373 (E.D. Pa. 2000).

In a claim of invasion of privacy and intentional infliction of emotional distress brought by a congregant against his church, the Michigan Supreme Court held that plaintiff’s consent to the church’s disciplinary practices precluded his claims as a matter of law. *Smith v. Calvary Christian Church*, 462 Mich. 679, 614 N.W.2d 590 (2000).

6. **Negligent Infliction of Emotional Distress**

**Recognition**

According to the 2001-2002 *MEDIA PRIVACY SURVEY*, 45 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress. 19 Seven jurisdictions have expressly

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19 Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri,
rejected the tort in all cases.\textsuperscript{20}

\textbf{Significant Media Cases}

In \textit{Rendon v. Valleycrest Productions, Ltd \& ABC.}, 119 F. Supp. 2d 1344, 1346-47 (S.D. Fla. 2000), the court dismissed for failure to state a claim a complaint filed by a group of disabled individuals against the owners and producers of the hit game show “Who Wants to Be a Millionaire.” Plaintiff’s alleged that they could not compete on an equal basis when participating in the initial contestant selection process for the show which rated potential contestants on their accuracy and speed in answering recording questions using a touch tone telephone. Plaintiffs alleged that this process violated 42 U.S.C. § 12182(a) (Title III), which prohibits discrimination in public accommodations, and constituted negligent infliction of emotional distress. Dismissing the complaint, the court held that the game show’s phone selection process was not a “public accommodation.” Further the court held that under Florida law, a plaintiff cannot recover damages for emotional distress caused by the negligence of another unless the emotional distress flows from the physical injuries sustained by the plaintiff, and there was no physical impact from the selection process.

In an interesting footnote to this decision, which is now on appeal to the Eleventh Circuit Court of Appeals, it has been reported that U.S. District Judge Federico Moreno, who granted the motion to dismiss, asked the Eleventh Circuit to reinstate the case in light of the U.S. Supreme Court’s decision in \textit{PGA Tour, Inc. v. Martin}, which held that under the Americans with Disabilities Act the PGA Tour was required to allow golfer Casey Martin to use a cart in PGA tournaments as an accommodation of his disability. \textit{See} S. Miller, “Federal Judge Seeks Rerun of ‘Millionaire’ ADA Case,” Miami Daily Business Review (Nov. 1, 2001).

\textbf{7. Conspiracy}

In \textit{Peavy v. WFFA-TV, Inc.}, 221 F.3d 158, 173 (5th Cir. 2000), \textit{cert. denied}, 121 S. Ct. 2191 (2001), the Fifth Circuit held that the First Amendment does not bar a conspiracy claim based on allegations that a reporter and broadcaster conspired with a source to intercept the plaintiff’s telephone calls.


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\textsuperscript{20} Alabama, Arkansas, Georgia, Iowa, Kentucky, Maryland, and Texas.
8. Breach of Contract

In a case brought by a source against a reporter, a federal court held that the District of Columbia does not recognize an action for breach of contract for failure to honor an oral promise of confidentiality. Steele v. Isikoff, 28 Media L. Rep. 2630 (D.D.C. 2000). Julie Hyatt Steele – a minor player in the Clinton Lewinsky scandal – sued reporter Michael Isikoff, Newsweek and The Washington Post for a broad array of contract and tort claims alleging that the defendants’ breached an agreement not to reveal her identity as a source for a story relating to accusations that then President Clinton groped Kathleen Willey in the White House.

The court dismissed for failure to state a claim her breach of contract claim in which she alleged her identity was disclosed despite an alleged oral agreement of confidentiality “because a reporter’s promise of confidentiality is a moral obligation, not a contractual requirement, and because a moral obligation does not give rise to express or implied contractual duties, there is no contractual relationship between” a reporter who promises confidentiality and a source. Id. at 2637. The court further found that even if a contractual relationship could be found to exist, it would be vitiated because Steele admittedly lied to the reporter by knowingly providing false statements pursuant to the promise of confidentiality. Id. at 2637. Similarly, the court ruled that because Steele knowingly provided false information she was barred by the “unclean hands” doctrine from recovery on a claim for unjust enrichment. Id. at 2639.

Interestingly, the court denied defendants’ motion to dismiss on First Amendment grounds. Although the court recognized that a party seeking damages for harm to reputation or state of mind must meet the constitutional requirements of a defamation claim, a party seeking “damages for non-reputational harms, which include lost jobs and diminished employment prospects,” need not do so for claims brought under generally applicable laws. Id. at 2635.


The Second Circuit held that an arrestee’s right to privacy under the Fourth Amendment was violated when in response to a media request police led the suspect outside in handcuffs and back into the station house so that a local New York news station could obtain video to accompany its report on plaintiff’s arrest. Lauro v. Charles, 219 F.3d 202, 213 (2d Cir. 2000). The case involved the so-called “perp walk” – the practice whereby police lead an arrestee into or out of a location, such as out of a police station, thereby making the suspect available to the media. The Second Circuit found that a perp walk specifically staged by the police for the media was an unreasonable seizure and not sufficiently related to a legitimate governmental objective. But while the police conduct constituted a violation of the Fourth Amendment, a reasonable police officer could not have discerned at the time of the seizure that it violated a constitutional right. As to the media, the court stated that “we are not intimating that it might be liable to Lauro for its participation in the perp walk.”

Several other cases reported in the 2001-2002 Media Privacy and Related Law Survey involved dismissals of §1983 claims based on alleged injury to reputation. See Idema v. Wager, 120

In an unusual claim brought under §1981, which prohibits racial discrimination in the making and enforcement of private contracts, the court denied a motion to dismiss in a suit brought against a newspaper for refusing to run plaintiff’s adult entertainment advertisements that contained pictures of black “erotic” dancers. Spence v. Daily News, 29 Media L. Rep. 1439 (S.D.N.Y. Feb. 13, 2001). The plaintiff alleged that the newspaper violated 42 U.S.C. § 1981 when it chose not to run the ads he had placed pursuant to the parties’ contract, but had printed adult entertainment ads featuring white dancers. In denying the newspaper’s motion to dismiss, the court rejected the newspaper’s First Amendment defense that it had the right to reject the proposed content of plaintiff’s advertisements, finding instead that the First Amendment does not “prevent courts from enforcing statutes, such as Section 1981, that prohibit discrimination.” Id.

10. Interference With Contract/Business Relations

The First Circuit, applying Puerto Rico law, dismissed a claim for intentional interference with business relations based on an article in Consumer Reports criticizing the safety of the Isuzu Trooper sports utility vehicle. Emerito Estrada Rivera-Isuzu de Puerto Rico, Inc., v. Consumers Union of United States, 233 F.3d 24, 30-31 (1st Cir. 2000). Plaintiff, the sole Isuzu dealer in Puerto Rico, failed to state a claim because he did not identify in his complaint any specific relationships that were injured or threatened because of the article.

In Zollman v. Murphy, 742 N.E.2d 1043 (Ind. Ct. App. 2001) (unpublished mem.decision), the Indiana Court of Appeals upheld the dismissal of what it deemed a tortious interference action against media defendants. Plaintiff sued media defendants and others for defamation and intentional harm to his medical practice. The defamation action was withdrawn because plaintiff could not establish actual malice as required by Indiana law in matters of public concern. See Journal-Gazette Co., Inc. v. Bandido’s, Inc., 712, N.E.2d 446, 456, 27 Media L. Rep. 2089 (Ind. 1999). However, plaintiff claimed that he could recover under a common law tort action for conduct intended to harm or destroy his medical practice. The Court of Appeals restated his complaint as one for tortious interference with a business relationship, which requires that the defendant engage in some act of unlawful interference. The Court of Appeals held that while the defendants’ acts may have cast plaintiff in an unfavorable light, the investigation and reporting of malpractice lawsuits filed against him were legal and no cause of action was stated.

Similarly, in Atiyeh Publishing, LLC v. Times Mirror Magazines, Inc., No. 00-CV-1962,
2000 WL 1886574, at * 3-4 (E.D. Pa. Dec. 7, 2000), the court found that plaintiff could not assert a claim for interference with contract when the allegations sounded primarily in defamation and commercial disparagement.

In an unusual case, a Georgia appellate court entered summary dismissing a newspaper’s tortious interference claim against a hospital and its CEO who allegedly would not patronize the newspaper’s advertisers because of repeated criticisms published in the paper. Sumter Reg’l Hosp., Inc. v. Sumter Free Press, Inc., 546 S.E.2d 831 (Ga. App. 2001) (finding no evidence of financial injury to newspaper to support tortious interference with business relations claim).

In CAT Internet Services, Inc. v. Magazines.com, Inc., No. 00-2135, 2001 WL 8858, at * 4 (E.D. Pa. Jan. 4, 2001), plaintiff magazine seller’s claim for tortious interference survived a motion to dismiss where it alleged that defendant redirected Internet traffic from plaintiff’s website to a site with a similar domain name.

**Significant Non Media Cases**

In Calvin Klein Trademark Trust v. Wachner, 129 F. Supp. 2d 248 (S.D.N.Y. 2001), the court found that alleged defamatory statements made by designer Calvin Klein on the Larry King Live television show describing a clothing manufacturer’s conduct as being “equivalent” to “counterfeiting” satisfied the “improper means” element in stating a claim for interference with business relations. According to the court “defamation surely counts as an improper means by which to interfere in the business relations of another.”

The Texas Supreme Court held that justification and privilege are affirmative defenses to tortious interference claims to the extent that they are defenses to the independent tortiousness of the defendant’s conduct. Wal-Mart Stores, Inc. v. Sturges, 2001 WL 228139 (Tex. Mar. 8, 2001). By way of example, the Texas Supreme Court noted that a defendant charged with interference with prospective business relations by making defamatory statements could assert the defense of privilege if his challenged statements were protected by a complete or qualified privilege. The decision cleared up a conflict in Texas courts as to whether plaintiff was required to plead lack of privilege. Compare, e.g., Grace v. Zimmerman, 853 S.W.2d 92 (Tex. App.--Houston [14th Dist.] 1993, no writ) (lack of privilege or justification is element of plaintiff’s claim for tortious interference with prospective business relations), with David L. Aldridge Co. v. Microsoft Corp., 995 F. Supp. 728 (S.D. Tex. 1998) (justification is affirmative defense to tortious interference with business relations).

11. **Injurious Falsehood/Product Disparagement/Slander of Title**

The Fifth Circuit held that a public-figure need not prove actual malice if that plaintiff’s statutory disparagement claim is based on false statements that are commercial speech. Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 29 Media L. Rep. (5th Cir.), cert. denied, 122 S. Ct. 329 (2001). Proctor & Gamble (“P&G”) sued Amway and several distributors for disparagement under Section 43(a) of the Lanham Act and Tex. Bus. & Comm. Code § 16.29, and related claims, alleging
that they injured P&G’s reputation by repeating long standing and false rumors that P&G is involved with Satanism. Following a trial, the district court granted judgment as a matter of law to the defendants on the disparagement claims. Noting that P&G was a public figure and that the Satanism rumor was a matter of public concern, the court found that P&G presented no evidence that the defendants repeated the rumor with actual malice. The Fifth Circuit reversed judgment on the disparagement claims. Although P&G is a limited purpose public figure with regard to the Satanism rumor and the speech at issue “touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society,” the court held that if the defendants’ motivation in spreading the rumor was substantially economic, their speech would be commercial and entitled to no protection under the First Amendment.

In Calvin Klein Trademark Trust v. Wachner, 129 F. Supp. 2d 248 (S.D.N.Y. 2001), the court denied summary judgment on a trade libel cause of action based on statements made by designer Calvin Klein on the Larry King Live television show describing a clothing manufacturer’s conduct as being “equivalent” to “counterfeiting.” The court rejected the argument that the statements were privileged under New York’s fair report statute as a fair summary of ongoing litigation between Klein and the manufacturer. In contrast, it found that a reasonable juror could find that the comments went well beyond anything reasonably suggested in the parties’ litigation, which concerned contractual breaches, trademark violations, and unauthorized distribution practices.

In Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 761 A.2d 553, 557 (2000), the court held that product disparagement claims are governed by a two year statute of limitations governing actions for “negligent, intentional, or otherwise tortious conduct” and not by the shorter one year limitation period for defamation actions. At issue was the newspaper defendant’s erroneous report that plaintiff’s business was to be demolished. Comparing the torts of product disparagement and defamation, the court found that the gravamen of plaintiff’s action is disparagement rather than defamation because the false report “in no way impugned or questioned the reputation of appellant, appellant’s products or appellant’s services.”

12. Lanham Act/State Unfair Competition Law

In Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658 (5th Cir. 2000), fashion designer Ralph Lauren sued a magazine publisher, alleging that its use of the title “POLO” for its magazine “New POLO Magazine” infringed on the designer’s “Polo” mark. The lower court entered judgment for the plaintiff, permanently enjoining the defendant’s use of the mark for its magazine. The Fifth Circuit, in an opinion authored by Circuit Judge Edith H. Jones, affirmed in part and vacated/remanded in part, holding that while the plaintiff’s mark was infringed by the defendant, First Amendment concerns warranted consideration of disclaimer relief rather than an order permanently enjoining the publisher from using the “POLO” title because the designer sold no literary products and the publisher acquired the title from an official publication of the U.S. Polo Association. The Fifth Circuit noted that “Literary titles do not violate the Lanham Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source of the content of the work.” Id. at 664. On remand, the district
court ruled that an accommodation with the First Amendment could be reached with the publication of the disclaimer “Not affiliated with Polo Ralph Lauren” next to the title of the magazine. See Westchester Media v. PRL USA Holdings, Inc., 2001 U.S. Dist. LEXIS 17468 (S.D. Tex. Oct. 23, 2001)

A Virginia court granted a preliminary injunction on Lanham Act and related state law claims, restraining a writer from using the name of crime writer Patricia Cornwell in false and misleading advertisements asserting defendant’s novel published in 1998 was the basis for plaintiff’s forthcoming novel. Cornwell v. Sachs, 99 F. Supp. 2d 695 (E.D. Va. 2000). The court found that defendant, a local Virginia author, was concocting a scandal to advertise and/or promote his own book.

13. Other Theories of Media Liability

Civil/Criminal Contempt

The Fourth Circuit reversed a controversial decision which had held a journalist and her newspaper, the Wilmington Morning Star, in civil contempt for viewing and reporting on a document given to her by a court clerk at the clerk’s office. Ashcraft v. Conoco, Inc., 218 F.3d 288, 28 Media L. Rep. 2089 (4th Cir. 2000) (Ashcraft I), reversing 26 Media L. Rep. 1620 (E.D.N.C. 1998). Earlier the same journalist had been found in criminal contempt for the same conduct. The district court imposed on both parties, jointly and severally, a fine of $500,000 plus attorneys’ fees to compensate an oil company for the economic injury caused by the contemnor’s actions. In a related case, another reporter for the same newspaper had been held in civil contempt and ordered to an indefinite term of imprisonment for refusing to divulge the identities of certain confidential news sources relating to the same news story. The Fourth Circuit reversed that contempt order as well. See Ashcraft v. Conoco, Inc., 218 F.3d 282, 28 Media L. Rep. 2103 (4th Cir. 2000) (Ashcraft II).

Criminal Liability

The Second Circuit affirmed the 1999 criminal conviction of an author and his wife for unlawfully conspiring to remove property from the wreckage of TWA flight 800 in violation of 49 U.S.C.S. § 1155(b), which makes it unlawful to remove without authority parts or property from a civil aircraft involved in an accident. United States v. Sanders, 211 F.3d 711, 28 Media L. Rep. 1769 (2d Cir.), cert. denied, 121 S. Ct. 574 (2000). Defendant James Sanders, author of a book alleging that a missile brought down TWA Flight 800, and his wife, a former TWA flight training supervisor, had encouraged a TWA pilot assisting in the crash investigation to remove and give to them pieces of seat fabric that might have contained residue from explosives. The government had offered the defendants a non-prosecution agreement if they revealed the identity of their source which they refused. The government later identified the pilot who testified at trial against the defendants. At trial, the defendants failed to convince the court that their conduct in obtaining the fabric was protected by a First Amendment newsgathering privilege. Similarly, the Second Circuit ruled that “the First Amendment erects no absolute bar against government attempts to coerce disclosure of a confidential news source nor does it invalidate every incidental burdening of the press that may result
from the enforcement of civil or criminal statutes of general applicability.” Id. at 720-21.

**Fiduciary Duty**

In *Cox Texas Newspapers v. Wootten*, 29 Media L. Rep. 2204 (Tex. App.--Austin July 26, 2001), withdrawing, 29 Media L. Rep. 1584) the plaintiff sued a newspaper for publishing photographs of his deceased wife in an article about the operations of a local funeral home. The plaintiff alleged he instructed the funeral home owner not to open his wife’s casket for anyone and that by allowing the newspaper to photograph his wife’s body, the funeral home owner breached his fiduciary duty to preserve the dignity of his wife’s body and that the newspaper participated as a “joint tortfeasor” in the funeral home owner’s fiduciary breach.

Initially on appeal from a denial of the newspaper’s motion for summary judgment, the appellate court found an issue of fact regarding whether the newspaper knowingly participated in the funeral home owner’s alleged breach of fiduciary duty. See 29 Media L. Rep. 1584. On a motion for rehearing, the court withdrew the decision and entered summary judgment in favor of the newspaper, finding no allegation or evidence that the newspaper was a knowing participant in the breach.

A New York federal court dismissed a lawsuit by death row inmate Mumia Abu-Jamal seeking to enjoin the publication of a book about his case written by one of his defense lawyers. *Abu-Jamal v. St. Martins Press*, No. 2001 Civ. 2850 (S.D.N.Y. April 10, 2001). The court found that the book did not disclose privileged information. As to the claim against the publisher, the court, applying Pennsylvania law, held that the state does not recognize a claim for aiding the breach of fiduciary duty.

In an employment related case, the North Carolina Supreme Court held that the Fourth Circuit in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), incorrectly interpreted North Carolina law in so far as it recognized an independent claim for breach of loyalty against an employee. *Dalton v. Camp*, 548 S.E.2d 704 (N.C. 2001).

**Incitement**

The lawsuit against the producers, distributors and director of the movie *Natural Born Killers* was finally dismissed after plaintiffs had the opportunity to take discovery and failed to substantiate their allegations that the defendants intended the movie to inspire violent copycat crimes. *Byers v. Edmondson*, No. 95-02213 (La. 21st Judicial Ct. Mar.12, 2001). The Louisiana state trial court granted the media defendants’ motion for summary judgment, dismissing all claims against them. In its reasons for judgment, the court stated that, despite having had extensive opportunity for discovery, plaintiffs had presented no evidence that the media defendants intended to incite violence. The court also found that the shooting of one of the plaintiffs had not followed imminently from the assailant’s alleged viewing of the film, and that on this additional ground summary judgment was warranted. Plaintiffs also unsuccessfully argued an alternative theory of liability, namely that because of the
movie’s violence it was obscene and therefore unprotected by the First Amendment. The trial court specifically rejected plaintiffs’ contention that the film was obscene. Plaintiffs have moved to appeal the dismissal. In 1999, the Louisiana Court of Appeal for the First Circuit reversed the trial court’s initial grant of a motion to dismiss, ruling that plaintiffs’ pleaded a cognizable cause of action because they alleged defendants “intended” to incite viewers to commit crime sprees, such as the one that injured plaintiffs, shortly after watching the move. 712 So. 2d 681 (La. App. 1st Cir.), cert. denied, 526 U.S. 1005 (1999).

In a strongly speech-protective opinion, the Ninth Circuit reversed a $107 million jury verdict against the creators of an anti-abortion web site in Planned Parenthood v. American Coalition of Life Activists, 244 F. 3d 1007 (9th Cir. 2001), a decision that was later superceded when the full court granted a motion for rehearing en banc. 2001 U.S. App. LEXIS 21414 (9th Cir. Oct. 3, 2001). The jury had found that the web site constituted a “true threat” of violence and was therefore not protected by the First Amendment. Reversing, Judge Kozinski found the site was political speech protected by the First Amendment because it did not authorize, ratify or directly threaten violence.

A Massachusetts court denied a motion to dismiss a wrongful death claim against the North American Man Boy Love Association (“NAMBLA”) based on allegations that its website inspired the murder of plaintiffs’ son. Curley v. NAMBLA, 2001 U.S. Dist. LEXIS 18305 (D. Mass. Sept. 27, 2001). Plaintiffs pled that the website encouraged child rape and that their son’s murderers viewed the website shortly before the killing. The court rejected the defense that the speech was protected by the First Amendment as a matter of law on a motion to dismiss, citing Brandenburg v. Ohio, 395 U.S. 444 (1969) and Rice v. Palladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997) for the proposition that the website could constitute actionable incitement.

A California court dismissed claims for wrongful death and unlawful business practices against a heavy metal band and several music industry companies based on allegations that the band’s song lyrics inspired a violent murder. Pahler v. Slayer, No. CV 79356 (Cal. Super. Ct. Oct. 29, 2001). The court held that the band’s songs were protected by the First Amendment and did not constitute “harmful matter” within the meaning of California’s unlawful business practices statute, Cal. Penal Code § 313. Since the lyrics were protected by the First Amendment, no claim for wrongful death could lie.

Misrepresentation

The federal district court in the District of Columbia dismissed a fraud claim for lack of proximate cause in a case brought by a source against a reporter alleging breach of an agreement to protect the source’s confidentiality, Steele v. Isikoff, 28 Media L. Rep. 2630 (D.D.C. 2000). Julie Hyatt Steele – a minor player in the Clinton Lewinsky scandal – sued reporter Michael Isikoff, Newsweek and The Washington Post for a broad array of contract and tort claims alleging that the defendants breached an agreement not to reveal her identity as a source for a story relating to accusations that then President Clinton groped Kathleen Willey in the White House. As to the fraud claim, the court held that the plaintiff herself, by fabricating the information that was reported,
proximately caused the alleged harm arising from the publicity associated with the story. *Id.* at 2639-40.

A Texas court affirmed dismissal of claims, including fraud, against a television station that was investigating whether convicted sex offenders were complying with state registration requirements by sending out address verification post cards that appeared to be from law enforcement. *Provencio v. Paradigm Media*, 44 S.W.3d 677, 29 Media L. Rep. 2033 (Tex. App. 2001). Without implying approval of the newsgathering tactic, the court found that since plaintiff was required to register the post card was substantially true and he had no grounds for any libel or privacy claims.

**Negligence**

In *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001), *cert. denied*, 122 S. Ct. 208 (2001), the Florida Supreme Court held that section 230 of the Communication Decency Act (CDA), 47 U.S.C. § 230, which prohibits civil actions that treat an interactive computer service provider as the “publisher or speaker” of messages transmitted over its service third parties, preempts Florida law causes of action. The court affirmed dismissal of claims that AOL was negligent in allowing users to sell or arrange to sell child pornography.

In a case brought against the Associated Press and one of its reporters, the federal district court in New Hampshire considered negligence claims based upon theories of third-party liability, violation of professional standards, negligent training and supervision, and negligent reporting. *Douglass v. Pratt*, No. 98-416-M, 2000 WL 1513712, at *5-7 (D.N.H. Sept. 29, 2000). Each of the negligence claims was dismissed upon a motion for judgment on the pleadings on the grounds that the plaintiffs failed to show that the defendants owed the plaintiffs a duty. *Id.* at *6*. With regard to the negligence claims against the AP, the court held that its ruling that the article was not defamatory precluded other forms of liability against the news service. *Id.* at 7.

In *EEE ZZZ Lay Drain Co. v. Lakeland Ledger Publishing Corp.*, 28 Media L. Rep. 1954 (W.D.N.C. 2000), a case arising under North Carolina law, plaintiff alleged, in addition to its claim for libel, that the newspaper defendant was negligent and grossly negligent in publishing an article and a correction concerning difficulties a residential subdivision was experiencing due to failure of septic systems manufactured by plaintiff. The court rejected these claims, noting that, as a matter of law, no tort exists for negligence in reporting, supervision of a reporter, or publication of articles.

In *Weber v. Multimedia Entertainment*, No. Civ. 06821, 2000 WL 526726 (S.D.N.Y. May 2, 2000), the court dismissed negligence causes of action against a television show’s producers where the claims were “a transparent and impermissible attempt to evade the exacting requirements that New York has imposed on a claim for defamation.”

**C. STATUTES AND RELATED CASE LAW REPORTED IN THE 2001-2002 SURVEYS**

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1. Anti-SLAPP Statutes

In the past year, Pennsylvania and Utah enacted anti-SLAPP (strategic lawsuits against public participation) statutes, continuing the trend of states creating a statutory remedy to deal with meritless defamation and related lawsuits. In December 2000, Pennsylvania enacted 27 Pa.C.S. § 7707 providing for the recovery of reasonable attorneys’ fees and costs where a party successfully defends a SLAPP lawsuit in the area of environmental law or regulation. In 2001 Utah enacted legislation entitled the “Citizen Participation in Government Act.” Utah Code Ann. §§ 78-58-101 to -105 (2001). The Act applies where a “defendant in an action . . . believes that the action is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant.” § 78-58-103(1).

Based on the 2001-2002 SURVEYS, fourteen states – California, Delaware, Georgia, Louisiana, Maine, Massachusetts, Nebraska, Nevada, New York, Pennsylvania, Rhode Island, Tennessee, Utah and Washington – now have anti-SLAPP statutes. While anti-SLAPP statutes generally provide for the early dismissal of claims brought against the protected right of petition and/or free speech, and may also provide for the recovery of legal fees, application of the statutes to the media remains uneven.

The California statute, Cal. Civ. Code § 425.16, continues to be in the vanguard for protecting the media, although there were two notable cases this past year where plaintiffs overcame the statute. In *M.G. v. Time Warner Inc.*, 89 Cal. App. 4th 623, 107 Cal. Rptr. 2d 504, 29 Media L. Rep. 1883 (Cal. Ct. App. 2001), the court affirmed the denial of a motion to strike a complaint under the California law, Cal. Civ. Code § 425.16, finding that plaintiffs demonstrated a likelihood of success on privacy claims. At issue was a *Sports Illustrated* article and HBO broadcast that used a Little League team photograph in reports on sexual abuse of children by adult coaches. While the bulk of the privacy claims were brought by minors depicted in the photograph, two adult coaches also brought suit. Describing the adults’ claims as weaker, the court nevertheless declined to dismiss their claims finding that the statute can be applied only to the entire cause of action and not a cause of action as it applies to an individual plaintiff.

The Ninth Circuit reversed the grant of a motion to strike in favor of a broadcaster and reporter in *Metabolife International, Inc. v Wornick*, 264 F.3d 832 (9th Cir. 2001), reversing 72 F. Supp. 2d 1160 (S.D. Cal. 1999). Defendants were sued for trade libel for a report on the safety of plaintiff’s herbal supplement product. The report relied in part on a doctor-source who was quoted saying “you can die from taking this product.” The district court stayed discovery and granted defendant’s motion to strike for insufficient evidence of falsity. On appeal, the Ninth Circuit held that the district court abused its discretion in refusing to admit certain scientific evidence offered by plaintiff to prove falsity. The court also reversed the district court’s alternative holding that the broadcast was a “rational misinterpretation” of the unresolved scientific evidence on the product’s safety. The court found that the source’s statement in its entirety linked death to abusing the product. While the source’s statement constituted a rational interpretation of the scientific evidence, the court found the defendants’ edited statement did not because it was broader and changed the
meaning of the source’s words.

In *Global Telemedia Int’l v. Doe 1*, 132 F. Supp. 2d 1261, 29 Media L. Rep. 1385 (C.D. Cal. 2001), the court granted a motion to strike a libel suit against two newsgroup users who criticized the plaintiff company in online chats. The online statements were matters of opinion and the publicly traded company was held to be a matter of public interest under § 425.16.

In *Barrett v. Clark*, 2001 Extra LEXIS 46 (Cal. Super. Ct. July 25, 2001), the court granted a special motion to strike a libel claim against an internet newsgroup user who reposted but did not author an libelous article because the newsgroup user was not the “publisher” and was immune from liability under § 230 of the Communications Decency Act.

The Supreme Judicial Court of Massachusetts addressed the burden of proof under the state’s anti-SLAPP statute, ruling that the non-moving party has the burden of proof in opposing dismissal. The Court ruled in *Baker v. Parsons*, 2001 Mass. LEXIS 387, at *20 that “the party opposing a special motion to dismiss is required to show by a preponderance of the evidence that the moving party lacked any reasonable factual support or any arguable basis in law for its petitioning activity.” *Id.* at *21. The *Baker* standard should make it easier for defendants to dismiss defamation suits on the basis that the defendants had a legitimate reason for petitioning.

In *Davis v. Emmis Pub. Corp.*, 536 S.E.2d 809, 29 Media L. Rep. 1791(Ga. App. 2000), the Georgia Court of Appeals affirmed the dismissal of libel and invasion of privacy claims against a magazine on statute of limitations grounds. The trial court had, in addition, found that the state’s anti-SLAPP statute, O.C.G.A. § 9-11-11.1, applied to the claims. On appeal, the court found it unnecessary to decide whether O.C.G.A. § 9-11-11.1 applied since it could affirm on limitations. A concurring judge wrote separately that the statute should apply only to petitions for public participation and should not be extended to media publications.

2. Access

**Cameras in the Courtroom**

As reported last year, in a high profile trial of police officers accused of murder, a New York trial court declared §52 of the Civil Rights Law, which bans video cameras from criminal court rooms, unconstitutional because the per se ban is a barrier to the “presumptive First Amendment right of the press to televise court proceedings, and of the public to view those proceedings on television.” *People v. Boss*, 182 Misc. 2d 700, 701 N.Y.S.2d 891, 28 Media L. Rep. 1731 (N.Y. Sup. 2000). Since then a number of lower courts in New York have declared likewise. *Coleman v. O’Shea*, 184 Misc. 2d 238, 707 N.Y.S.2d 308 (Sup. Ct. Nassau Co. 2000) (also finding § 52 a violation of the equal protection clause of the Fourteenth Amendment because “no safeguards were included to ameliorate the effect of denying coverage to a segment of the press in the face of consent”); *People v. Santiago*, 185 Misc. 2d 138, 712 N.Y.S.2d 244 (Co. Ct. Monroe Co. 2000); *People v. Anthony Schroedel*, Indict. # 115-99, slip op. (N.Y. Sup. Sullivan Co. Mar. 5, 2001) (allowing still photography in capital case).

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In another high profile case, the Oklahoma Court of Criminal Appeals granted a petition filed by convicted Oklahoma City bomber Terry Nichols to overturn a lower court order permitting Oklahoma network television stations and Court TV to televise for “pool” broadcast, Nichols’ preliminary hearing, trial and other proceedings in his state court murder trial arising from the Oklahoma City bombing. *State of Oklahoma v. Terry Lynn Nichols*, Case No. CF-99-1845. A media petition to the Oklahoma Supreme Court to reconsider the camera ban was denied. The decision of the Oklahoma Court of Criminal Appeals affirms the constitutionality of Oklahoma’s rules governing cameras in courtrooms (Oklahoma Code of Judicial Conduct, 5 Okla. Stat. Ch. 1, App. 4, Canon 3(B)(9)(e)(2)), which gives veto power to criminal defendants over requests by the news media to photograph or televise criminal proceedings.

**Access to Information**

In *Chicago Tribune, et al v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 29 Media L. Rep. 2313 (11th Cir. 2001), the court reversed a district court decision’s to unseal documents produced by Bridgestone/Firestone in a litigation involving the highly publicized issue of whether its tires were responsible for causing roll over accidents in Ford Explorers. The district court held that Firestone failed to show that continued closure was justified by a compelling interest. See *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375, 1379-81 (S.D. Ga. 2000). The Eleventh Circuit held this to be an erroneous standard, instructing the court below to instead apply the good cause standard of Fed. R. Civ. P. 26(c).

In *Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001), the court vacated a trial court’s confidentiality order covering settlement documents in a suit for racial and sex discrimination against the city of Huntsville. *The Huntsville Item*, a Texas newspaper, appealed the sealing order, alleging that it was impermissible under the Texas Public Information Act, which provides that a settlement agreement to which a governmental body is a party is public information. See Tex. Gov’t Code Ann. § 552.022(a)(18) (Vernon 1999). The Fifth Circuit held that while the Texas open records law was not directly binding on the federal courts, the appellate court had previously made clear that, at a minimum, the district court “was obliged to consider the effect of its order on state law.” Hence, the lower court abused its discretion by entering a confidentiality order without considering the Texas open records law. Given the content of that state law, the lower court also erred by failing to require a compelling reason for the sealing order.

A similar issue was before the Montana Supreme Court in *Pengra v. State*, 2000 MT 291, 14 P.3d 499, 29 Media L. Rep. 1047 (2000). In a 4-3 decision, the court sided with a group of press intervenors and rejected a request to seal a settlement agreement in a negligence action against the state. Plaintiff brought a negligence claim against the state relating to his wife’s rape and murder by a state prison probationer. Although Montana Statute § 2-9-303 requires that settlements of claims against the state be open to public inspection, plaintiff argued that his and his minor daughter’s right to privacy under the Montana Constitution outweighed the public’s interest in knowing the terms of the settlement. Balancing the two interests, the court found that there is no heightened privacy right for minors in settlement agreements and that compelling policy reasons supported disclosure, whereas
plaintiff had no expectation of privacy in the settlement. Because plaintiff only raised the argument on appeal, the court declined to entertain plaintiff’s claim that § 2-9-303 was unconstitutional on its face for restricting the right to privacy under the state constitution. The three dissenting justices found that the constitutional claim was preserved and would have held § 2-9-303 unconstitutional on its face for giving an absolute preference for access over the constitutional right of privacy.

The Montana Supreme Court also considered the state constitution’s “right to know” provision in Associated Press, Inc. v. Montana Dept. of Revenue, 2000 MT 160, 4 P.3d 5 (2000), holding that an administrative rule barring the release of certain corporate tax summaries was unconstitutional on its face as a violation of the right to know provision. See also In re Sealed Documents, 772 A.2d 518, 29 Media L. Rep. 1809 (Vt. 2001). The Vermont Supreme Court held that there is a presumptive right of public access to search warrants and related materials under the court docket and the state’s records statute, 4 V.S.A. § 693, which may be overcome only through a specific showing of substantial harm to public or private interests.

The Seventh Circuit in United States v. Ladd, 218 F.3d 701, 28 Media L. Rep. 2002 (7th Cir. 2000), granted the press intervenors’ petition to unseal the names of unindicted coconspirators in a criminal case. Reversing the trial court’s decision to keep that information sealed to protect the reputations of the individuals, the court concluded that, “where there is a more reliable basis for finding that the individuals were indeed coconspirators, [reputational injury] must yield to the public’s right to know the source of the evidence considered by the jury.” Id.

With respect to discovery material, the Wisconsin Supreme Court held that neither the news media nor the public has a common law or First Amendment right to material not filed with the court. State ex rel Mitsubishi Heavy Indus. v. Milwaukee County Circuit Court, 233 Wis. 2d 1, 11, 605 N.W.2d 868, 873, 28 Media L. Rep. 1685 (2000). In Mitsubishi, a tort suit brought following a construction accident, a newspaper sought to intervene for the limited purpose of obtaining access to discovery materials. The circuit court allowed the intervention and permitted the newspaper access to any discovery materials not covered by a protective order; the court’s order permitted attendance at depositions if one of the parties invited the newspaper. Id. at 8, 605 N.W.2d at 872. The supreme court reversed, holding that a right of access does not attach to unfiled materials. The opinion does not affect the parties’ right to release materials to the media and does not touch upon the media’s right to disseminate information. Id. at 20 n.6, 605 N.W.2d at 878 n.6.


D. PRIOR RESTRAINT / GAG ORDERS REPORTED IN THE 2001-2002 SURVEYS

In Cornwell v. Sachs, 99 F. Supp. 2d 695 (E.D. Va. 2000), author Patricia Cornwell sought a preliminary injunction against Leslie Sachs, a local Virginia author, based upon alleged violations of the Lanham Act and related state law, Virginia Code § 8.01-40 and §43(a). After a hearing, the district court granted the injunction finding that Sachs had concocted a scandal concerning Cornwell by falsely accusing her of plagiarism, extortion, and other threatening behavior, and that Sachs was using that concocted story to sell his own book. Although Sachs attempted to defend himself under

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the public interest/newsworthiness exception, the court rejected that defense finding that “it would pervert the public interest/newsworthiness exception to apply it so as to protect the publication of a ‘scandal’ which was wholly fabricated by the Defendant.”

In *Dow Jones & Co., et al v. Hon. Robert Kaye*, 90 F. Supp. 2d 1347, 1353, 1359-61, 28 Media L. Rep. 1737 (S.D. Fla. 2000), the court held that media plaintiffs were entitled to a preliminary injunction against enforcement of a state judge’s gag order in a high profile tobacco case (*Engle et al. v. R.J. Reynolds Tobacco Co. et al.*, No. 94-8273) that prohibited the litigants from making any statements about the case. Plaintiffs showed a likelihood of success on the merits because the gag order was broader than necessary to ensure a fair trial, had no expiration date, and the media’s inability to obtain newsworthy information from litigants constituted irreparable injury. The court also held that in reviewing a state trial court’s gag order, it was not bound by state appellate court’s findings or holdings regarding the order.

In *Pérez v. Criado*, 2000 TSPR 92 (PR 2000), a lower court injunction restraining a newspaper from publishing autopsy photographs was set aside as a prior restraint, but a cause of action for damages was recognized to the decedent’s mother under a theory of excessive publicity and negligent infliction of mental anguish due to the repeated publication of grotesque photographs of her dead son’s corpse, that had been illegally obtained from the Coroner’s Office.

The South Dakota Supreme Court upheld a pretrial gag order in a criminal action that prohibited parties, attorneys and witness from speaking about the case and banned all interviews and broadcasts from within the courtroom at all times, ruling that the interest in avoiding adverse publicity in the case outweighed the media’s First Amendment interests. *Sioux Falls Argus Leader v. Miller*, 2000 SD 63, 610 N.W.2d 76, 28 Media L. Rep. 1833 (2000).