Newsgathering, Jury Reform, and Other Hot Issues Dominate Scottsdale Meeting

JACKLYN E. BRUCE, TREVOR HAYES, AND ALAN LAPTER

The 8th Annual Conference offered something for everyone: plenary sessions on newsgathering and terrorism; jury reform and libel cases; a retrospective on *Hustler Magazine, Inc. v. Falwell*; and five concurrent workshops, known collectively as "Hot Issues." The conference was held February 13–15, 2003, in Scottsdale. Law students Alan Lapter, Jackie Bruce, and Trevor Hayes attended the conference and submitted reports for *Communications Lawyer*. Lapter is the Law Student Division liaison member to the Forum on Communications Law; Bruce and Hayes received Forum scholarships.

Newsgathering in the Shadow of Terrorism
Alan Lapter

In these fragile times, how far should reporters go in writing a news story that could have tremendous consequences for national security? Should editors publish such a story in the face of preliminary injunction? Can reporters actually become pawns of the government and further stigmatize those caught in the web of the "war on terrorism"? These and similar topics were discussed during the Scottsdale panel on newsgathering in the shadow of terrorism.

The panel debated a hypothetical posed by moderator George Freeman, in which a reporter learned of specific war plans in advance of a proposed military operation. Although the panelists disagreed about the appropriate response, there was a general consensus about the issues that the hypothetical presented. A reporter would have the right, under the First Amendment, to write a story about possible war plans and strategies. But the government, upon learning about a story containing specific war plans, would probably seek a court injunction. The nature and content of such a story may well allow the government to satisfy the standard articulated in the so-called *Pentagon Papers* case. It could argue that national security is at stake because disclosing the information could endanger the operation and the lives of military personnel.

The reporter could argue that the public deserves to know the specific details, that the reporter's job is to gather and report all truthful information, and that if the reporter knows the information, the enemy may already know it as well. The court might also hold the hearing in closed chambers, a venue that generally favors the government.

The panelists discussed the issues raised by in camera hearings. Civil libertarians argued that such hearings must be open to the public because of the potential trammeling on the democratic process and individual rights. On the other hand, proponents of closed hearings cited the potential ramifications for national security as a rationale for secrecy.

These competing concerns are especially evident when a reporter wants to publish a story from a government source that links a specific person to terrorist activities. This becomes particularly problematic when the government has not yet decided to bring an indictment. One of the main concerns is the potential for harm to an individual's reputation as a result of the story's publication. Although newspapers publish stories every day about people who are arrested but are later exonerated, the media should remain concerned about identifying specific individuals, especially in the absence of charges or an indictment.

Strong competition among media outlets to be the first and sometimes the most sensational leads to the "lowest common denominator," in the words of one panelist, and to a competitive race to file a story with specific names. Broadcasting the story could also lead to a demand by the government that the reporter reveal his or her sources. Although the reporter might be able to shield the source, the government would probably have enough national security interests to subpoena the reporter and ultimately to seek contempt charges if the reporter continued to withhold the source's identity.

These are just a few of the issues that journalists, publishers, and broadcasters face on a daily basis. Their decisions must find a proper balance between dissemination of the truth, the public's right to know, the potential ramifications to the story's protagonists, and the government's national security interests. The far-reaching legal and social conse-

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NEWSGATHERING IN THE SHADOW OF TERRORISM

Facilitators:

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Gray Cary Ware & Freidenrich, LLP
San Francisco

Robin Bierstedt
Time, Inc.
New York City

Guylyn Cummins
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Randall B. Hamud
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Dennis Wagner
Arizona Republic
Phoenix

Grant Woods
Talk show host,
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quences of these decisions continue to permeate the media industry and certainly affect how news is reported.

New Jury Initiatives and Libel Cases
Jacklyn E. Bruce

Moderator Thomas B. Kelley, after acknowledging the changing demographics of America and the resulting changes in jury pools, recognized the critical need to improve the jury fact-finding process by involving jurors more effectively during the actual trial.

Many jurors find the challenges of jury service confusing at best. First, they are called upon to apply and understand, sometimes within the space of a single day, legal principles that often are counterintuitive. Second, jurors with little experience are asked to desensitize themselves from evidence that is particularly sensitive. Third, jurors are usually required to listen to the proceedings with no knowledge of the analytical framework that they will later use to determine the facts and reach a verdict.

Judge Stanley Freeman said that the process must be made more juror friendly, if only to reduce the number of hung juries caused by jurors who do not understand the law, their instructions, or both. In 1993, the Arizona Supreme Court appointed a committee of judges, lawyers, linguists, behavioral scientists, and "real live people who had served as jurors" to study the problem. A year later, the committee issued a report that suggested changes to the state's rules of civil procedure, many of which were enacted in 1995.

Judge Michael J. Brown added that although "Arizona's innovations are often referred to as jury reforms . . . the people we are trying to reform are judges and lawyers." The Arizona reforms include the following:

- Five-minute opening statements are made about the actual facts of the case, generally before the voir dire process starts. If jurors show interest in the case, the voir dire becomes more meaningful because their biases are more likely to surface. The process also gives the lawyers a chance to ask relevant questions of the jurors after the judge has concluded his or her voir dire.
- With appropriate recognition of due process considerations, trials have time limits, a restriction that encourages lawyers to introduce only relevant evidence.
- Judges can provide instructions, including definitions of substantive law, before the trial begins. Most judges currently do this before voir dire. This process can address whether a potential juror is likely to have problems understanding the issues. Each juror receives a copy of the definitions and can keep it for reference.
- Jurors are encouraged to take notes.
- Jurors may ask questions of the witnesses. Questions are submitted anonymously in writing for vetting by the judge. The Arizona jurists at the Scottsdale meeting said that few questions from jurors are irrelevant. Although some lawyers feel that the process forces them to give up control over the presentation of evidence, it does give them valuable insight into the mind of a juror.
- Before the close of the trial, jurors can discuss, but not deliberate, any element of the case as long as they are all in the jury room. Studies have suggested that one-quarter of jurors discuss the case among themselves, even if they have been warned not to do so.
- The jurors receive notebooks that include a statement of the case, an outline of the courtroom and seating chart, photographs and names of the lawyers, a list of possible witnesses, a glossary of terms, photographic and written exhibits and diagrams, labeled photographs of each witness, and space for notes under each photo. At the end of the trial, jurors also receive copies of the final instructions, which are substituted for the preliminary instructions.
- A committee of lawyers, judges, and linguists revised the pattern jury instructions to encourage the use of plain language and eliminate legal jargon.
- Alternate jurors are not excused until a decision has been made. If the jury reaches an impasse, the court may provide assistance after the jurors identify their specific problem areas.

Other jurisdictions, including the Ninth Circuit, are considering similar innovations.

The panel included plaintiffs' and defense counsel who described their experiences with similar innovations. James S. Green represented Dr. Margo Kanaga in a defamation case against the *Wilmington News Journal*. The lawyers did not conduct voir dire; instead, the bailiff read a list of questions. The judge then took each potential juror before counsel in camera to answer personalized questions submitted by the defendant. When the jurors were finally selected, it appeared that both sides were looking for the same types of jurors.

The judge provided a detailed pretrial instruction as well as intermittent instructions during the trial. Jurors were encouraged to take notes and received exhibit books that included key evidence. The verdict sheet included an approved list of special interrogatories enumerating each element that the defendant had to prove. The bifurcated trial allowed the jury to consider punitive damages separately from liability for compensatory damages and negligence. The plaintiff received a judgment for $2.6 million in compensatory damages.

Kelli Sager discussed *Ross v. Santa Barbara New Press*, a thirteen-year-old

NEW JURY INITIATIVES AND LIBEL CASES

Facilitators:

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Faegre & Benson, LLP
Denver

Judge Stanley Freeman
Former Chief Justice
Arizona Supreme Court
Phoenix

Judge Michael J. Brown (ret'd)
Arizona Superior Court
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James S. Green, Seitz
Van Ogtrop & Green, P.A.
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Kelli L. Sager
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case that is still pending. One of the problems that arose in jury selection involved an overestimate of the expected length of the trial, which discouraged participation by jurors with college educations, professionals, and others with extensive time commitments. Based on her experience in *Ross* and other cases, Sager was enthusiastic about the potential for jury innovations. A California pilot program is just getting started. The Nevada Supreme Court has also appointed a jury commission that is likely to suggest innovations based on the Arizona experience.

Hustler Magazine, Inc. v. Falwell: Fifteen Years Later

Trevor Hayes

What's happened in the fifteen years since Jerry Falwell and Larry Flynt took their beef over a *Hustler* magazine cartoon to the U.S. Supreme Court? The question is easier asked than answered, according to panelists.

Hustler Magazine, Inc. v. Falwell stems from the Reverend Jerry Falwell's long-running crusade against the Kings of Porn whom he claimed were endangering the nation. In response, *Hustler*, which was owned by Larry Flynt, ran a satirical cartoon suggesting that Falwell lost his virginity in an outhouse during an encounter with his own mother. Falwell sued, claiming libel, invasion of property, and intentional infliction of emotional distress. He filed the case in Lynchburg, Virginia, which had a population of 63,000, more than a third of whom belonged to his church. After Flynt's motions for a change of venue were rejected, a jury was selected, including ten Southern Baptists and two Primitive Baptists, the latter two of whom Flynt's attorney Alan Isaacman describes as politically right of the former.

As his defense, Flynt contended that satire has a long history as protected speech in America and other Western nations. The jury found in favor of Flynt on the first question of the special verdict form, which asked if there was factual information that could reasonably be believed. According to the Scottsdale panelists, the jury's finding on this question has been often misconstrued. The jury did not find the absence of a statement of fact; instead, it found that no reasonable person would believe the cartoon and therefore there was no libel or damage.

The jury found in favor of Falwell on the claim for intentional infliction of emotional distress (ILED), for which believability is not an issue, but awarded him only $200,000. Falwell's attorney Jeffrey Daichman suggested two reasons for the low damages. First, in the wake of multimillion-dollar jury verdicts being overturned on appeal, he purposely presented a less compelling case in the hope of getting a verdict that would be more likely to stand. Second, the jury was aware that Falwell had distributed thousands of copies of the cartoon as part of a fund-raising drive that netted $1 million. So Daichman believes that the jury actually wanted to award Falwell $1.2 million but subtracted the $1 million that he received from the fund-raising campaign.

Pre-Supreme Court

With such a small verdict and the potential of a damaging precedent from the U.S. Supreme Court, some media lawyers hoped that Flynt would not appeal the decision, especially in view of a comment by Justice Byron White that *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), had outlived its usefulness.

Judge Robert Sack stated that he knew that *Sullivan* was relevant, but was not sure how, given that the IIED tort had nothing to do with truth and falsity. He now says that his assessment was wrong. Judge Sack told the Scottsdale participants that the *Flynt* decision reads like an abridged version of *Sullivan* and that Roslyn Mazer's amicus brief on behalf of the editorial cartoonists is among the most effective that he has ever seen.

Mazer said that significant portions of the decision appeared to be drawn directly from her amicus brief. The greatest challenge in writing that brief, she said, was finding a group to serve as an amicus, especially in view of widespread disdain for the case among mainstream media. Mazer was warned that an unfavorable decision would lead to a chilling of First Amendment rights, but she feared that the lower court verdict would be used to circumvent *Sullivan.* She approached the Association of Editorial Cartoonists, which was nearly moribund at the time, to serve as an amicus. The brief included an appendix of thirty cartoons, many dating back to eighteenth-century England, which were picked because they deeply wounded the subjects.

HUSTLER MAGAZINE, INC. V. FALWELL

Facilitators:

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Alan L. Isaacman
Isaacman, Kaufman & Painter
Beverly Hills
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Pat Oliphant, editorial cartoonist
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Roslyn A. Mazer
Washington, D.C.
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Judge Robert D. Sack
U.S. Court of Appeals
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At the High Court

While preparing for the oral argument, Isaacman realized that a key element was missing from the previous proceedings: the issue was about a humorous cartoon but the lower court cases were devoid of humor. He was warned not to make a joke during oral arguments, but, inspired by a late night talk show host, decided to risk it.

"*Hustler* is saying, let's deflate this stuffed shirt, let's bring him down to our level, or at least to the level where you will listen to what we have to say," he quipped in oral argument. The joke went over well, the mood in the courtroom lightened, and jokes were tossed from both sides of the bench—a key turning point in the proceedings.

The Decision

Judge Sack, who has read the decision numerous times and written about it in his treatise on libel and slander, said that, as he was rereading the case in transit to Scottsdale, he realized that he was not sure what the holding was. The section in the decision that resembles a

holding states that an outrageous statement about a public figure is not actionable unless it contains a high degree of malice. Sack discussed text at the end of the decision that refers to caricatures and then asked the panel, "suppose it wasn't funny? What if the reasonable judge thinks it is not funny but the person who (created it) says it is intended to be funny?" he continued. "Why doesn't it matter what the reader said?"

Satire in Trouble Again

Satire recently has come under fire again. Following the five-day jailing of a thirteen-year-old boy for a Halloween essay that he wrote as a homework assignment, the *Dallas Observer* wrote a parody of the judge, in which the judge detained a six-year-old boy for writing a book report about the book *Where the Wild Things Are*. The newspaper's motion for summary judgment was denied. The court held that the First Amendment does not protect parody or satire that conveys a substantially false and defamatory impression and that the *Observer* parody be scrutinized for any statements of fact.

Hot Issues in Access, Newsgathering, and Subpoenas

Trevor Hayes

A recent twist on the newsgathering process involves reporters who break the law to obtain information, according to a panel at the Scottsdale conference. Advice that may seem to be common sense to lawyers—do not commit felonies while gathering news—is contrary to many reporters' instincts. Reporters are prone to ask for forgiveness rather than permission, said one panelist. But this instinct can land the reporter in jail rather than on the finalist list for a Pulitzer Prize.

The panelists rattled off a number of cases, including *Ventura v. Cincinnati Enquirer*, in which a reporter illegally accessed the voice mail system of the Chiquita Banana Co. The panel also discussed another case to illustrate the opposing viewpoints held by many reporters and those lawyers and corporate executives who are usually allies of journalists. A reporter in Florida entered a murder suspect's home, claiming that the door was open, and took papers and phone numbers found in the home. The paper fired the reporter the next day, leading to an outcry in the newsroom and in journalism trade publications.

The outraged journalists claimed a First Amendment right to gather news in any manner, taking the First Amendment ("Congress shall make no law . . . abridging the freedom of speech, or of the press") to its extreme. A week after the incident, a corporate executive from the paper's parent company denounced the reporter's actions, saying that reporters should not break laws while gathering news and should not be canonized when they do. The reporter sued for defamation, but the case was dismissed a week before the Scottsdale conference on the basis that the executive's statements were true and the reporter suffered no damages. The panelists warned that cases like these are potentially troublesome because of the danger of a court's handing down a broader ruling covering all reporters rather than a narrower ruling targeting one journalist in a specific case.

Another example of overzealous journalism involved television reporters who went to the site of a dog fight that the police had stopped the previous night, crossed police lines, and searched a vehicle on the property. They found a videotape of the dog fight, took the tape, made copies, turned a copy over to the police, and ran the story using footage from the illegally obtained tape.

Sometimes the determination of what information can be used in a story does not even approach the lines of criminal law. In one such case, a man sued an Idaho paper for printing a photograph of a forty-year-old court document as part of its story on the treatment of homosexuals. The plaintiff, whose name could faintly be made out in the photograph, was accused of being homosexual. The photograph reproduced a signed but unsworn police statement dating from 1955. The plaintiff successfully fended off the paper's summary judgment motion until the state supreme court agreed to reconsider its decision to dismiss the case. The day before the Scottsdale conference started, the Idaho Supreme Court ruled in favor of the paper's summary judgment motion.

Many media law trend watchers feared the assault by the USA PATRIOT Act, signed in the wake of 9/11, on the public's right to government information. Even more frightening are provisions in the law that established the Department of Homeland Security.

Provisions in the Act preempt state open records laws in cases where the federal government shares information with state and local officials. It also creates new categories of information, such as "sensitive but not classified," that allow bureaucrats to decide whether to comply with an FOIA request.

The Homeland Security Act also provides FOIA exemptions when a private party volunteers information that could be deemed necessary to public safety. For example, if a company in suburban Washington, D.C., voluntarily informed federal officials that it had illegally stored hazardous chemicals and the chemicals later cause damage, there is no way to find out what the company knew and when it knew it. The provisions not only exempt the company from being forced to share the information but also make it illegal for any employee to blow the whistle.

Other provisions of the Act, such as requirements that those requesting information of the covered agencies through an FOIA request must disclose who they are and why they want the information, are likely to have a chilling effect on the newsgathering process. It is not just the execu-

HOT ISSUES IN ACCESS, NEWSGATHERING, AND SUBPOENAS

Facilitators:

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Los Angeles Times
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tive branch that is infringing upon the free flow of information. In the *City of Chicago v. Bureau of Alcohol, Tobacco and Firearms*, the ATF refused to release information about gun sales to municipal employees in Chicago. While the case was pending in the U.S. Supreme Court, Congress withdrew funding for the ATF to supply the information and the case was remanded back to the Seventh Circuit.

These affronts to freedom of information have resulted in new coalitions of concerned groups, such as the Reporters Committee for the Freedom of the Press, Society of Professional Journalists, OMB Watch, American Civil Liberties Union, and the National Archive. The Reporters Committee has started a weblog of stories related to the Homeland Security Act (www.rcfp.org/behindthehomefront).

HOT ISSUES IN DIVERSITY INITIATIVES

Facilitators:

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Hot Issues in Diversity Initiatives
Jacklyn E. Bruce

Recruitment and retention of minority attorneys was a major problem for most people attending this program session. Many law firms find it difficult to retain minority attorneys long enough to incorporate media work into their portfolios. This situation, coupled with periodic recruitment drives by in-house corporate legal departments, has drained the pool of minority attorneys at many law firms.

Minority lawyers are often clustered within certain areas of law, such as labor and employment law and property law, a problem that leads to less exposure to communications law issues and in many cases ensures that they will not work on media cases. Among the solutions discussed in Scottsdale were in-house training programs for attorneys with the goal of shifting them from "traditional" areas of the law to media law practices. One attorney found the transition easy to make, adding that she might never have sought the change if she had not been approached by a partner. Other suggestions for expanding minority involvement in the media bar included:

- offering law firm affiliation to established minority attorneys and judges; in addition to their demonstrated abilities, these attorneys have considerable potential as rainmakers;
- increasing communication between the Forum on Communications Law and other professional associations that include large numbers of minority members;
- increasing involvement by the National Bar Association at ABA events and visa versa;
- encouraging law firms and companies to offer internships to law students and continue the Forum's scholarship program to expose students to the Forum on Communications Law.

One particular example of innovative programming includes a program sponsored by the Tribune Company, which invites a practicing attorney to work in-house for six weeks in Chicago. The attorney gains exposure to the practice area and an opportunity to establish a relationship with the company. A past participant in the audience spoke very favorably of the opportunity that working at the Tribune afforded him.

HOT ISSUES IN LIBEL AND PRIVACY

Facilitators:

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Jackson Walker, LLP
Dallas

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Cahill Gordon & Reindel
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Judith Fanshaw
Copley Press, Inc.
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Hot Issues in Libel and Privacy
Trevor Hayes

Libel suits are increasingly accompanied by "tag-along" claims, such as eavesdropping, intentional infliction of emotional distress, invasion of privacy, and illegal wiretapping, according to the panelists. These "other" claims may be the only claim at issue in a lawsuit because the statute of limitations for defamation is just one year in many jurisdictions while other claims allow more time to file.

In one such case, a wiretapping charge was based on a broadcast reporter's use of a hidden camera in which the only "wire" involved was the wire from the camera to its battery. In another, the statute of limitations for defamation had expired so the plaintiff sued a magazine for "disparaging property" after it had quoted someone as saying that the plaintiff's unpublished book was of poor quality. The plaintiff

claimed that the story caused a loss of value in her property. Nevertheless, the court concluded that the claim was sufficiently like defamation that it required adequate allegation of special damages. Other attempts to circumvent traditional defamation cases are also being treated as defamation by the courts.

One panelist discussed a strategy that has been successful at the summary judgment stage in some courts. Because the basic issue in a libel suit is whether the information in a publication complained of is false, the key question becomes defining exactly what is alleged to be false—the quotation or the underlying allegation. Using the facts in the Watergate saga as an example, imagine that a publication is sued for reporting that, according to Democratic Party official Larry O'Brien, the Watergate burglars were members of the Committee to Re-elect the President (CREEP). The question becomes whether the issue in the libel suit is the accuracy of the quote attributed to O'Brien or the truth of the underlying allegation that the burglars belong to CREEP. If the court agrees that the pivotal issue is the accuracy of the reporting rather than the allegation, the case is dismissed once the plaintiff concedes that the quote is accurate. Although this approach is similar to the theory of neutral reportage privilege, courts are more receptive because it is not couched as a "privilege" but as something that reporters do every day.

Hot Issues in Entertainment
Alan Lapter

Wouldn't everyone like to watch his or her favorite celebrities stranded on a deserted island, forced to fend for themselves with no glamorous amenities to interfere with their "getting back to nature"?

Everyone perhaps except CBS, which recently sued ABC for copyright infringement in the U.S. District Court for the Southern District of New York over a new reality show, *I'm a Celebrity—Now Get Me Out of Here*. CBS, as the producer of *Survivor*, sought a preliminary injunction against ABC to block the broadcast of *Celebrity*, claiming that ABC and the new show's producers infringed on a protected copyright. CBS's claim was based on the similar "look and feel" and objectives of the two programs.

ABC argued that, although the basic concepts of the two shows were similar, a producer's copyright protection to a program does not include the authority to bar shows with similar concepts but strikingly different approaches. Otherwise, the initial producer of a show with a particular format—for example, a quiz show—could block all other quiz shows for ninety years.

Following a three-day hearing, the court denied the injunction and *Celebrity* premiered in late February 2003. The court examined the elements, both general and unique, of each show and based its analysis on the assumption that generic elements have less protection than unique ones. Upon evaluating the tone of the shows, production quality, participation by the host, and the overall "look and feel," the court found that some of these critical features were unique to each show.

While *Survivor* takes on a more dramatic tone, *Celebrity* is a comedy, albeit one with English humor. *Celebrity* uses a grainy production quality without all of the high-tech glitz of *Survivor*. The objective of *Survivor* is to get the prize money by winning the game, but the game is not as crucial in *Celebrity*, whose objective is to see how celebrities manage in the wild when removed from their normal pampered environments. The prize money is ultimately donated to charity.

The court held that the shows were not alike, concluding that generic elements strung together in a unique fashion could produce a protectable copyrighted format. However, the court also held that multiple programs could employ different combinations of the unique elements, which at their roots consist of generic and unprotectable elements.

For example, CBS argued that *Celebrity* copied the bug-eating contest from *Survivor*. However, although the contest as demonstrated in *Survivor* was unique, the court found that the underlying elements to the bug-eating challenge were generic and therefore not protected by copyright. The overall elements of the contest, including its different purpose in each program, made it uniquely different in each show. *Survivor* pitted two teams against each other, with the team eating the bugs winning the round; in Celebrity, the contest was portrayed as simply a challenge for the contestants, with no negative consequences for refusing to participate. In short, the court held that CBS could not have a copyright for all bug-eating contests unless the underlying generic elements were combined to mirror the contest in *Survivor*.

HOT ISSUES IN ENTERTAINMENT

Facilitators:

Avis Frazier-Thomas
Warner Bros.
Burbank

Andrea Hartman
National Broadcasting Co.
Burbank

Henry Hoberman
ABC, Inc.
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Edward Klaris
New Yorker
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Bruce Pottash
Paramount Pictures Corp.
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To date, no format claims, such as CBS's in *Survivor*, have been successful. Consequently, the producers of *American Idol* cannot sue the producers of the new *Star Search* because the latter is a takeoff of the former; conversely, the original producers of *Star Search* cannot sue *American Idol* for infringing on its purported copyright. Courts have not allowed producers to corner the market over a generic format, such as a dating show, that would allow them to restrict others from producing conceptually similar yet substantively different programs.

Reality shows are causing headaches for insurance companies as well. Due to the lack of a bright-line test in determining copyright protection, the intellectual property risk has been their biggest concern about such shows. To analyze the potential for problems, an insurance carrier evaluates similarities between the proposed program and those already broadcast, including format and location.

One way to manage the potential risk of liability is to obtain comprehensive and valid releases from all participants in reality shows. Serious physical injury has been averted thus far, but breach of con-

tract and defamation claims have been brought against quiz shows, courtroom programs, and other reality shows by aggrieved contestants who challenged the validity of their liability releases. In two similar cases, filed on each coast, plaintiffs sued *Who Wants to Be a Millionaire* and its producers, claiming, inter alia, breach of contract based on allegedly unfair or ambiguous questions that resulted in their elimination. In both cases, the courts upheld releases that the plaintiffs had signed that stated that the show's decisions were final, and dismissed the lawsuits. The only difference in the two rulings was that the California court required discovery on the suit's merits prior to dismissal, while the New York court skipped discovery.

In another breach of contract and tort action for fraud, libel, and intentional infliction of emotional distress, *Peterson v. Judge Joe Brown*, an unhappy plaintiff asserted that an arbitration presided over by Judge Brown was not conducted fairly. The plaintiff argued that the written agreements, including the arbitration agreement, included a covenant of good faith and fair dealing as well as a directive to apply the legal standards of California. However, the arbitration agreement contained clauses stating that the arbitrator's decision was final and that the parties agreed to waive their right to appellate review, that the arbitrator was allowed to apply laws from any jurisdiction, and that the parties waived any rights to pursue legal action against the show.

As for the libel and intentional infliction of emotional distress claims, the contestant had signed a separate provision stating that the parties understood that the arbitrator at times could make derogatory and defamatory statements. Judge Niles of the Los Angeles Superior Court held "[t]hat's why I thought you went on TV with these cases, to be insulted. . . . You're either going to be in show biz or you're going to be in a court of law. You choose show biz, you get show biz and the agreement tells you that up front." With that comment, he dismissed the case.

Hot Issues on the Internet
Alan Lapter

Imagine, as the CEO of an online company, being held liable for someone's hacking into your state-of-the-art security system. Businesses victimized by hackers ordinarily are not liable for customer losses, but if a merchant is negligent with respect to security statements made in its user agreements, it could be held liable for any security breaches. In addition, several states have enacted laws that mandate notification after a security breach. For example, in California, if hackers gain access to nonencrypted data, the company must notify the people whose information has been compromised.

To address the problem, online companies may want to consider outsourcing computer security to a third party. If this option is selected, the contract should ensure that the security provided is in line with agreements signed by the end users. The contract should also include an indemnity clause that releases the merchant from liability for any security breach. Finally, the third party should have proper insurance covering a possible loss of customer information.

Two other precautions will help companies to protect themselves against liability. First, users should be required to sign consent notices that state that the site affords reasonable security and privacy. A lawyer should make certain that these agreements are custom designed for individual merchants and that they are accurate. Online businesses should obtain written agreements from Internet service providers and hosts that require security of personal customer information, redundant systems in case of failure, limitations on amount of downtime, and prior notice and appropriate scheduling of downtime.

The possibility of patent infringement looms as another concern for websites. In one recent case, patent holder Paul C. Heckel of Los Angeles filed suit in the U.S. District Court for the Northern District of California against a dozen small newspapers throughout the United States for infringing patents that allegedly apply to technology used by their website. Heckel reportedly sent out sixty cease-and-desist letters offering licenses at a cost of $1 per each print copy of the newspaper in circulation. Such letters generally do not assert patent infringement directly, but instead offer a license for use of the technology for a fee. The letters are usually obscurely written, often failing to identify which patent is allegedly being infringed.

There are several ways to deal with these letters, which are usually sent out in large numbers in the hope of getting a few companies to "take the bait." A company can simply pay the license to avoid the cost of patent litigation, a solution that may be cheaper in the long run. The other approach is to burden the patent holder with demands for more direct information on the allegedly infringed-upon technology. Faced with the possibility that its patent may be invalidated, the patent holder may retrench.

Finally, jurisdiction over online publishing litigation is being shaped by cases such as *Dow Jones v. Gutnick*. Gutnick, a resident of Victoria, Australia, contended that he was defamed by a Dow Jones publication, *Barron's*. Although the print version is not published in Australia, *Barron's Online* is available to residents of Victoria and other Australian states. With no connection to Australia other than the Internet, Dow Jones sought to remove the case from Victoria to England, where the article originated. Since the Scottsdale conference, the Australian High Court has indeed claimed jurisdiction because the Internet "publication" and injury had occurred in Australia. Such a ruling is an obvious concern for Internet publishers, but many believe that an international treaty on foreign jurisdiction for online publications will soon be promulgated.

HOT ISSUES ON THE INTERNET

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