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## In this issue



# Newspapers in the 21st Century

SUE CLARK-JOHNSON

I am a journalist. Retired perhaps, but still a journalist.

I love what journalism represents, what it means. I know you do, too.

I know Barbara Wall [Gannett VP and associate general counsel] and David Bodney [Steptoe & Johnson], and how deeply they believe in press freedom. Through them and the other media attorneys I have had the good fortune to be guided by in more than forty years in journalism, I know that you love representing the press and that you are as committed to the First Amendment and all its implications for a free society as I am.

I grew up in this business. Of late, I have been thinking a lot about my journalist father, who died the year I became managing editor at a small newspaper in Niagara Falls, New York. He started out working for William Randolph Hearst Sr. My father always said he wanted to see and report from a "box seat to life" . . . he wrote about what he saw on an old Underwood, and his stories were published in publications like the now-defunct *The American Weekly*.

During my forty-one years as a journalist, I too had a box seat, although oftentimes I was the first woman in some of them. Like my father, I saw and reported on life and witnessed and participated in the dramatic change in our business.

Everything *he* knew about this business has changed—just as everything I have known has changed.

Well, maybe not everything.

What this business *stands for* has not.

We stand for truth and for the public's right to know . . .

In every town, every city across this country, dedicated newspaper reporters have done so for generations.

Since I retired last spring, I have been asked often what I am most proud of. It isn't being the first woman, or top positions I have held. It is being a participant in the good journalism that has helped rectify wrongs. As one example: when I was an editor in Niagara Falls, a reporter brought me a jar of what looked like black tar. He said people were dying in a neighborhood called Love Canal and they believed this black substance was the cause.

We had it analyzed and relentlessly wrote news stories documenting health findings and the suffering of families living there. The chemical company that had used that neighborhood as a dumping ground before houses were built put extraordinary pressure on the publisher to stop. So did the Chamber of Commerce. The publisher asked me whether I was absolutely sure we were right. I said yes . . . and you know the rest of the story.

That's what newspaper journalists did, what they are doing now, and what I believe they will continue to do. The words may come to you in print, on your laptop, or on your iPod. But the work will continue.

Journalists do not do this work by themselves. I have worked with media lawyers in many cities and newspapers. I have seen the passion in their eyes and in their legal arguments for doing the right thing.

*(Continued on page 23)*

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*Sue Clark-Johnson retired in May 2008 as president of Gannett's Newspaper Division after a forty-year career in journalism that included, among other things, service as chairman and CEO of Phoenix Newspapers, Inc.; senior group president of Pacific Newspaper Group; and publisher and CEO of* The Arizona Republic. *This article is based on her February 6, 2009, keynote address at the Forum's 14th Annual Conference in Scottsdale, Arizona.*

# The Fairness Doctrine Redux?

GUYLYN CUMMINS


Guylyn Cummins

Does anyone remember the fairness doctrine? I never dreamed I would be writing a column about it in 2009. I thought it had died a natural death in 1987. It may be about to be resurrected.

According to recent news stories, "Democrats and liberals—tired of wrestling with conservative talk radio—have stepped up talk" of bringing the fairness doctrine back. They believe that the doctrine's demise is to blame for talk radio's opinionated, yet highly popular, form. A Reuters article estimates conservatives on talk radio dominate liberals by a ratio of ten to one.

Others, like Andrew Schwartzman of the Media Access Project, have dubbed the discussion of reviving the fairness doctrine "entirely a creation of a bunch of right-wing talk-show hosts trying to make a ruckus." Yet, House Speaker Nancy Pelosi and influential senators like Barbara Boxer and Chuck Schumer are said to favor its return. President Barack Obama does not, at least for now.

But Obama is said to favor "localism," a kind of stepchild of the fairness doctrine. The FCC is considering whether to require broadcasters to create community advisory boards made up of local officials and other community leaders to tell media executives whether their news coverage is addressing the needs of the community. What? Government-mandated community advisory boards that tell broadcasters whether their news coverage is sufficient in the community?

Maybe it's time we dust off our knowledge of the fairness doctrine and learn more about localism.

The seminal case of *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*[1] recounts the history of the fairness doctrine and provides Justice White's ruling that the doctrine was both authorized by Congress and constitutional. The case was really two cases.

The *Red Lion* case involved Reverend Billy James Hargis's attack as part of the Christian Crusade series on Fred J. Cook, the author of the book *Goldwater: Extremist on the Right.* Hargis said that Cook, after being fired by a newspaper for making false charges against city officials, went to work for "the left-wing publication, *The Nation*, one of the most scurrilous publications of the left which has championed many communist causes over the years. . . ." Cook, believing he had been personally attacked, demanded free reply time under the fairness doctrine, which the station refused. The FCC weighed in and agreed with Cook, and the D.C. Circuit upheld the FCC's position as "constitutional and otherwise proper."

The second case involved the Radio and Television News Directors Association's (RTNDA) action to challenge the constitutionality of the FCC's personal attack and political editorializing regulations. These regulations were adopted in 1967 to make the personal attack aspect of the fairness doctrine "more precise and more readily enforceable," and to specify rules relating to political editorials. The Seventh Circuit held the regulations were unconstitutional as abridgments of free speech and press.

Justice White, delivering the opinion for the Court, upheld both the FCC order requiring the Red Lion station to furnish Mr. Cook with a tape, transcript, or summary of the broadcast, and free time to reply, as well as the constitutionality of the FCC regulations on personal attacks and political editorializing. Both, Justice White concluded, were authorized by Congress, and were content-based speech restrictions that enhanced rather than infringed (yes, you read that correctly) freedom of speech and press under the First Amendment.

In a nutshell, the fairness doctrine required broadcasters to present all contrasting points of view in any coverage of a controversial issue of public importance. In upholding it, Justice White reasoned that, for many years, the FCC (and before it, the Federal Radio Commission) imposed on radio and television broadcasters the requirement to discuss public issues and to give each side of those issues fair coverage. The rationale for the fairness doctrine was premised largely on the fact that broadcast frequencies constituted a scarce resource (spectrum scarcity), and without government control, the radio medium would be of little use "because of the cacophony of competing voices, none of which could be clearly and predictably heard." Justice White wrote that, before 1927, "the allocation of frequencies was left entirely to the private sector, and the result was chaos."

Consequently, in the Radio Act of 1927, the Federal Radio Commission was established to allocate frequencies among competing applicants "in a manner responsive to the public 'convenience, interest, or necessity.'"

*Guylyn Cummins (gcummins@sheppardmullin.com) is a partner in the San Diego office of Sheppard Mullin Richter & Hampton LLP.*

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This enactment repudiated the rationale of the 1912 Act, i.e., that "anyone who will may transmit their message," and in its stead substituted the principle that "the right of the public to service is superior to the right of any individual" or station owner. Very shortly thereafter, the Federal Radio Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views," and this principle applies to "all discussions of issues of importance to the public." Through the denial of license renewals and construction permits, the fairness doctrine was enforced.

While the fairness doctrine initially required licensees to *refrain from publishing their own views*, as of 1969, it essentially required broadcasters only to give adequate coverage to public issues and to fairly reflect opposing views—even at the broadcaster's own expense if sponsorship was unavailable and on its own initiative if no other source was available.

As Justice White explained, "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'" Broadcast frequencies are limited and necessarily considered a public trust, White found. Therefore, the fairness doctrine extends to "all legitimate areas of public importance which are controversial, not just politics."

In rejecting a First Amendment defense to the constitutionality of the doctrine, Justice White reasoned that the "licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens." Rather,

> [i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount, and the public has the right to receive suitable access to social, political, esthetic, moral, and other ideas and experiences, which is crucial. . . . There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Justice White concluded that

> [t]here is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program . . . or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and editorials.

Notably, the fairness doctrine's legislative history contained this important statement: "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience."

Later cases showed the difficult contours of the fairness doctrine. In *Green v. Federal Communications Commission*,[2] for example, the FCC and the courts struggled with whether a broadcast advertisement urging enlistment in the armed services during the Vietnam War triggered application of the doctrine. The court noted the advertisement sought to present "the attractive, positive and advantageous side of military service." Green, chairman of the Peace Committee of the Baltimore Meeting of the Religious Society of Friends, wanted free time to air various spots showing families who had lost loved ones, or a row of gravestones, or contained this warning to young men before they joined the army:

> Chances are, the only job you'll learn is how to kill. Chances are, you'll wind up in Vietnam killing and perhaps getting killed, in a war that doesn't make much sense. Remember this: You may be eligible for military deferment. For free information call 642-1431.

The court, in ruling that the fairness doctrine was not triggered by the enlistment advertisement, held both that Armed Forces recruitment was not a "controversial issue of public importance requiring presentation of conflicting viewpoints," and in any event, the draft and Vietnam war were being covered extensively by licensees, including video of battlefields strewn with dead soldiers.

In reaching its ruling, the *Green* court had to distinguish the *Banzhaf v. FCC* decision,[3] which reached a directly contrary ruling on a cigarette advertisement. The *Green* court held that cigarette advertisements were unlike enlistment advertisements due to the "uniquely serious and well-documented hazards to the public health inherent in cigarette smoking." The *Green* court also had to distinguish the decision in *Retail Store Employees Union v. FCC*.[4] In that case, a labor union challenged a refusal to air announcements urging listeners to boycott a department store engaged in a labor dispute, after the store paid for advertisements asking for public patronage. In remanding the case to the trial court to reconsider the application of the fairness doctrine, the D.C. Circuit required it to "take into account, as an aspect of the 'public interest,' the congressional policy of favoring the equalization of economic bargaining power between workers and their employers." Also pending before the appellate courts at the time were air pollution issues raised by automobile and gasoline advertising in New York City.

In short, the contours of the fairness doctrine were hotly litigated and yielded a wide spectrum of judicial rulings until its demise. In 1985, the FCC released a Fairness Report sounding a death knell for the doctrine. The FCC said the fairness doctrine no longer produced its desired effect and instead caused a "chilling effect" on news coverage that "might" violate the First Amendment. In 1987, the doctrine was abolished.

Recent law review articles explore the resurgent views for and against the fairness doctrine. Compare Professor Magarian's *Substantive Media Regulation in Three Dimensions*[5] with Professor Goodman's *No Time for Equal Time: A Comment on Professor Magarian's Substantive Media Regulation in*

*Three Dimensions*.[6] Professor Magarian's push for its revival stems from a "justifiable and deeply held dissatisfaction with the State of American media," i.e., whether it is "overly commercial, partisan, trivial, and concentrated." This dissatisfaction includes the failure of the media to reveal major errors, such as in the Bush administration's justifications for the Iraq War. Professor Magarian even explores extending the doctrine to "conventional mass media." Professor Goodman disagrees with reviving the doctrine, arguing that there are no differences—either in reach or audience—that can justify government regulatory distinctions between broadcasters or conventional mass media and other media. And the "abundance of media options" dooms "a government attempt to shape public discourse through targeted content requirements." She concludes that what is "salient in public discourse is much more likely to be affected by search engine algorithms and network traffic management practices than by whether news-producing broadcast stations have to include differing viewpoints."

One thing is clear: the spectrum scarcity on which the fairness doctrine was premised does not exist for the Internet, cable television, and collectively, the conventional mass media at large. With the advent of satellite radio, cellular technology for delivering audio, video, and text as well as voice, and wireless broadband capable of doing the same, it is questionable whether there is any spectrum scarcity in any medium. Groups like the National Association of Broadcasters (NAB) have so far beat back efforts to resurrect the doctrine and vow to continue to fight the FCC's localism proposals. The NAB's David Rehr wrote that "[t]he so-called fairness doctrine would stifle the growth of diverse views and, in effect, make free speech less free." Some station owners agree, saying they would simply drop controversial programming and air.

But we can no longer assume that the fairness doctrine has been safely interred. Last month, Democrats like Iowa Sen. Tom Harkin and Michigan Sen. Debbie Stabenow were still calling for a return to the Fairness Doctrine standards, and New York Democratic Rep. Maurice Hinchey said he wants the doctrine back. It may be rising again—or at least there are some powerful people trying to exhume it—and it would be folly to ignore the lessons of its history.

**Endnotes**

1. 395 U.S. 367 (1969).
2. 447 F.2d 323 (D.C. Cir. 1971).
3. 405 F.2d 1082 (D.C. Cir. 1968).
4. 436 F.2d 248 (D.C. Cir. 1970).
5. 76 Geo. Wash. L. Rev. 845 (2008).
6. *Id.* at 897.



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# Online and Off-Line Publisher Liability and the Independent Contractor Defense

CHARLES D. TOBIN AND DREW SHENKMAN

Media and entertainment companies—with the waves of buyouts, layoffs, and other measures to cut payroll in a challenging industry environment—are turning more and more to freelancers and other third-party providers to produce content.[1] The use of freelancers is, of course, not new to the industry. Many magazines and most book publishers traditionally have relied on independent contractors rather than employees in the production of new works. But the economic pressures on off-line media, the business models for much of the online world, and the emerging options for self-publication augur well for freelancer-supplied content.

An increased reliance on freelancers may provide new opportunities for media defense counsel and their corporate clients to shorten litigation and curtail exposure for tort claims. While employer-employee relationships bring with them *respondeat superior* liability for publishing torts such as defamation,[2] masters traditionally have not been held vicariously liable for the torts of their independent contractor servants.[3] Although a handful of reported decisions—most of them favorable to the defense—reflect some pursuit of the independent contractor defense, its use in the media and entertainment industries remains, from all outward appearances, confined to the field of book publishing.

Ethical and practical considerations may make it difficult to mount this type of defense in a given case. But the strength and continued vitality of the doctrine suggest that media defense lawyers ought to consider it seriously. And, in fact, counsel assisting in the engagement of a freelancer would benefit from considering this defense at the onset of the independent contractor's engagement. One need look no further than a recent federal court's application of the doctrine to an actual malice claim against an on-demand book publisher to see the power of the independent contractor arrangement.[4]

*Charles D. Tobin is a partner and and Drew Shenkman is an associate in the Washington, D.C., office of Holland & Knight LLP.* *The authors gratefully acknowledge two excellent white papers: Larry Worrall,* The Insurer's Perspective*, ABA Tort Trial and Insurance Practice Section, Media, Privacy, & Defamation Law Newsletter, Spring 2004; James E. Stewart,* The Joint Defense of Publishers and Independent Authors—Tactical and Insurance Considerations*, ABA Tort Trial and Insurance Practice Section, Media, Privacy, & Defamation Law Newsletter, Spring 2004.*

**Independent Contractor Defense**

As a general rule, the common law holds that a principal (or master) is not liable for the torts of an independent contractor agent. The rule is a departure from that of the employer-employee relationship, where the employer directs the employee's work, provides the means of performance, and enjoys all rights to exploit the results.[5] Unlike the typical employment context, a principal in an independent contractor relationship gives up the right to control most of the details about the manner in which the work is produced, and the principal therefore ordinarily is not legally responsible for an independent contractor's torts.[6] Of course, the media industry has refamiliarized itself with the legal consequences of the independent contractor relationship through a number of recent high-profile copyright infringement claims brought by freelancers, arising out of digitized publications.[7]

The independent contractor doctrine has long been an absolute defense to tort liability claims brought against corporations in a number of industries. Construction companies, for example, routinely assert this defense in litigation arising out of alleged defects in the erection of a building[8] and injuries suffered on the job site.[9] Premises owners,[10] providers of services in homes,[11] and transporters of goods[12] are among the many other types of defendants who have made good use of their status as principals as a bar to their tort liability for the acts of independent contractor agents.

Of course, if a plaintiff is able to demonstrate a factual question on the bona fides of the independent contractor, the principal will not succeed on summary judgment. For example, in medical malpractice cases, the complex relationships between physicians and health care facilities often make it difficult for hospitals to obtain summary judgment.[13]

The following list identifies some of the factors that courts use to determine whether an agent is an independent contractor or an employee:

- the extent of control exercised over the contractor's work;
- whether the contractor is engaged in a distinct occupation or business;
- whether the work is supervised by the principal at that locale;
- the level of skill required in the occupation;
- whether the principal supplies the instrumentalities;
- the length of the contractor's engagement;
- whether payment is per job or salaried;
- whether the work is an integral part of the principal's regular business;
- the intent and belief of the parties;
- whether benefits are provided by the principal.

**Liabilities of Principals**

Despite this strong protection for principals, the law has developed several exceptions where the independent contractor's wrongdoing may be attributed to the principal, even where the contractor's status is not in question. For example, the law disfavors dismissal of the principal where a statute or regulation imposes particular responsibility on the principal, or where the duty is so

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integral to the principal's business that it is presumed to be "non-delegable." In a decision that hits very close to home for most law firms, the New York Court of Appeals has held that, notwithstanding the use of an independent contractor, a law firm can be held liable for negligently failing to make service. That duty is so integral to the legal practice that the courts will presume that it cannot be delegated as a matter of liability.[14]

Additionally, when the work carries with it an inherent risk of harm, the law holds that the principal should recognize the risk in advance of retaining a contractor. Because of the obviousness of the risk, the law will hold the principal vicariously responsible for the independent contractor's negligent performance.[15] But to warrant vicarious liability for the principal, the conduct must be so unreasonably dangerous that even reasonable care does not render it safe.[16]

**The independent contractor doctrine has long been an absolute defense to tort liability claims.**

Moreover, if the principal was on notice that the independent contractor was likely to create unsafe conditions, or had done so in the past, the principal will not be protected from liability under imputed theories of negligent hiring or negligent retention. Negligent hiring claims tend to yield anomalous results. Depending on the jurisdiction, ignorance of a contractor's incompetence or lack of qualifications is potentially exculpatory and knowledge of them is inculpatory.[17] Yet in others, ignorance can yield to liability if the principal failed to probe its putative contractor thoroughly enough.[18]

New York courts are the most reluctant to allow negligent hiring and negligent retention claims to subsume the doctrine that absolves principals for contractors' conduct. Courts there are "cautious in extending liability to defendants for their failure to control the conduct of others[.]"[19] A plaintiff seeking to impose liability on a principal for the torts of an independent contractor under the negligent hiring theory therefore "must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury."[20]

**If It Looks like a Duck**

Importantly, as the Ninth Circuit held in the landmark case of *Vizcaino v. Microsoft,* it is insufficient to merely label workers as "independent contractors." If the worker is, in fact, treated as an employee, the court will find no independent contract relationship existed and instead will accord the worker the legal status of an employee.[21] In *Vizcaino,* Microsoft routinely hired workers who were anomalously designated as "permatemps." Permatemps were required to sign written agreements acknowledging that they were independent contractors. Nevertheless, these workers were integrated into the workforce, participated on teams with regular employees, shared the same supervisors, performed identical functions, and worked the same hours.[22] The only difference was that the permatemps had to pay their own taxes and were not included in Microsoft's fringe benefits programs.[23] The permatemps sued Microsoft in class action and eventually won a judgment against the company allowing them to buy reduced stock.[24] Microsoft eventually settled for $75 million.[25]

The lesson learned from *Vizcaino* is that publishers entering into agreements with independently contracted authors should ensure that the contractual declaration of independent contractor status cannot be interpreted as a sham, as the Ninth Circuit deemed Microsoft's arrangement.

**Actual Malice Claims**

To the extent publishers have used the independent contractor defense in libel and related tort claims, they have met with the most success where the standard of care is actual malice.[26] This makes perfect sense in the context of actual malice claims, which require clear and convincing proof that a given defendant actually knew the information was false or proceeded to publish despite subjectively entertaining doubts in fact as to the truth.[27] Because of the rigorous burden plaintiffs face as to the subjective state of mind of each individual defendant,[28] courts have been receptive to arguments that, whatever the freelance writer's state of mind, an author's independent contractor status breaks the chain of imputation of actual malice on the part of the publisher.[29]

An excellent application of the doctrine is Judge Revercomb's opinion in *Secord v. Cockburn,*[30] a libel action by Gen. Richard Secord, arising out of the book *Out of Control: The Story of the Reagan Administration's Secret War in Nicaragua, the Illegal Pipeline, and the Contra Drug Connection.* Secord brought the action against the book's author, editors, publisher, and distributor. The author of the book, which reported on Secord's role in the Iran-Contra affair, was a freelancer.

In rendering summary judgment to the publisher, editors, and distributor on grounds of no actual malice, the court noted as an initial matter:

> Actual malice must be proved separately with respect to each defendant, and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior.* . . . . . .
>
> Plaintiff cannot rely upon the theory of *respondeat superior* to impute evidence of actual malice from Leslie Cockburn to these defendants because the undisputed facts in the record before this Court provide that the author is an independent contractor. The plaintiff has failed to point to a single fact in the record on whether Entrekin, AMP, and Little Brown each had personal actual knowledge of falsity or serious doubts as to the truth of *Out of Control.*[31]

Judge Revercomb found the record lacking any evidence as to the states of mind of the book's principal editor, publisher, and distributor, and for that reason granted summary judgment for want of actual malice.

The court's analysis of another editor's potential liability was much more detailed. The editor had submitted an affidavit attesting that he had "worked with [the freelance author] editing and reorganizing the manuscript" and had assisted in "incorporat[ing] into the manuscript new material that was becoming available on an almost daily basis as a result of the ongoing investigation of the Iran-Contra Committees (which were then in the process of holding hearings)." The editor's

affidavit concluded that "all suggestions that I made were read by and/or discussed with [the author] to assure their accuracy."[32] Additionally, in his deposition, the editor had testified that rather than rewrite the manuscript himself, he had instead "suggested to [the author] that paragraphs be rewritten. Sometimes I submitted ideas."[33]

The court declined to equate this record of the editor's hands-on involvement in shaping the text with imputed knowledge from the author. In the words of the court, the testimony "establishes that he was not involved in substantively writing *Out of Control*." The court further rejected the argument favoring liability that the plaintiff had cast as "aiding and abetting."

> Simply alleging a "close working relationship" or "aiding and abetting" is begging the fundamental question at issue before this Court, namely, where are the record facts from which a reasonable jury could find actual malice pursuant to the clear and convincing standard? The plaintiff has come forward with none[.][34]

The court therefore granted summary judgment in favor of the editor as well.[35]

Book publishers have done well in numerous other cases governed by heightened levels of proof in which they have asserted no liability for the works authored by freelancers.[36]

**Don't Try This at Home**

There is a dearth of case law interpreting or applying vicarious liability of publishers to defamation-type cases that are not governed by the actual malice standard. However, in another type of publishing tort claim in which the negligence standard was applied, a book publisher was not held vicariously liable for freelancer content.

In *Winter v. G.P. Putnam's Sons,* plaintiffs alleged that they were poisoned when eating wild mushrooms they picked based on information contained in a book.[37] The Ninth Circuit affirmed summary judgment in favor of the book publisher because a publisher is not "a guarantor of the author's statements of fact," and "ha[s] no duty to investigate the accuracy of the contents of the books it publishes" unless it "assumes such a burden."[38] The court made clear that the First Amendment would not allow it to impose such a duty upon publishers.

Another court similarly granted summary judgment in favor of a book publisher on claims of negligent misrepresentation and deceptive practices arising out of plaintiff's alleged reliance on factual information contained in a book to counsel adult victims of child abuse.[39] The court concluded that, unless the book publishers assume the duty to investigate, placing a burden on them "to check every fact in the books they publish is both impractical and outside the realm of their contemplated legal duties."[40] Thus, even if the authors could be held liable for negligent publication of erroneous information, the publishers were immune from liability for the independent contractor's alleged torts.[41]

Much as with the independent contractor defense in actual malice cases, the courts are unwilling to hold publishers, absent actual knowledge, to a high duty in these nondefamation negligence claims.[42]

**Third–Party Content Online**

In a related area of the law, Communications Decency Act § 230 has routinely been applied to limit liability for re-publication of third-party content on the Internet.[43] Courts generally have interpreted this provision broadly, finding that it encompasses not only claims such as defamation for which publication is an element, but any claim based on a service provider's alleged failure to "exercise . . . a publisher's traditional editorial functions," such as monitoring or screening other parties' transmissions or deciding whether to withdraw or delete content.[44] Recent cases have generally continued the provision's broad swath of publisher immunity, with the emerging issue that the immunity claim is weaker where the online service provider played a significant role in the creation or development of the information.[45] Notably, the protection of § 230 is expressly limited to publications occurring on an "interactive computer service" and would not be available to a publisher that reproduced the identical text off-line.

**So You Want to Be a Writer?**

Book publishing recently has taken a new path in the increasingly popular world of publish-on-demand. Through the power of the Internet, individuals now may circumvent traditional publishing houses to bring their works to publication. The common characteristic of publish-on-demand services is their singular role of printing whatever the customer requests. In the world of on-demand publishing, the editing and fact-checking services of traditional publishers are strictly at the author's option. And, unlike vanity publishing companies of the past, on-demand publishers typically do not require customers to buy a minimum quantity of their books upfront. Instead, the publisher prints copies only as purchased by the author for resale or as they are purchased online.

Publish-on-demand companies, however, are not simply copying services. They also offer a menu of à la carte services to help authors prepare, edit, and market their works. Some of the larger on-demand services include Lulu.com, the Amazon.com subsidiary BookSurge, and AuthorHouse.[46] For example, Lulu.com offers sophisticated design templates and comprehensive editing packages for purchase. BookSurge, utilizing its association with Amazon.com, offers comprehensive marketing services to authors, including printing and shipping the books directly to customers upon purchase. Some on-demand publishers contract out the fact-checking and editing services, but the extent of this practice is unknown.

Publish-on-demand has begun to prove fertile ground for the growth of the independent contractor defense for publishers. Recently, in *Sandler v. Calcagni,*[47] the federal court in Maine decided the first major publish-on-demand defamation lawsuit in which BookSurge was one of the defendants. The facts from *Sandler* are straight out of an after-school special gone bad. Two young women, Shana Sandler and Mia Calcagni, were classmates in high school and members of the cheerleading squad. Over time, their friendship soured, and Calcagni spread vicious rumors about Sandler. The fight eventually escalated to the point where Calcagni was found guilty of criminal mischief and agreed to a consent decree for a hate-crime charge.[48]

After Calcagni's criminal ordeal, her family wanted to tell their side of the story. They hired an author and independent fact-checker to help write and research their version of events for

a book, *Help Us Get Mia.* The Calcagnis purchased a package from BookSurge called "Author's Express PDF," which obligated BookSurge to print the book exactly as it was submitted without any additional fact-checking or editorial services.[49] The Calcagnis purchased 760 copies to give to friends and sell to local bookstores. The book was also available for purchase on Amazon.com, where approximately 80 copies were bought.

Plaintiff, Shana Sandler, filed a complaint for libel, false light, publication of private facts and punitive damages, naming as defendants Mia Calcagni and her parents, Peter Mars (the ghostwriter and fact-checker), and BookSurge. Before the court were cross motions for summary judgment pertaining to BookSurge's liability. The court granted BookSurge summary judgment, and the remaining parties later settled their claims.[50]

The district court first distinguished the meaning of the word "publication" in the context of defamation law, and concluded that merely because BookSurge participated in the publication of *Help Us Get Mia,* that alone did not "ipso facto establish liability."[51] It then turned to the view of the *Restatement (Second) of Torts,* and that of Prosser and Keeton, that the defendants' liability turns on their involvement in the defamation. Under Maine defamation law, fault must be proven at least to the negligence standard.[52] Thus, the court held that BookSurge would not be liable absent *scienter*—that it knew or should have known of the libel.[53]

Applying this negligence standard, the court granted summary judgment in favor of BookSurge, finding that it did not know or have reason to know of the defamation in printing *Help Us Get Mia.* The court held that because BookSurge did not "undertake to edit, review or fact-check any of its publications, it has no means or way of knowing whether defamatory material is contained within the works that it publishes."[54] The court highlighted the fact that, in this case, BookSurge had no involvement in the writing or production of the book and was merely paid by the authors to bind and print the manuscript. Interestingly, the court contrasted BookSurge to traditional book publishers (suggesting, without stating, that they *would* be liable for an author's negligence), noting that a traditional publisher "pays the author for the right to print a manuscript . . . review a manuscript when it is received to determine whether to accept the piece and pay the author . . . and edit and improve the manuscript in cooperation with the author."[55] By contrast, the court found that BookSurge would print, publish, and distribute anything submitted to it for publication, and engaged in no editing, fact-checking, or review of the manuscript. It also noted that any editing or fact-checking purchased through BookSurge was outsourced and performed by another, unaffiliated entity.[56]

Courts are not entirely consistent, however, in judging on-demand publisher liability. In an unreported case from 2006, *Brandewyne v. Author Solutions,* a Kansas jury found AuthorHouse, another on-demand publisher, liable for defamation.[57] The process by which AuthorHouse publishes books is nearly identical to the process described above concerning BookSurge. In 2003, AuthorHouse published a book entitled *Paperback Poison: The Romance Writer and the Hit Man,* ghostwritten under the byline of Gary Brock, the ex-husband of best-selling romance novelist Rebecca Brandewyne. *Paperback Poison* made accusations that Brandewyne

## DRAFTING THE CONTRACT

In structuring contracts with freelancer-authors, publishers should consider the following specific issues:[1]

**Intention of independent contract:** From the outset, all parties must understand that the author is entering into an independent contractor arrangement, which may vary from the author's previous experience. Generally, the contract should refer to the hired party as "contractor" or "agent." But do not abandon common sense when hiring an author as an independent contractor. Even an airtight independent contractual relationship can be overcome if the contracting author had no business producing the work on his own. The publisher does not, of course, vouch for the author. But a "no" answer in discovery to the question, "Did you feel that you could trust this author to do a good job?" will not help anyone.

**Duties and responsibilities:** The contract should contain a duties clause explaining the task and the independent contractor's responsibility in connection with that task. This is where the publisher should set forth length and general content requirements. Outline the legal and stylistic expectations, but clearly state that all final determinations will be left to the author's sole discretion.

**Editing:** The right to edit for style alone is unlikely to impose liability upon the publisher. However, editing for substance may raise the concern that the independent contractor relationship is a sham. Thus, the publisher's risk of liability increases the more the publisher edits an independent contractor's work for content.

**Expenses and author's tools:** Include the independent contractor's agreement to supply his or her own facilities and supplies used to perform the job. It is advisable to require third-party fact-checkers and editors for less-experienced authors and potentially for all authors, regardless of experience. Make clear that these services must be obtained at the author's own expense. Explain to authors the benefit of procuring their own services and why it is to their creative advantage to work with their own hired help. But be sure to not mandate any specific persons or firms to contract with for editing and fact-checking purposes—though putting together a suggested list of potential "trusted" firms may be helpful to steer the author in the right direction.

**Intellectual property:** Don't forget copyright law. Be sure to include that the work will be a work-for-hire and that the publisher retains all rights to re-publication and derivative works. At the same time, include in the agreement a clause limiting the author's ability to disclose proprietary information obtained during the independent contracting term.

**Compensation:** Specify the financial arrangement—whether flat fee or commission based. Use the word "fee" rather than "salary" or "wage." Of equal importance, emphasize what is not included (i.e., health benefits, workers' compensation, pension, 401k). Include an express statement that publisher will not withhold any federal, state, or local income taxes, Social Security taxes, and the author assumes sole responsibility for appropriately submitting them. If payment is conditioned upon the submission of the finished product, explicitly state that payment is contingent upon the author's certification that the work is complete and ready for publication, and that it has been thoroughly vetted, edited, and fact-checked.

**Term and deadline:** A term of contract should be set and a deadline for the completion of work. However, the contract should avoid descriptions of working hours, which would be inconsistent with independent contractors' ability to set their own hours.

**Termination:** Termination clauses should be drafted so that publisher's ability to terminate the agreement is based on the results accomplished or the freelancer's failure to assume the risks and expenses contemplated by the agreement. In contrast, an unconditional termination right suggests a relationship with an employer-employee rather than independent contractor.

**Warranty:** The publisher should ensure that authors warrant, among other things, that (1) they have the necessary equipment and ability to complete the project; (2) the work will be solely that of their own creation; (3) the work will be performed in a high-quality, professional, and timely manner; (4) authors will exercise reasonable care and diligence in performing their duties, including customary journalistic fact-checking and verification of sources and information; and (5) the work will not impair or violate anyone else's right to privacy, rights of publicity, libel, infringement of copyright, or any other rights.

**Indemnification:** An indemnification provision should allow publisher to defend and settle any claim made against the publisher where the freelancer breached his or her warranty. The provision should make the freelancer liable for all the publisher's costs, damages, and attorney fees resulting from any claim, whether the claim is eventually held valid. Although freelancers may balk at the potential liability of such a contract, help them understand its benefits, including increased editorial freedom and complete content control beyond the general subject matter of the work.

1. For an in-depth analysis of independent contract drafting issues in general, see Jacob Rabkin & Mark H. Johnson, Current Legal Forms with Tax Analysis, ch. 12, §§ 12.36, 12.61 & 12.62 (2007).

had adulterous affairs with men and women, abused her child, abused drugs, plagiarized other authors, and hired a hit man to kill her ex-husband. The book also contained accusations about Brandewyne's parents and current husband. Brandewyne and her family sued her ex-husband Gary Brock, his current wife, the ghostwriter, and AuthorHouse for libel, invasion of privacy, and outrage. Claims against Gary Brock were dismissed without prejudice after he filed for bankruptcy, and all other defendants later settled except AuthorHouse.[58]

At trial, Brandewyne put forth an internal AuthorHouse memo demonstrating its knowledge that the book had been rejected by another publish-on-demand company because of concerns with libel. The judge found Brandewyne to be a private figure, and under Kansas law, gave jurors a negligence instruction as to the defamation liability, and an actual malice instruction for punitive damages. The jury returned a verdict for plaintiff on all counts, awarding libel and privacy damages of $200,000 to Brandewyne and $10,000 each to her parents and husband.

Kansas law calls for a bifurcated hearing on punitive damages, in which the jury determines whether the defamation was wanton conduct, and the judge determines the amount.[59] The jury found AuthorHouse's conduct met that standard, and the judge awarded $240,000 in punitive damages. In his written decision on punitive damages, Judge Jeff Goering ruled that AuthorHouse ignored clear warnings of potential libel, finding that "[e]very employee involved in the decision making process . . . had to have made a conscious decision to ignore a clear warning that the book was defamatory, or to pass the buck on to someone else."[60] Given AuthorHouse's knowledge of the content of the book, Judge Goering wrote that a "responsible publisher would make some effort to screen the content of the book at issue in this case before accepting it for publication" and that "AuthorHouse's failure to act when it had information that would have placed a prudent publisher on notice that the content of [the] book was harmful to the Plaintiffs."[61]

Although the conclusions of *Sandler* and *Brandewyne* are contradictory, they can be reconciled by looking to the application of the *scienter* element to the specific facts in each case. In *Sandler,* the court found BookSurge had no reason to know of the alleged defamation by virtue of its attenuated involvement in the publishing of the book. In contrast, the court in *Brandewyne* found much greater involvement by AuthorHouse, as demonstrated by an internal memo acknowledging that another publisher-on-demand previously rejected the manuscript because of its concerns with libel exposure. The lesson to be drawn from these two cases is that in negligence cases, the publisher's specific knowledge of the content of the book is critical.

**General Lessons from the Case Law**

The brick-and-mortar, online, and on-demand publishing case law discussed in this article may provide a road map for publishers to maximize their use of the independent contractor defense. All of the cases indicate that courts will look most favorably upon publishers that appear to be as far removed as possible from the creation and editing of the written work. Thus, the closer a work is to immediate publication when the publisher first touches it, or the more a publisher relies on outside fact-checking and editing services, the less likely it is

for the publisher to be held liable. While this may sound risky, especially with unknown and unproven authors—and may not be acceptable under certain publishers' standards and practices—the law rewards the publisher for detachment and distance.

In fact, it may be best to leave the retention of third-party editing and fact-checking services entirely to the author, to comport with the standard that the independent contractor will supply his or her own tools in the production of the work. The tools of an author go beyond the act of writing to include research, fact-checking, and editing for style and substance and to ensure that the final product complies with the law of defamation. Similarly, communication between the publisher and author during the production of the manuscript should be limited to questions of timing and delivery. Any additional communication as to content should be restricted to preserve the independence of the author and curtail any potentially adverse inference that the publisher participated in and supervised the creation of the work.

See the sidebar on page 8 for specific suggestions on drafting contracts with freelancers.

**Ethical Issues for Lawyers**

Lawyers retained by publishers in these circumstances need to be especially mindful of the ethical rules in dealing with or additionally representing the freelancer. Like many media joint-representation arrangements, independent contracting raises potential ethical problems for the lawyer.[62]

For media lawyers, joint representation typically is guided by *respondeat superior* principles, where the employee reporter, editor, and publisher share common interests and goals and in turn share in the liability.[63] More issues arise, however, when creating an arrangement that purposefully severs liability for the publisher, but not the author. These include identification of the client, joint responsibilities, confidentiality, potentially divergent objectives, and potentially adverse litigation positions. Except for the possibility of directly adverse litigation positions, the other potential traps for the lawyer typically may be overcome through careful client counseling and obtaining certain waivers.

Identifying who is the client in the independent contractor author arrangement is difficult in that only upon legal action against the publisher do the interests of freelancer and publisher substantially diverge. The *Restatement (Third) of the Law Governing Lawyers* states that when a lawyer attempts to represent an organization, along with one or more persons associated with the organization, determining who is the lawyer's client "is a question of fact to be determined based on reasonable expectations in the circumstances."[64] Thus, the lawyer's resulting "failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer relationships not intended by the lawyer."[65]

As a result, if lawyers want to represent both freelancer and publisher, they must obtain informed consent from both clients. When undertaking a joint representation, they must endeavor in a two-part duty of disclosure to the clients.[66] First, lawyers must investigate the "essential facts" and determine in their "professional opinion that interests are, in fact, common and not adverse."[67] Second, they must "explain fully to each client the implications of the common representation."[68] These conversations about conflict should be more than cursory. Candidly confront the possibility of conflicts and explain in depth the consequences of dual representation and conflicts of interest.[69] Failure to properly counsel and obtain informed consent may result in possible disqualification of the attorney and possible mandatory withdrawal. Other potential consequences include preclusion of cross-examination or taking any adverse position against a former client, thereby limiting representation to your primary client.[70] Most obviously, joint representation limits the ability to safeguard the attorney-client privilege and can increase exposure to malpractice claims.[71]

A potential conflict may be mitigated by signing an advance waiver under Rule 1.7(b) of the Model Rules of Professional Conduct when (1) the lawyer believes he will be able to provide competent and diligent representation, (2) the representation is not prohibited by law, (3) representation does not involve a direct claim of one client against the other, and (4) each affected gives informed consent in writing.[72] Informed consent means the lawyer has made adequate disclosure of the risks and alternatives and the client has agreed to the course of conduct.[73]

In 2005, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 05–436, approving the use of advanced waivers under Rule 1.7, giving lawyers far greater latitude in obtaining advanced conflict waivers from clients.[74] It stresses that the waiver's effectiveness is "generally determined by the extent to which the client reasonably understands the material risks that the waiver entails."[75] The committee notes that the more comprehensive and detailed the explanation to the client is concerning the actual and reasonably foreseeable consequences, the more likely the client has the requisite understanding.[76] General and open-ended waivers are typically only sufficient where the client is an experienced user of legal services and has a genuine understanding of the material risks involved.[77] The *Restatement* echoes the concern that open-ended advanced waivers require a certain level of client sophistication for them to retain their effectiveness over time.[78] A number of jurisdictions have adopted their own advanced waiver rules,[79] while many jurisdictions have adopted the amendments to the Model Rules in their entirety.[80]

Rule 1.7(b) specifically prohibits the representation of both clients in adverse litigation claims against the other. To the extent freelancers and publishers will be directly adverse is likely only where both parties have lost a lawsuit and the publisher must sue the freelancer for indemnification. It is then that the publisher will assert its contractual limitation of liability and place sole responsibility on the freelancer. By placing this specific instance in the language of the waiver, it will provide the requisite notice to the clients of this exact scenario.

In sum, the independent contractor and publisher relationship requires careful counseling of all parties involved. Both freelancer and publisher should be fully briefed so that they understand the potential conflicts of interest and their impact on continued representation. The moment any claim arises, the lawyer should analyze it for any potential conflict and again counsel the client.

**Conclusion**

While there are many advantages of structuring the relationship between publisher and author as an independent contractor agreement, perhaps here more than most areas of publishing law, facts

will rule the day. Simply drafting a tight agreement will not alone ensure success if the performance does not comport with the contract. Thus, not only is careful planning needed in the drafting but also in publisher follow-through to ensure that the relationship maintains an independent character and does not appear to be a sham. Independent contracting law can be a friend to both author and publisher in these difficult times for the industry, allowing for increasingly independent expression by encouraging publishers to relinquish control in order to lower legal risk.

**Endnotes**

1. *See* Joe Strupp, *Cuts like a Knife,* Editor & Publisher, Sept. 3, 2008.

2. Restatement (Third) of Agency § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

3. *See id.* § 7.07 cmt. f ("For purposes of *respondeat superior,* an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs the work.").

4. *See* Sandler v. Calcagni, 565 F. Supp. 2d 184 (D. Me. 2008) (holding that without proof of *scienter,* on-demand book publisher was not liable for defamatory statements made by author where publisher did not participate in the substantive editing and writing of the book).

5. *See* Restatement (Third) of Agency § 7.07 (2006).

6. *Id.*

7. *See, e.g.,* Tasini v. New York Times Co., 533 U.S. 483 (2001); Faulkner v. Nat'l Geographic Enters., 409 F.3d 26 (2d Cir. 2005); Greenberg v. Nat'l Geographic Soc'y, 533 F.3d 1244 (11th Cir. 2008) (en banc) *cert. denied,* 2008 WL 4451872 (U.S. Dec. 8, 2008).

8. *See, e.g.,* East Point Condominium Owners Ass'n v. Cedar House Ass'n, 663 N.E. 2d 343 (8th Dist. Cuyahoga County 1995) (finding contractor liable for the faulty work of its subcontractors).

9. *See, e.g.,* Pershing v. United States, 736 F. Supp. 132 (W.D. Tex. 1990) (finding no liability for United States because liability for job site injuries generally determined on the basis of control, and United States did not exercise the means and methods in performing the construction work).

10. *See, e.g.,* Adams v. Hilton Hotels, Inc., 787 N.Y.S.2d 238, 240 (N.Y. App. Div. 2004) (affirming summary judgment for television station whose independent contractor's negligence assembling stage led to decedent's death).

11. *See, e.g.,* Carrasquillo v. Holiday Carpet Serv., Inc., 615 So. 2d 862, 863 (Fla. Dist. Ct. App. 1993) (affirming summary judgment for carpet cleaning company whose contractor's negligence injured plaintiff).

12. Hill Bros. Chem. Co. v. Superior Court, 20 Cal. Rptr. 3d 530, 536 (Cal. Ct. App. 2004) (holding that summary judgment had been improperly granted for plaintiff who was injured in negligent car crash by for-hire carrier hired as independent contractor).

13. *See, e.g.,* Tesillo v. Emergency Phys. Assocs., Inc., 376 F. Supp. 2d 327 (W.D.N.Y. 2005) (disputed issues of fact about extent of control hospital exerted over doctor precluded summary judgment for hospital).

14. Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993).

15. *See* Restatement (Third) of Agency § 7.06 (2006).

16. *See* Atl. Container Line AB v. Aref Hassan Abul, Inc., 281 F. Supp. 2d 457, 465 (N.D.N.Y. 2003) (seller of used tires was not liable for the torts of its agent against common carrier contracted by agent to transport the tires).

17. *See, e.g.,* Mireles v. Ashley, 201 S.W.3d 779, 784 (Tex. App. 2006) (reversing summary judgment and remanding due to existence of material issue of fact as to whether company inquired into its independent contractor's competency to drive—in fact, company was shown to have knowledge that the independent contractor driver had received eight citations over a five-and-a-half-year period).

18. *See* Puckrein v. ATI Transport, Inc., 897 A.2d 1034, 1044 (N.J. 2006) (reversing summary judgment and remanding on issue of negligent hiring where waste disposal company failed to inquire into whether its independent contractor haulers had proper insurance and registration).

19. *Atl. Container Line,* 281 F. Supp. 2d at 466 (defendant tire seller had no duty to inquire into the entities independent contractor intended to ship tires to, and therefore plaintiff carriers who were harmed by independent contractor's deceptive trade practices could not create issue of fact under negligent selection sufficient to survive summary judgment—any other result would force the principal to act as a guarantor of the independent contractor's conduct).

20. *Id. See also* Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 823 N.Y.S.2d 463, 467 (N.Y. App. Div. 2006) (affirming summary judgment in favor of hospital whose nurse sexually assaulted a patient—negligent hiring exception inapplicable because hospital, which used an independent contractor temporary staffing service for the selection of nurses, had no reason to foresee misconduct by the nurse).

21. 120 F.3d 1006 (9th Cir. 1997).

22. *Id.* at 1008.

23. *Id.* at 1011–12.

24. Vizcaino v. U.S. District Court for the Western District of Washington, 173 F.3d 713 (9th Cir. 1999).

25. *See* Steven Greenhouse, *Technology: Temp Workers at Microsoft Win Lawsuit,* N.Y. Times, Dec. 13, 2000.

26. New York Times v. Sullivan, 376 U.S. 254 (1964).

27. Anderson v. Liberty Lobby, 477 U.S. 242 (1986); *Sullivan,* 376 U.S. at 287.

28. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (summary judgment for book publisher affirmed; "reckless disregard must be proved with respect to each defendant" and cannot be imputed if the author is an independent contractor).

29. *See, e.g.,* Nelson v. Globe Int'l, 626 F. Supp. 969, 978–79 (S.D.N.Y. 1986) (granting summary judgment in favor of magazine publisher, considering author's total control over the manner in which articles were written, notwithstanding editorial rewrites made by publisher); D.A.R.E. Am. v. Rolling Stone Mag., 101 F. Supp. 2d 1270, 1278 (C.D. Cal. 2000) (affirming summary judgment in favor of magazine, despite author's admissions as to falsehoods in article, because the author was an independent contractor; magazine exerted limited control over "the result of the work and not the means by which it is accomplished," the author was paid per article and not salary, and author retained staff position at another magazine during this independent contractor relationship); Chaiken v. Village Voice Publ'g Corp., 119 F.3d 1018, 1033–34 (2nd Cir. 1997) (affirming summary judgment for newspaper in libel action because reporter independently selected topics and conducted research, wrote articles without guidance, was subjected only to edits by the newspaper, received payment per article, and did not receive benefits); Falls v. Sporting News Publ'g Co., 899 F.2d 1221 (6th Cir. 1990) (applying Michigan law and concluding that weekly sports columnist was an independent contractor, notwithstanding the fact that his work was integral to the success of the paper; newspaper had the right only to edit the columnist's work, the columnist was paid per column, did not receive benefits, and did not list the newspaper on his tax return as an employer).

30. 747 F. Supp. 779, 787 (D.D.C. 1990).

31. *Id.* (citations omitted).

32. *Id.* at 788 n.7.

33. *Id.*

34. *Id.* at 788.

35. After careful analysis of her work, the

court also awarded summary judgment to the author on grounds that plaintiff had failed to demonstrate clear and convincing evidence of actual malice. *Id*. at 797.

36. *See e.g.,* Naantaanbuu v. Abernathy, 816 F. Supp. 218, 226–27 (S.D.N.Y. 1993) (publisher found not liable under "gross irresponsibility" standard, it adhered to established editorial procedure to ensure thorough review); Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (affirming summary judgment for book publisher: "[R]eckless disregard must be proved with respect to each defendant" and cannot be imputed if the author is an independent contractor); Chalpin v. Amordian Press, 14 Media L. Rep. 1206 (N.Y. Sup. Ct. App. Div. 1987) (magazine publisher's unrebutted showing that it relied upon integrity of reputable author and had no substantial reason to question accuracy of information provided by author warrants summary judgment for publisher under "gross irresponsibility"); Geiger v. Dell Publ'g Co., 719 F.2d 515, 518 (1st Cir. 1983) (affirming summary judgment in libel action in favor of book publisher, noting that publishers can only be held liable, under New York's "gross irresponsibility" standard, if it had reason to believe that the author's statements were likely to be untrue); Adams v. Maas, 7 Media L. Rep. 1188 (S.D. Tex. 1981) (granting summary judgment to publisher Bantam Books, finding its reliance on authors did not amount to a reckless disregard).

37. 938 F.2d 1033, 1036–37 (9th Cir. 1991).

38. *Id.* at 1037.

39. Barden v. HarperCollins Publishers, Inc*.,* 863 F. Supp. 41, 45 (D. Mass. 1994).

40. *Id.*

41. Numerous other courts have echoed the refusal to create a duty on traditional publishers based on a reader's misplaced reliance. *See, e.g.,* First Equity Corp. v. Standard & Poor's Corp*.,* 869 F.2d 175, 179–80 (2nd Cir. 1989) (investors who relied on inaccurate financial publications to their detriment were unable to recover their losses); Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1216–17 (D. Md. 1988) (finding no liability for publisher of nursing textbook when nursing student alleged that she injured herself with a home remedy described in nursing textbook); Lewin v. McCreight, 655 F. Supp. 282, 283 (E.D. Mich. 1987) (publisher found not liable to plaintiffs injured in explosion after mixing chemicals in reliance on metalsmithing book); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. Ct. App. 1985) (publisher not liable to plaintiff whose injuries stemmed from reliance on a book's instructions on how to make tools); Gutter v. Dow Jones, Inc., 490 N.E. 2d 898, 902 (Ohio 1986) (finding no liability for *Wall Street Journal*'s inaccurate description of corporate bonds).

42. A notable outlier reliance case is Rice v. Paladin Enterprises Inc., 128 F.3d 233 (4th Cir. 1997).The Fourth Circuit held that a publisher was potentially liable as an aider and abettor when a murderer followed instructions in a technical "how-to" for hit men. The parties had stipulated to the publisher's knowledge and specific intent to target the book to would-be murderers. The court concluded that the case was "unique in the law" due to "astonishing stipulations . . . the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder. . . ." *Id.* at 267.

43. 47 U.S.C. § 230(c).

44. *See* Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997).

45. *See* Chicago Lawyers Comm. v. Craigslist, 519 F.3d 666 (7th Cir. 2008) (housing website publisher not required to filter or screen for discriminatory content; imposing such a duty would make the service impractical or substantially increase its costs); Fair Housing Council v. Roommate.com, 521 F.3d 1157 (9th Cir. 2008) (housing website could not avail itself of the immunity provided to operators in § 230 because it played a part in developing the allegedly illegal content when it solicited answers to discriminatory questions and allowed its members to search based on those answers).

46. *See* www.booksurge.com/info/About_Us; http://www.authorhouse.com/AboutUs/index.asp; and http://www.lulu.com/en/products/?cid = en_tab_publish.

47. 565 F. Supp. 2d 184 (D. Me. 2008).

48. *Id.* at 188–89.

49. *Id.* at 189.

50. *See* Notice of Settlement of All Parties, Sandler v. Calcagni, Docket No. 07-cv-29, Doc. #170 (D. Me. filed Sept. 4, 2008).

51. *Sandler,* 565 F. Supp. 2d at 193–94.

52. Maine generally follows *Restatement* view that "one who only transmits defamatory matter published by a third person is subject to liability, if, but only if, he knows or has reason to know of its defamatory character." *Sandler,* 565 F. Supp. 2d at 193 (quoting Restatement (Second) of Torts § 581). *See also* Levinsky's Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997); Lester v. Powers, 596 A.2d 65, 69 (Me. 1991).

53. *See Sandler,* 565 F. Supp. 2d at 194 (quoting Maynard v. Port Publ'ns, 297 N.W. 2d 500, 506 (Wis. 1980); Lewis v. Time, Inc., 83 F.R.D. 455, 463 (E.D. Cal. 1979)).

54. *Id.* at 195.

55. *Id.* at 194.

56. Calcagnis hired their own independent fact-checker and editor, co-defendant Peter Mars. *Id.*

57. Brandewyne et al. v. AuthorHouse, No. 04-cv-4363 (Dist. Ct. Sedgewick County, Kan. Aug. 2, 2006). *See also* MLRC MediaLawLetter at 17–18 (Aug. 2006).

58. Claims against Debbie Brock and the ghostwriter were settled for a combined $9,000. *Id.*

59. Kan. Stat. § 60-3702(b).

60. MLRC MediaLawLetter, *supra* note 57, at 17.

61. *Id.*

62. For an excellent and indispensable treatment of joint representation of media clients, *see generally* Richard M. Goehler, Bruce E.H. Johnson & Thomas S. Leatherbury, *Representing Media Clients and Their Employees in Newsgathering Cases: Traps for the Unwary,* ABA Comm. Lawyer, Summer 2002, at 10.

63. *Id.*

64. Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (2001).

65. *Id.*

66. *See* Felix v. Balkin, 49 F. Supp. 2d 260 (S.D.N.Y. 1999).

67. *Id.*

68. *Id.*

69. *See id.*

70. *See* United States v. Henke, 222 F.3d 633 (9th Cir. 2000).

71. *See* Goehler et al., *supra* note 62.

72. Model Rules of Prof'l Conduct, R. 1.7(b).

73. *See* Model Rules of Prof'l Conduct. R. 1.0(e).

74. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05–436 (2005). *See also* Alice E. Brown, *Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?,* 19 Geo. J. Legal Ethics 567 (2006).

75. ABA Formal Op. 05–436, *supra* note 74.

76. *Id.*

77. *Id.*

78. Restatement (Third) of the Law Governing Lawyers § 122 cmt. d (2000).

79. *See* D.C. Bar Legal Ethics Comm., Op. 309 (2001) (holding that advanced waivers are generally not prohibited); N.Y.C.L.A. Comm. on Ethics, Op. 724 (1998) (holding that as an ethical matter there is no bar to seeking a waiver of future conflicts).

80. Brown, *supra* note 74, at 574.

# Illinois' Anti–SLAPP Statute: A Potentially Powerful New Weapon for Media Defendants

DEBBIE L. BERMAN AND WADE A. THOMSON

In August 2007, Illinois became the twenty-sixth state to enact anti–SLAPP protection into law. The jury, however, is still out as to what exactly the Illinois Citizen Participation Act (CPA)[1] will mean in practice, especially for media defendants. Despite the CPA's enactment more than a year ago, to date there appears to be only one decision involving a CPA motion filed by a media defendant. In three other cases in which a media defendant has filed a CPA motion, two settled before the court ruled on the motion, and as of the writing of this article, the other motion is still pending. Despite this dearth of judicial guidance, the broad language of the CPA and a few decisions involving nonmedia defendants suggest that the CPA may provide the media with another useful weapon for fighting lawsuits arising from certain types of speech.

**Key Provisions**

Section 110/5, the public policy introduction, is the most extensive provision of the CPA. It declares that the "constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence." That provision further provides that "information, reports, opinions, claims, arguments and other expressions" are vital to democracy and that there must be the "utmost protection for the free exercise of these rights of petition, speech, association and government participation." After noting the disturbing increase in SLAPP suits, the provision declares that the CPA strikes a balance between the rights of persons to file lawsuits for injury and the constitutional rights to petition, speak freely, associate freely, and otherwise participate in government.

Section 110/10 sets forth six CPA definitions. Among the most notable is that "government" includes the "electorate." Also, a "person" is defined to include corporations, organizations, and associations, thereby suggesting that media defendants can take advantage of the CPA.

Section 110/15 provides that the CPA applies to any motion against a claim that is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." The only stated limitation comes in the next sentence, which states that the acts discussed are immune from liability, "regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result or outcome." This language appears to come from the 1991 U.S. Supreme Court *Noerr-Pennington* doctrine case, *City of Columbia v. Omni Outdoor Advertising*.[2] Indeed, the sponsor of the CPA legislation in the Illinois House of Representatives stated that the CPA codifies the standard from *Omni* "when dealing with citizen participation lawsuits."[3]

Section 110/20 sets forth the timing and standards applied to CPA motions, which differ in many key respects from the timing and standards applied to other motions to dismiss filed under the various provisions of the Illinois Code of Civil Procedure. First, the court must rule on a CPA motion within ninety days after the plaintiff has received notice of the motion. Second, the court shall grant a CPA motion unless the court finds that the plaintiff has produced "clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability" by the CPA. Third, while a CPA motion is pending, discovery is suspended unless the plaintiff shows good cause for discovery into the narrow subject of whether the movant's acts are covered by the CPA. Fourth, the movant is allowed an appeal as a matter of right provided that the appeal is filed within ninety days after a trial court's order denying a CPA motion, or if the court failed to rule within the ninety-day time period.

Section 110/25 provides that the court shall award a successful moving party reasonable attorney fees and costs incurred in connection with the CPA motion.

Section 110/30, which sets forth the construction of the act, may be one of the most important. It provides that the CPA should be "construed liberally to effectuate its purposes and intent fully." When read in conjunction with the policy statement, i.e., "The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation,"[4] the provision bolsters the argument that media defendants are included within the scope of the CPA's protections.

**CPA Motions to Date**

Of the few decisions that have been issued, many address whether the CPA can be applied retroactively. Retroactivity will become less of an issue because the statute was enacted more than a year ago, and many of the torts at issue in the types of lawsuits to which the CPA applies have a one-year statute of limitations.[5] Thus, new suits likely will concern conduct arising after the effective date of the statute.

Some of the decisions concern other aspects of the CPA, including whether a party can amend its complaint after a CPA motion has been filed and the scope of the appellate court's

*Debbie L. Berman is a partner and co-chair of the First Amendment and Media Law practice group in the Chicago office of Jenner & Block LLP. Wade A. Thomson is an associate. The authors currently represent a media defendant that has filed a motion to dismiss, which is still pending, under the CPA.*

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jurisdiction to hear CPA appeals. These are key issues when assessing how much protection the CPA will afford defendants. So far, however, there are no appellate or Illinois Supreme Court decisions on these or any other CPA-related issues, although at least two cases involving CPA motions are on appeal as of the publication of this article. Nevertheless, the following cases and motions that have arisen from the CPA to date offer useful insight into the potential benefits to media defendants:

**Condo Association Controversy**

*Shoreline Towers Condominium Association v. Gassman*[6] involved an acrimonious battle in which a resident sued the condominium association over a rule that prohibited displaying personal objects in doorways. The resident alleged that this rule violated her right to practice her religion and display a mezuzah.

After the association amended its rules to permit the mezuzah and other religious symbols, the association and the association president sued the resident, claiming that she engaged in a campaign of harassment and intimidation against them. This campaign allegedly included supplying inaccurate information about the association to a local Jewish newspaper, ripping down flyers, influencing others to provoke altercations with the association, and accusing the association of theft. The association president's claims for defamation alleged that the resident made accusations that he was a drug dealer, a homosexual, and anti-Semitic.

The defendant resident filed a motion to dismiss under the CPA, arguing that the complaint against her was the result of her filing suit and making complaints about religious discrimination. In response, the plaintiffs countered that the CPA should not apply because the defendant's issues about the condominium policies already had been resolved. The court rejected this argument stating "the statutory language clearly demonstrates that the statute does not require there be pending attempts to further the party's moving rights."[7] Next, the plaintiffs argued that the dispute was a "personal issue" and did not involve "issues of major public concern."[8] The court rejected this argument because of the changes made to the association rules.

The court also addressed whether the CPA can be applied retroactively. Following the statutory language that the CPA is to be construed broadly to effectuate its purposes and citing to case law involving application of California's anti–SLAPP statute, the court held that the CPA is procedural in nature and therefore can be applied retroactively.[9]

The court, however, did not dismiss the plaintiffs' complaint in its entirety. Instead, the court concluded that only some of the actions in the complaint were a result of defendant's exercise of her constitutional rights through her original litigation against the condominium association. As a result, the court dismissed six of the ten counts in the complaint (including the defamation counts by the association arising from accusations of theft).

The court, however, declined to dismiss the defamation claims brought by the association president (including accusations that he was a drug dealer), explaining that those claims had "nothing to do with the other disputes or her lawsuits but constitute affirmative statements on [defendant's] part to damage" the president.[10] The court held that the anti–SLAPP laws, such as the CPA, are "intended to protect those who speak out on public issues from being sued into silence" but they are not intended to

> protect those who actually commit torts. Anti–SLAPP legislation does not permit a person to actually defame another and then seek the protection of the statute. The law is intended to protect those who are in danger of being sued solely because of their valid attempts to petition the government.[11]

It appears the court's rationale for distinguishing the various claims was that once the dispute between the parties became more of a personal smear campaign than a battle against the condominium association's rules, the defendant was no longer protected by the CPA. However, this distinction is somewhat illusory upon further analysis. Some of the defendant's actions against the association appeared more like a personal battle and some of the statements about the president of the association appeared more related to the alleged religious discrimination. The court's ruling also appears to conflict with the plain language of the CPA. Unlike some other anti–SLAPP statutes, a claim is barred by the CPA if the defendant's conduct and purpose fit within the statute, regardless of whether the plaintiff's claim would be meritorious but for the CPA's protections.

**Planned Parenthood**

*Scheidler v. Trombley*[12] stems from a heated public controversy over plans by a medical facility in Aurora, Illinois, to house a Planned Parenthood clinic. A group opposed to the clinic protested through rallies, prayer vigils, and a letter-writing campaign. Planned Parenthood also wrote letters to Aurora officials and placed an advertisement in a local paper appealing to citizens of Aurora to express their support of the clinic to their local representatives. Asserting two theories of liability, the group that opposed the clinic sued Planned Parenthood for defamation based on its letters and advertisement. First, the plaintiffs argued that the Planned Parenthood letters defamed them by accusing them of having a well-documented history of violence and criminal activity. Second, plaintiffs argued the advertisement defamed them because it discussed an earlier verdict against them for unlawful activities.

The circuit court judge granted Planned Parenthood's CPA motion dismissing the amended complaint, holding that Planned Parenthood's communications at issue were "acts in furtherance of the constitutional rights to petition, speech, association, and participation in government and were genuinely aimed at procuring favorable government action, result, or outcome."[13] The court carefully examined and rejected plaintiffs' arguments as to why the CPA should not apply and in so doing wrote the most in-depth examination of the CPA to date.

The court initially considered the plaintiffs' argument that the Illinois General Assembly did not intend to immunize defamation claims under the CPA. In rejecting this argument, the court held that the "plain and ordinary language of Section 15 does not appear to expressly state any limitation in the application of immunity for tortious or malicious acts such as libel or slander."[14] The court then noted that even though such a limitation did not expressly exist, § 15 was ambiguous because it appears to exclude inquiry as

to subjective intent behind the acts but then includes inquiry as to the genuine aim of the acts. The court examined the legislative history and the sponsoring state representative's statement that the CPA would codify the *Omni* decision.[15] The court held that the inquiry under the CPA as to whether the acts at issue were "genuinely aimed at procuring favorable government action, result or outcome" was similar to whether an act was a sham under *Omni* and was first and foremost an objective test.[16] Therefore, there was no implied legislative intent to provide inquiry into subjective intent or malice, and torts such as defamation were not excluded from the scope of the CPA. In so ruling, the court compared the CPA to Minnesota's anti–SLAPP statute, which explicitly carves out from its protection "conduct or speech [that] constitutes a tort."[17]

The court next rejected plaintiffs' argument that the CPA is unconstitutional because applying it to defamation claims would deprive plaintiffs of a remedy for harm to their reputation. The court pointed to other privileges that render otherwise defamatory conduct immune and held that the CPA's explicit purpose is to "strike a balance between the rights of persons to file lawsuits for injury" and constitutional rights to free speech and petition, and that it is not within the court's purview to redo the legislative balance.[18]

Turning to the merits of the case, the court found that Planned Parenthood's communications were protected because they sought the continued cooperation of the City of Aurora and the "electorate."[19]

After the court granted Planned Parenthood's CPA motion, the plaintiffs were allowed to amend their complaint to add additional claims, and Planned Parenthood filed another CPA motion seeking dismissal of the amended claims. The fourth amended complaint was based on two Planned Parenthood press releases, an open letter to a local newspaper, and a statement to the media.

In December 2008, the court dismissed the amended claims as to the press releases under the CPA but denied the motion as to the claims regarding the open letter and statement to the media. The court held that the press releases were almost verbatim recitations of what Planned Parenthood actually petitioned before the City Council and therefore were covered by the CPA. As to the open letter to the local newspaper and the statements to the press, the court held that they were not protected by the CPA at this stage of the litigation because the communications were only about one plaintiff's violent history and were not petitioning either government officials or the electorate to actually do something. The judge noted, however, that Planned Parenthood could replead the CPA as an affirmative defense and seek summary judgment on the CPA defense after discovery on whether Planned Parenthood was acting in furtherance of its protected rights. Planned Parenthood has filed a motion to reconsider the court's decision regarding the open letter.

**Public Meetings**

In *Wright Development Group, LLC v. Walsh*,[20] the plaintiff, a developer, sued the condominium association president of one of its developments as well as two newspapers. The plaintiff claimed that the individual defendant (Walsh) had made defamatory statements during a public meeting (sponsored by an alderman) about plaintiff's allegedly faulty work and that Walsh's defamatory statements were republished by the newspapers. Defendant Walsh filed a CPA motion, and the court, pursuant to CPA § 20, allowed limited discovery into whether the CPA covered Walsh's acts.

After discovery, the court denied Walsh's CPA motion, holding that his statements to newspaper reporters after the public meeting were outside of the CPA's coverage. According to the court, he was not "trying to procure favorable government action . . . because the Alderman's representatives ha[d] left the room." The court, contrary to the CPA language, also ruled that the statute needed to be strictly construed.

Furthermore, when defendant Walsh asked the court to certify its findings so as to allow an appeal by permission, the circuit court denied the request, finding that an appeal would not materially advance the case and that there were no grounds for a difference of opinion on the law**.** Walsh apparently requested certification instead of seeking appeal as a matter of right as granted by the CPA, because Illinois Supreme Court Rule 307, which determines which actions can be appealed as of right, has not yet been amended to address the CPA. As a result, defendant Walsh petitioned the Illinois Supreme Court for a supervisory order, arguing that the lower court's error was so obvious that due process makes it appropriate for the state supreme court to intervene. This matter is still pending as of the time of this writing.

***Mund v. Brown***

In *Mund v. Brown*,[21] plaintiff sued for malicious prosecution, abuse of process, and intentional infliction of emotional distress, alleging that the two defendants improperly challenged his acquisition of certain parcels of lands. The trial court denied the defendants' CPA motion in a one-page order without explanation.[22] On appeal, the Illinois appellate court held that the CPA presented a separation-of-powers issue because its creation of an appeal by right from an interlocutory order appears to conflict with the Illinois Supreme Court's power to prescribe the conditions for interlocutory appeals. The appellate court requested supplemental briefing on the separation-of-powers issue, which governs its own jurisdiction to hear the appeal. At the time of writing, the issue remained pending.

**The jury is still out as to exactly what the Illinois CPA will mean in practice, especially for media defendants.**

**Citizens Group's Website**

In *Consociate v. Daniels*,[23] plaintiffs, who were administrators of the health plan for the City of Decatur, Illinois, sued defendants, a citizens group that ran a website allegedly containing defamatory statements about plaintiffs.[24] After defendants filed a motion to dismiss under the CPA, plaintiffs filed a motion to voluntarily dismiss their case. The court granted the motion, effectively permitting them to avoid having to pay attorney fees under the CPA. Defendants moved to reconsider, arguing that if the CPA is to have any real protection for defendants, a plaintiff should not be permitted to voluntarily dismiss and potentially replead.

Defendants based their arguments on numerous California anti–SLAPP cases allowing for attorney fees even after a plaintiff has voluntarily dismissed. This motion to reconsider is still pending.[25]

**Investigative Reporting**

Catherine Doubek was a police detective who allegedly had helped her husband in restraining, torturing, and interrogating one Joseph Rossi, who they believed had stolen equipment from Doubek's husband's trucking and excavation company.[26] Months later, portions of an interview with Rossi about the incident were part of a larger investigative report by a Chicago television station (CBS) about the Chicago Police Department's (CPD) failure to properly investigate allegations of police misconduct. CPD reacted promptly to the report. The day of the broadcast, plaintiff was placed on administrative leave and CPD's then-dormant investigation was reopened. Several months later, the plaintiff's husband and brother-in-law were criminally charged.

**The CPA appears to be working in that it is leading to quick resolution of SLAPP lawsuits.**

On June 30, 2008, CBS moved to dismiss the case under the CPA and to recover fees and costs. CBS argued that this sort of public interest journalism was speech "genuinely aimed at procuring favorable government action, result, or outcome" under the statute and therefore immunized.[27]

Plaintiff sought an extension to respond to the motion and sought leave to take discovery on the broadcaster's intent in producing the report. In opposition, CBS argued that the Illinois legislature had chosen an objective standard, through its statement of purpose and by expressly adopting the *Noerr-Pennington* language, and therefore discovery into alleged subjective intent was irrelevant to the issue to be decided in the anti–SLAPP motion. Essentially, CBS argued that because it was apparent from the face of the broadcast that the goal was to prompt government action, and that action in fact followed, CBS should prevail as a matter of law.

Following the briefing, plaintiff dismissed her lawsuit with prejudice, each side bearing its own costs and fees.

**Media Defendant**

The first decision on a CPA motion by a media defendant, *Sandholm v. Kuecker*,[28] was handed down on December 10, 2008. In that case, plaintiff was an embattled high school basketball coach. Some parents started a campaign to remove plaintiff as head coach, and a radio station hosted and moderated a program with the parents. During that program, the radio station's general manager discussed the parents' dissatisfaction with the school board's decision to retain the coach. Several days later, the radio station aired a compilation of the parents' comments about the head coach. The coach sued several of the parents, the radio station, and its general manager for defamation, false light, and several other claims.

Defendants moved under the CPA to dismiss the complaint. In dismissing all counts of the complaint, the court first acknowledged that the CPA "appeared to be one of the most far reaching" of all anti–SLAPP statutes. The court then rejected plaintiff's claim that the radio station and manager could not receive CPA protection because they got involved in the controversy only after the school board already had voted to retain the plaintiff. The court stated that plaintiff's argument read the CPA too narrowly and that publicizing parents' disapproval with the school board's decision was actually part of the process.

The court then rejected plaintiff's argument, based on the holding in *Shoreline*, that the CPA was not intended to protect those who actually commit defamation. The court noted that the *Shoreline* decision dismissed all counts except those that had "nothing to do with the requested government action. It does not follow then that one can conclude that the immunity sections of the CPA do not apply to defamation actions." The court then agreed with the *Scheidler* analysis, which found that the CPA immunized protected conduct, even if it is defamatory.

**Other CPA Motions**

In at least two other cases in the Cook County circuit courts, plaintiffs have settled their actions after defendants filed CPA motions. The CPA appears to be working in that it is leading to quick resolution of SLAPP lawsuits. But even those cases have required several rounds of briefing as CPA movants have had to explain to the courts the new statute and its implications. In one of these cases, *Waguespack v. Matlak*,[29] the court initially held that the CPA was not retroactive, in part because the court did not have the entire statute before it at the time of its decision. On reconsideration after reviewing the entire statute, the court held that the CPA was retroactive. After the court resolved that issue, the case settled. The other case, *Jaeger v. Okan*,[30] involved a defamation and conspiracy action against individuals who voiced opposition to a potential real estate development.

**Merits of the Underlying Claim**

On its face, the CPA provides broader protection than some other anti–SLAPP statutes because it appears to provide absolute immunity if the actions at issue actually involve "the right to petition, speech, association or to otherwise participate in government" and are not a sham, regardless of the merits of the underlying claim.

Under the California anti–SLAPP statute, a plaintiff can defeat the anti–SLAPP motion if the plaintiff can prove a probability of success on its underlying claim.[31] For example, in *Lieberman v. KCOP Television, Inc.*,[32] the California Court of Appeal first ruled that defendant television station's undercover reporting of a doctor's practice was in furtherance of the media's rights. However, the court conducted the second inquiry under the California anti–SLAPP statute and found that the plaintiff had established that he could prove a violation of a state eavesdropping statute.[33]

Other anti–SLAPP statutes, including those in Indiana and Louisiana, also consider the merits of the underlying claim in determining the statute's applicability. Indiana's law requires that a defendant's act be lawful, which courts have interpreted to mean that a plaintiff, in response to an anti–SLAPP motion, can put forward evidence of actual malice to defeat the motion.[34] Louisiana's anti–SLAPP statute mirrors California's provision that allows a plaintiff to establish a probability of

*(Continued on page 26)*

## IN MEMORIAM

# Remembering Cam DeVore

DAVID C. KOHLER

Being asked to reflect on someone's life is a daunting task. When that someone is a person as special as Cam DeVore was, the task becomes all the more formidable. Whatever I say will not be enough—it will never give a full picture of the man. So with that lawyer-like disclaimer, I'll try to say something that is worthy of the extraordinary person he was.

I start with the obvious. Cam was an incredibly accomplished lawyer—a leader of the national media bar, a builder of a successful and prestigious law firm, a pillar of the Seattle legal community. He handled or was integrally involved in any number of important media cases, including several before the U.S. Supreme Court. Many of us hired Cam and relied on his sage advice regularly. When engaged, he would work tirelessly on our behalf. I routinely arrived early in the morning at my office to find my voice-mail light already lit, and I knew there was a better than even chance that the message was from Cam—actually, it was more likely that there would be multiple messages, as Cam was pathologically incapable of finishing within the time allotted for a single message by most of our voice-mail systems. And, of course, Cam was working on West Coast time whereas I was in the East.

Cam's ability to deliver exceptional legal services tells only a small part of the story—and for me it isn't even close to the most important part. He was more than a lawyer's lawyer to many of us—he was a mentor, a confidant, and a friend. But even if you weren't lucky enough to know Cam in these ways, I suggest that he likely has touched your life in a very personal way.

As members of the media bar, most of us would agree that we are incredibly lucky in what we get to do for a living. The work is interesting and challenging. Our clients may not always be right, but our cause is. And we work among the most collegial group of lawyers on the planet. This collegiality, which characterizes our bar, and which so enhances the quality of all our professional lives, is something for which Cam DeVore can fairly claim a good share of the credit. The organized media bar is a relatively recent phenomenon, having been conceived and nurtured by a select few—a short list of people whom I don't dare name for fear of leaving someone out, but Cam DeVore was chief among them. That our field has tended to attract people who like and respect each other—and treat each other well even when they may disagree—is no accident. It was Cam DeVore, and others like him, who set the tone and who provided the model that we all strive to live up to. So even if you didn't know Cam personally, you have reason to be thankful that he was one of the first on the scene.

For those of us lucky enough to have known Cam well, our lives were enriched, and we will miss him so much. Personally, I will miss his unfailing cheerfulness and his infectious enthusiasm for everything he did in life. Whether it was rousting us out of bed to catch the first lift up the mountain (which of course didn't mean we could quit skiing early), extolling the virtues of yoga and step class, or savoring a good meal and a great bottle of wine, Cam threw himself into everything he did. He didn't hesitate. He committed. And for those of us lucky enough to have been pulled along in his wake—or perhaps more appropriately, his avalanche of fresh powder—our lives are the richer for it.

I recently attended Cam's memorial service in Seattle. Many nice things were said. One that particularly stood out for me was Bob Sack's simple, eloquent description. Cam, Bob observed, was just a lovely person. He was indeed that and so much more. We all miss you Cam, and you will always be with us in our memories.

*David C. Kohler is director of the Donald E. Biederman Entertainment and Media Law Institute and professor of law at Southwestern Law School in Los Angeles.*



  

IN MEMORIAM

# Recollections of Cam DeVore, First Amendment Pioneer

BRUCE E. H. JOHNSON

As Judge Sack reminds us [page 20], Cam DeVore became a commercial speech pioneer purely by happenstance. In the early 1970s, a pioneering group of First Amendment lawyers led by Jim Goodale instituted the Practising Law Institute's annual Communications Law seminars. When topic areas were divided up among the PLI seminar's founders, Cam, with grace, accepted the commercial speech portfolio.

Commercial speech was, as it remains to a major extent, the "stepchild of First Amendment jurisprudence," according to Judge Alex Kozinski and Professor Stuart Banner in a 1990 law review article. "Liberals," they said, "don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech." (As Kozinski and Banner noted in a 1993 article, the term "commercial speech" was a recent one. It had first appeared in a judicial opinion in 1971.)

At that time, the scope of First Amendment protections for commercial speech, Cam's chosen topic, did not offer much promise. The Supreme Court's holding in *Valentine v. Christensen* (1942) remained in place: the First Amendment, the Court held, imposed "no . . . restraint" on governmental restrictions on commercial advertising.

But Cam was a Montanan, born in Great Falls in 1932, and notwithstanding an education at such established institutions as Yale, Cambridge, and Harvard, probably still understood the important role of pioneers. Some lawyers who know Cam suggest that he wanted to do commercial speech precisely because it was legal terra incognita. This is the same Cam DeVore, after all, who graduated from Harvard Law School in 1961 and then immediately headed to Seattle rather than an East Coast law practice. The analysis sounds accurate; I can hear some of Cam's voice when I read Huck Finn's comment: "But I reckon I got to light out for the Territory ahead of the rest . . ."

He leaped into the topic, and became not merely a casual commentator but also a nationally known advocate and legal evangelist. Cam quickly developed a consistent viewpoint about the inherent values of commercial speech and a vision of First Amendment policy which he pushed, in case after case, and which was eventually embraced by the U.S. Supreme Court. As a lawyer, he used every available forum to press these reforms, including a major treatise on commercial speech that he and Bob Sack co-authored in 1998.

One of Cam's earliest commercial speech cases, decided even before the Supreme Court's landmark decision in *Virginia Pharmacy Board v. Virginia Consumer Council* (1976), involved a Washington statute that made it unlawful to use any dairy terms in advertising margarine or other nondairy products. As a result of this peculiar rule, national margarine manufacturers had been forced to expunge all such references in any national advertising that was broadcast or published in Washington State.

In 1975, Cam persuaded the U.S. District Court in Seattle to toss out this restrictive law, with the court noting that, while the state could constitutionally restrict false or misleading advertising, the "proscriptions [of the statute] are so broad that even true, honest and nondeceiving comparative references to the dairy term 'butter' in informational advertisements . . . are made criminal acts." (It was a sweet victory; two years earlier, in *State v. 28 Containers of Thick and Frosty*, Cam had failed to persuade the Washington Supreme Court that it was unconstitutional for the state to prohibit advertising a Bird's Eye high-protein drink as "thick and frosty," permitting dairy protectionist laws to limit such terminology to milk shakes.)

Cam spent the next two-plus decades deeply engaged with a series of U.S. Supreme Court cases that examined the scope of constitutional protections for commercial speech. He repeatedly urged the Court to develop a sensible and consistent commercial speech doctrine. Chapters in his treatise ("Age of Anxiety" and "Fits and Starts") aptly describe the Court's halting progress.

Cam was involved in several of these seminal cases, sometimes for the challenger (as in *Frank v. Minnesota Newspaper Association*, a 1989 decision concerning government attempts to crack down on news coverage and advertising about lotteries) but more often as attorney for media and advertising groups (as in *City of Cincinnati v. Discovery Network*, a 1993 case in which the Supreme Court struck down a municipal ban on commercial news racks, citing Cam's amicus argument) offering amicus briefs to the Court seeking to stabilize commercial speech law and promote free speech protections.

In each of his briefs, Cam remained true to the original consumer activism that had prompted the modern commercial speech doctrine, by stressing the liberty values inherent in consumer sovereignty and by attacking the paternalist view that government, not consumers, should determine what truthful commercial information Americans should be permitted to receive. Each November, lecturing at the PLI conference in New York, Cam summarized

*Bruce E. H. Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP and co-author (with Steven G. Brody) of the second edition of* Advertising and Commercial Speech: A First Amendment Guide *(2004). The author practiced law with Cam DeVore for more than thirty years.*

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## PROTECTION OF COMMERCIAL SPEECH

The amici brief on behalf of the petitioners in *Greater New Orleans Broadcasting Association v. United States* called upon the Supreme Court to prohibit "the Government's paternalistic efforts to use public ignorance as a means of influencing citizens' thoughts and behavior" through control of commercial speech. An excerpt appears below[1]:

> "[P]rotection for commercial speech [is] an important part of the marketplace of ideas, providing an unimpeded flow of truthful, nonmisleading speech about lawful products. The media are a major link between speakers (including advertisers and the businesses they represent) and their audience (consumers), and the First Amendment was intended to foster the interests of both. *Amici*, therefore, support First Amendment protection of truthful and nonmisleading commercial speech concerning lawful products, services, and activities[.] The ability of advertisers to disclose and consumers to receive information about such activities is instrumental to making fully informed decisions. Governmental restrictions on the public availability of that information . . . undermine not only the market for a particular product or service but also the discussion about public policy issues concerning that product or service.
>
> "The continuing efforts of government at all levels—federal, state, and local—to advance social policy goals by suppressing speech and keeping citizens in ignorance demand constant vigilance, not only from the courts but from those individuals and organizations . . . who inform and educate the public and monitor First Amendment protections. Restrictions on truthful and nonmisleading advertising . . . are directly contrary to the theory of unfettered access to information on which our society is based. *Amici* urge the Court to provide unambiguous, prescriptive guidance to both the lower courts and governmental entities that will effectively prohibit the Government's paternalistic efforts to use public ignorance as a means of influencing citizens' thoughts and behavior."

1. 525 U.S. 1097 (1999), Br. Amici Curiae in Support of Pet'rs.

the progress of the case law and urged the Court to strengthen constitutional protection for commercial speech.

Of course, some members of the Court remained resistant, with Justice Rehnquist pouring scorn (in his opinion in *Carey v. Population Services International*) on the notion that Union soldiers had died at Shiloh, Gettysburg, and Cold Harbor so that condom makers could "peddle" products to "unmarried minors" visiting "the men's room of truck stops." In a 1988 law review article, Cam reacted to Chief Justice Rehnquist's restrictive approach to commercial speech rights, gently noting that "it continues to be obvious to me" that his "opponents have the better argument" and pointing out that his 1986 *Posadas* opinion for the Court, which sought to undermine the developing consensus in favor of free speech, "cannot be squared with" existing precedent. Cam observed that *Posadas* reflected "a time of turbulence for commercial speech."

By the mid-1990s, after a series of strengthening decisions, victory was at hand, and Cam celebrated. As Cam noted in his treatise, strong pro-expression opinions such as *Rubin* and *44 Liquormart* (where he had participated as attorney for amici) showed that commercial speech protections were now "an integral part of First Amendment jurisprudence," and he commented that the tone of judicial opinions had become "openhanded rather than grudging." By 1999, with the unanimous *Greater New Orleans Broadcasting* case (again, with Cam acting as attorney for amici), this position solidified. It was confirmed in 2001 with the *Lorillard* ruling, in which Cam's amicus brief urged the Court to strike down Massachusetts restrictions on tobacco advertising, because "no matter how justified the end, speech restrictions can be used, if ever, only as the regulatory tool of last resort."

Cam was also involved in many lower court rulings testing application of the Court's decisions establishing First Amendment protections for commercial speech, including cases such as *Association of National Advertisers, Inc. v. Lungren* (a 1992 federal district court case involving environmental advertising claims), and *Anheuser-Busch, Inc. v. Schmoke* (a 1996 Fourth Circuit case involving a prohibition on outdoor advertising by alcohol companies).

It is rare for a practicing lawyer to become intimately and consistently involved with the development of a major constitutional doctrine, especially over the course of three decades and involving many clients. Cam cheerfully embraced the unpromising topic choice he had been handed by his fellow PLI participants and, despite the apparent lack of First Amendment case law confirming protections for commercial speech, made the subject his cause.

Even from the sidelines, with repeated briefs, lectures, and articles, and eventually with the Sack-DeVore treatise, Cam became a First Amendment pioneer, as he worked to cajole the courts into acceptance of ample constitutional protections for advertising and commercial speech.

IN MEMORIAM

# P. Cameron DeVore—"Such a lovely man"

ROBERT D. SACK

The Sack family met the DeVore clan in July 1972. We were on our way back from an Alaska vacation. Evan Schwab, with whom I was working on a now forgotten piece of litigation, thought I ought to meet Cam. It made sense. Cam was the lawyer for the *Seattle Times*; I represented the *Wall Street Journal*. We were in the same business. And all three families spent a lovely afternoon together on Vashon Island (if I've got my islands straight).

The following year, by pure happenstance, Cam and I were enlisted to speak at an inaugural seminar on media law being run by then-*New York Times* general counsel Jim Goodale and the Practising Law Institute in New York. The 36th annual incarnation of the event will be held next week. Cam would have been there. It was on my calendar: the two of us were going to have lunch together next Friday.

I did my thing in New York; Cam a California version of the same event. The topic assigned to us was the law of, primarily, constitutional protection for "Advertising and Commercial Speech." Nice, we thought, but something of a booby prize. The governing law at the time was that there *was no* constitutional protection for commercial advertising. We joked that we got this "plum" assignment because I was the youngest participant—and he was the farthest away.

Then, though, the Supreme Court did the two of us a long string of favors. In the decade and more that followed, the Brethren and Sistren decided a series of cases establishing an extensive, if problematic, doctrine applying the First Amendment to advertising. Cam and I therefore continued to give updated versions of the same lecture every year; we added to our program materials year by year, fueled by developments in the High Court. And about a dozen years ago, we incorporated all this into a treatise to establish the illusion of permanence.

Thus did we become experts, if by default, in a new field. But more important, thus did we—and our families—develop a friendship that lasted for both Cam and me half a lifetime.

An unusual friendship to be sure: he was in Seattle; I was in New York. With one exception, a week in and around Seattle and Lopez Island more than 25 years ago—think Ranier, ice caves, Suiattle River rafting (I've never been so cold in my life)—we spent no more than a widely separated few hours together at a time. Yet we became remarkably close.

Indeed, when Anne and I were married in San Francisco nearly twenty years ago, Cam was my best man. The choice wasn't hard: Cam was not *my* best man; he was *the* best man.

Scant hours after I heard the devastating news of Cam's death—as I was beginning the process of absorbing and assimilating the fact that he was gone—I received the first of several telephone calls from reporters writing about his life. I was bewildered. They persisted in asking me about his leadership of the bar, his great law firm, his community. What was his most important case? His most signal accomplishment? His standing amongst journalists and lawyers? Most difficult, they asked, "What on earth is 'commercial speech?'"

Confused, I kept brushing off their questions. Instead, I repeated over and over, in one way and another, "He was such a lovely man."

But then, in the few hours a year we had to spend in genuine conversation with one another, Cam and I had little time to talk of the law, or the bench, or even our beloved First Amendment. It was always about Bobbie, and about Jen and Andrew and Christopher. And about my children—Deb, Suzanne, and David, who feel so close to the DeVores. Then about their husbands and wives. Later about our grandchildren. And always about our mutual friends and colleagues—in the firm he loved and took such pride in, and elsewhere. Where we had been; and whom we had seen. Occasionally, maybe a moment or two about, of all things, Shakespeare, Cam's all-around favorite playwright and poet. Typically—long before we got to talk of recent cases and controversies, the Constitution, of briefs written and clients represented—we parted. It would be months before we had the chance to pick up the thread of family and friends again.

A wonderful friendship between two lawyers. It has occurred to me many times in the last several days, though, that it was all the more remarkable for the fact that had I been, to coin a phrase, Bob the Builder and he Cam the Plumber, our friendship would have been no different. No less a privilege to be a part of.

Of course, I know the reporters had a job to do when they called. To write about Cam's stature, his career, his place in the world. But that wasn't what I was thinking when they called me. It's not what I'm thinking now.

Cam was unique, an extraordinary combination of complexity and simplicity. Cheerful, but with deep dark places. Relaxed, but thoroughly driven. The quintessential people-person, yet enchanted by ideas. Serious and funny. Urbane and countrified. A believer and a skeptic. But always, *always* dedicated to family and friends. Always loving. And always loved.

Our much beloved Bard might have been talking about Cam when he said, "His life was gentle, and the elements so mixed in him that Nature might stand up and say to all the world, 'This was a man!'" And also when he said: "Take him for all and all, I shall not"—we shall not "look upon his like again."

Thank you, Cam. Thank you all.

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*The Hon. Robert D. Sack serves on the U.S. Court of Appeals for the Second Circuit. With P. Cameron DeVore, he wrote* Advertising and Commercial Speech: A First Amendment Guide *(1998). This tribute is based on Judge Sack's comments on November 6, 2008, at St. Mark's Cathedral in Seattle.*

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# COURTSIDE

PAUL M. SMITH, KATHERINE FALLOW, JULIE CARPENTER, AND ADAM UNIKOWSKY

Recent days have seen several significant developments in First Amendment cases in the Supreme Court.

**U.S. Seeks Review of Federal Law Criminalizing Certain Images**

The Solicitor General has filed a petition for a writ of certiorari to review the Third Circuit's decision in *United States v. Stevens*,[1] which held that a federal statute banning the dissemination of any "depiction of animal cruelty" violates the First Amendment. The statute at issue, 18 U.S.C. § 48, provides that "[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both." The statute requires that the "depiction of animal cruelty" be illegal "under federal law or the law of the state in which the creation, sale, or possession takes place," regardless whether the act of animal cruelty being depicted was illegal where the depiction was created. It makes an exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Robert J. Stevens sold videos with graphic footage of dogfights to undercover law enforcement agents. After a jury trial, Stevens was convicted of violating 18 U.S.C. § 48 and was sentenced to thirty-seven months' imprisonment. Stevens appealed his conviction to the Third Circuit, which took the case en banc *sua sponte*. By a ten-to-three vote, the court, in an opinion by Judge Smith, held the statute facially unconstitutional and reversed Stevens's conviction.

*Paul M. Smith (psmith@jenner.com), Katherine Fallow (kfallow@jenner.com), and Julie Carpenter (jcarpenter@jenner.com) are partners in the Washington, D.C., office of Jenner & Block LLP. Adam Unikowsky (aunikowsky@jenner.com) is a law clerk in the Washington, D.C., office of Jenner & Block.*

The court rejected the government's contention that society's interest in combating animal cruelty was sufficiently strong as to render depictions of animal cruelty categorically unprotected speech. It held that depictions of animal cruelty were not analogous to child pornography, which the Supreme Court held to be categorically unprotected speech in *New York v. Ferber*,[2] noting that "[p]reventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm."[3] The court found that there was no empirical evidence that banning depictions of animal cruelty would significantly reduce animal cruelty, observing that because most dogfights are conducted at live venues and produce significant gambling revenue, banning depictions of dogfights would not eliminate the economic incentive to conduct dogfights. It held that the government's interest in preventing people from being desensitized to animal cruelty was not sufficiently compelling to render depictions of animal cruelty unprotected speech; indeed, the Supreme Court rejected a similar justification for banning virtual child pornography in *Ashcroft v. Free Speech Coalition*.[4]

Having concluded that depictions of animal cruelty were not categorically unprotected speech, the court determined that 18 U.S.C. § 48 was a content-based restriction on speech and must therefore be subjected to strict scrutiny. For the reasons it explained in distinguishing the case from *Ferber*, it found that the government had not demonstrated a compelling state interest that would justify banning depictions of animal cruelty. In addition, the court found that the statute was not narrowly tailored to the government's interest in reducing animal cruelty. It was both underinclusive, because it did not apply to depictions of animal cruelty created for personal use, and overinclusive, because it banned depictions of animal cruelty even when the underlying conduct was legal. Indeed, the court observed that one of Stevens's videos depicted footage of a dogfight conducted in Japan, where dogfighting is legal.

The court also rejected the government's argument that banning depictions of animal cruelty was necessary because of the difficulties in enforcing direct bans on animal cruelty. Contrary to the government's contention that the faces of the handlers in dogfighting videos are often obscured, making them difficult to apprehend, the court noted that the faces of the handlers in the videos Stevens had sold were easily observable.

Finally, the court suggested that the statute might be unconstitutionally overbroad as well. It observed that a substantial amount of protected speech, such as depictions of fishing and hunting, might be chilled by the statute and rejected the government's suggestion that prosecutorial discretion was sufficient to alleviate this concern. It declined, however, to hold definitively that 18 U.S.C. § 48 was unconstitutionally overbroad.

Judge Cowen, joined by Judges Fuentes and Fisher, issued a lengthy dissent. Citing the long American tradition of enacting statutes to prevent animal cruelty, he found the prevention of animal cruelty to be a compelling state interest. He also concluded that the speech proscribed by the statute was of minimal social value, especially given that the statute exempts any speech created for "religious, political, scientific, educational, journalistic, historical, or artistic" purposes. Analogizing the statute to the child pornography law held constitutional in *Ferber*, Judge Cowen emphasized the tragic brutality of dogfighting and the challenges facing law enforcement in combating it.

The United States filed its petition for a writ of certiorari in December 2008. If the Supreme Court agrees to hear the case, it will have the opportunity to clarify whether *Ferber* permits a

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legislature to proscribe a broad variety of speech depicting illegal conduct, or whether it applies only to the unique evil of child pornography. The Court is likely to decide whether to hear the case by this summer.

**Court Denies Review, Finally Ending the COPA Saga**

On January 21, 2009, the Supreme Court denied the Solicitor General petition for certiorari in No. 08–565, *Mukasey v. ACLU*, the long-running case involving the constitutionality of the Child Online Protection Act (COPA). That law regulating adult content on the Internet was passed a decade ago in response to the Court's invalidation of the somewhat broader Communications Decency Act in the landmark case of *Reno v. ACLU*.[5] COPA never went into effect, as injunctions barring its enforcement remained in force as the constitutional challenge wandered from the U.S. District Court for the Eastern District of Pennsylvania to the Third Circuit and to the Supreme Court on two earlier occasions.

**The issue of reciprocity is likely to provide fodder for future issues.**

In 2004, the Court had upheld a preliminary injunction, concluding that COPA was likely unconstitutional as burden on delivery of speech that is protected for adults. It rejected as a justification the need to protect children from adult content, relying on the existence of a less restrictive and more effective alternative—installing filters to block adult content from computer accessibility by minors.[6] Because the preliminary injunction factual record was then several years old, the Court remanded for a trial on the merits on the effectiveness of filtering as an alternative method to address the need to protect minors from adult content.

After a trial lasting several weeks, the district found that filtering technology is both readily available and quite effective at blocking access to adult content.[7] The evidence showed that filters generally block around 95 percent of the relevant material. The court also found that filtering was much more effective than the alternative Congress chose—criminal prohibition. That was true in part because a very large percentage of adult sites are located overseas, where they are accessible by American users but effectively untouchable by U.S. law. The Third Circuit affirmed.[8]

**First Amendment and Union Dues**

In our last column, we highlighted the union service fee/compelled speech issues raised in *Locke v. Karass* and speculated on whether the Supreme Court would harmonize the cases or fashion a new rule. In this column, we can report that the Court has unanimously done neither.

At issue in *Locke* (for those who missed our last column) was a claim by union nonmembers, who were nevertheless covered by a collective bargaining unit, that the local union could not charge them a fee used to pay litigation expenses for other units. Arguing that *Ellis v. Brotherhood of Railway Clerks*[9] prohibited charging expenses of litigation not having a connection with the bargaining unit, petitioners called for a bright-line rule disallowing such charges. Respondents argued for application of the expanded germaneness rule of *Lehnert v. Ferris Faculty Association*,[10] which allowed chargeablility for activities that would "ultimately inure to the benefit of the members of the local union."

Because logic suggested that the same standard should apply to national litigation expenses as to other national expenses, the Court concluded that the costs of national litigation could be chargeable in the same way that other national costs were chargeable under *Lehnert*. Noting that both the *Ellis* and the *Lehnert* Courts had ruled "without any understanding as to reciprocity," the Court concluded that costs of "national litigation" are chargeable if

> (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'

Applying that test here, the Court concluded that both the lower courts and the parties had assumed reciprocity, and that it was not in dispute. Thus, since the kind of litigation (about collective bargaining and contract administration, for example) was the kind that was otherwise chargeable, and since reciprocity was assumed, the Court held the fees properly chargeable to the union's nonmembers. Writing a separate concurrence, Justice Alito (joined by Chief Justice Roberts and Justice Scalia) emphasized that because reciprocity was assumed here, the decision does not reach the issue of what reciprocity is. That question will no doubt surface soon, and provide fodder for another column.

**Endnotes**

1. 533 F.3d 218 (3d Cir. 2008) (en banc).
2. 458 U.S. 747 (1982).
3. *Stevens*, 533 F.3d at 228.
4. 535 U.S. 234 (2002).
5. 520 U.S. 1113 (1997).
6. Ashcroft v. ACLU, 542 U.S. 656 (2004).
7. 478 F. Supp. 2d 775 (E.D. Pa. 2007)
8. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008).
9. 466 U.S. 435 (1984).
10. 501 U.S. 1244 (1991).

## *Newspapers in the Twenty-First Century*

*(Continued from page 1)*

I learned very early on the value of media lawyers. John Quinn, a revered news executive at Gannett during its growth heyday of the '70s and '80s, said that "courage and care must go together in aggressive journalism. No solid story should be blocked by the mere existence of risk, but no real risk should be bypassed in judging just how solid the story is . . . the rights of a free press must be, and will be, vigorously protected within Gannett newsrooms with the best of editing and legal talent, each in its own province. Lawyers are not going to be allowed to play journalist—and vice versa."

**Will Newspapers Survive?**

So journalists and lawyers are aligned in our beliefs and in our fears. I am worried that the business of newspapering and the very foundation of a democratic society won't survive. So are you. I am going to take a few minutes to talk about how real the threat is, and let's see if you and I have reason to be worried.

A 2000 survey asked Americans what products they would want to see survive in the twenty-first century. The No. 2 product on the list of things people wanted to stay around was the newspaper. Oreo cookies were No. 1. Considering Americans' love of Oreos, I didn't think No. 2 was bad at all.

How could newspapers not survive? After all, we served such a crucial role in our communities. We had tremendous clout, and that clout was earned because we had credibility. We were the only media (and still are, really) that kept a close watch on how government spends your tax dollars. We reported on crime and courts and city councils and land use. We told people where they could go to have fun. We reported on their high school, college, and pro sports teams. We told people who was born, who was getting married, who had a baby, who got divorced, and who died. We told them what their stocks were doing and what businesses were opening and closing. We told them where to find good deals. We told them who was hiring and how to apply. We told them what houses were for sale and for how much. We were a marketplace of ideas and a marketplace for retailers and people to sell things. We brought communities together because just about everyone read the paper.

We anticipated survival well into the twenty-first century, although it was only in 1910 that the essential features of the recognizable modern American newspaper emerged, according to *A Brief History of American Journalism*. The first successful newspaper was the Boston News-letter in 1704, which was heavily subsidized by the colonial government—so I guess government subsidies are part of our country's DNA after all. By the eve of the Revolutionary War, more than two dozen newspapers were in existence, and they were a major force that influenced public opinion regarding political independence. When the Bill of Rights was ratified in 1791, freedom of the press was guaranteed, and American newspapers began to take on a central role in national affairs.

Before the advent of newspapers in early seventeenth-century Europe, reports of events—in other words, news—were spread by word of mouth or by letters to friends and families. In its review of a recent Washington, D.C., exhibit of Renaissance journalism, the *New York Times* said that the story of how journalism became a public enterprise in Renaissance England is actually a history of how a public itself took shape . . . and how another kind of identity emerged out of a monarchical society, one based on increased literacy and impassioned written argument. The newspaper evolved as the creator and mirror of its public. *Political modernity, said the reviewer, is almost unimaginable without that relationship.*

And it is that relationship that you and I worry about surviving.

**The Color of Money**

In short, for the last 400 years, newspapers were necessary. Newspapers mattered. And, because we mattered, we were also very profitable.

Citizen Kane, in responding to his top financial adviser that they had lost $1 million that year, said, "You're right. I did lose $1 million last year. I expect to lose $1 million this year. I expect to lose $1 million every year. At the rate of $1 million a year, I'll have to close this place in sixty years."

That was sixty-eight years ago.

Today, most newspapers are still profitable, but not as profitable as in the past. I like to believe that we are still necessary and that we still matter despite the media noise of cell phone pictures, You Tube, Facebook, Sirius XM, 24/7 screaming cable talking heads, bloggers, twitterers, and flickers. *The Economist* observed last fall that, if the 2008 election proved anything, it is that the media are hardly the monolithic, agenda-setting forces they may have been before the Internet and cable.

Today, citizens get to pick their filters. Human nature being what it is, many people opt for filters that feed their own preconceptions. In other words, ever-expanding new media permit people to ratify their own worldviews without straying too far afield. Conservatives watch Fox and listen to Rush. Liberals watch Keith Olbermann and Rachel Maddow.

The reports of the extraordinary negative influence of competing media noise on the future of newspapers are true. But, interestingly enough, it is the newspaper that still reaches the most people every day with the unmatched credibility of decades behind it. We're holding on to our audience better than our competitors. On a daily basis, according to the Newspaper Association of America, U.S. print papers reach 51 percent of all U.S. adults, ranking them the single largest media in virtually every market on any given day.

**The Perfect Storm?**

But we are caught smack in the middle of that perfect storm of enormous systemic and cyclical factors. The systemic factors were already causing an unprecedented shift in the basic business model of the newspaper industry, changing the way that we generate, compile, and distribute news and information—and the way readers consume it. Then along came the economic upheaval, which has threatened to engulf many businesses, not just ours. For newspapers, the recession means serious declines in advertising revenue in addition to the revenue shifts from print to websites. Newspaper advertising is synonymous with cars, real estate, retail department stores, and banks. And we know what trouble they are all in.

Two of the fastest, and among the only, growing news magazines are *The Economist* and *The Week*, a weekly print aggregator of news culled from newspapers around the country and the world. This tells us something—people can

get the day's headlines online, on TV, or both. But at some point, they want it synthesized and complete, ergo *The Week*, or analyzed and placed in context, thus *The Economist*.

**The Newspaper as Watchdog**

But newspapers do have one thing that other media don't.

We have an entrenched, valuable brand that, for all our foibles, is a fundamental cornerstone of the democratic process in this country.

We have a strong tradition and credibility as watchdogs and guardians of the First Amendment, a tradition that is getting stronger because of the new tools we have at our command. Last spring, the Pew Foundation reported that many of the top website destinations are traditional brands such as *USA Today*, the *New York Times*, and the *Washington Post*, thereby demonstrating, according to the Pew Foundation, that people still want what newspaper companies produce—good, credible reporting.

So, given all this, what about newspapers?

First, it's important to consider what makes a newspaper? Is it the "paper" or the "news"? If we can all agree that the news is the important part, then the paper is just the delivery mechanism, the way that you get the news.

Eduardo Hauser, a former media lawyer and entrepreneur who started *dailyme.com*, an online news aggregator, said at a recent Online News Association meeting that "journalism and newspapers are two different things and content creation can no longer be tied to a single platform . . . good journalism will survive and, in fact, the web will foster a golden age for journalism."

William Powers, the *National Review*'s media critic and a 2006 Shorenstein Fellow, published a Harvard white paper with the catchy title "Hamlet's Blackberry: Why Paper Is Eternal," in which he reminds us that newspaper journalists produce the vast majority of the journalism that really matters—the groundbreaking work that illuminates the dark places in society and keeps governments honest. TV and radio follow the lead of newspapers. Most of the substantial reportage on Yahoo, Google, and similar sites is derived from newspaper fare. In a speech last year, John Carroll, former editor of the *Los Angeles Times*, estimated that no less than 80 percent of America's news originates in newspapers.

Dean Singleton, CEO of the MediaNews Group, said earlier this year at an Aspen Institute forum on the media: "Don't feel sorry for the newspaper business. It's not a dying business; it's a changing one."

**A New Business Model?**

We can't change the world around us, so we have to change ourselves. And we have been doing just that. Most of us are building new business models that are indeed transformative. In short, we have replaced our single print product with a full, rich media mix.

But the current recession is and will continue to take its toll: *The Seattle Post-Intelligencer* published its last print edition on March 17, 2009. The Scripps-owned *Rocky Mountain News* published its last issue on February 27, 2009, and Gannett-owned *Tucson Citizen* will close soon if buyers are not found. The Tribune Company, owner of the *Chicago Tribune*, the *Los Angeles Times*, and the *Baltimore Sun*, has declared bankruptcy as has the *Philadelphia Inquirer*. The *New York Times* is trying to sell most of its brand new building and has sold a $300 million financial interest in the company to a Mexican billionaire. And I believe more newspapers, including metros, will close this year. Thousands of newspaper workers are being laid off across the country. The newspapers that survive this recession will continue to grow multiple delivery platforms and right-size cost structures that reflect the new realities, both media and economic. The business model will include:

- Core newspapers in some form and perhaps with a different frequency of distribution.
- Internet operations, including iPods, cell phones, twitter messages, streaming video . . . you name it.
- Niche print and online products and publications. When I retired last spring, Gannett had almost 1,000 print publications operating in our markets, targeted toward very specific audiences—by geography, by age, by interest. We were developing niche websites appealing to moms, kids, sports, and music, among others, and all geared toward local markets.

We are embracing the Internet for what it offers rather than simply as a new delivery mechanism for old content. The new digital platforms have become our friends, not our enemies, giving us the power to broaden our reach every minute of the day. *New York Times* publisher Arthur Sulzburger expects the paper to stop printing in his lifetime. "I do not care when we print our last newsprint edition," he told USC's *Online Journalism Review*. "We will remain the major source of news and information in this country and perhaps the world."

The questions are these: Will advertising revenue move to the Internet? Can it support the newsgathering operation? Will both print and online subscribers be willing to pay for content of particular interest to them on the platform they desire? Can companies survive the recession to implement new business models successfully?

Muddying this dilemma is the fact that Internet advertising is in its infancy and not just for newspapers. Very few people have found profitability yet in the Internet. As of last summer, even Politico, the website that burst into prominence during the 2008 campaign, started a weekly print product, which is responsible for much of its revenue. And, as reported in company earnings during the fourth quarter of 2008, advertising has dropped for online companies as well. So the Web may not be the Holy Grail after all.

For those that survive the current fiscal crisis, I believe that we will find the right revenue-producing model for Internet. Print will survive in some form, also with a new business model of support. "Newspapers of the future will be very different, better and more profitable than ever," predicts a World Association of Newspapers report on newspapers in 2020, but only "if they embrace change and innovation without losing the core and soul of the business of journalism."

**What Will Newspapers Look Like?**

Different. Newspapers are very expensive to write, print, and distribute seven days a week. A former Merrill Lynch newspaper analyst, Lauren Rich Fine, summed up what many believe. Newspapers need to get out of the print and distribution costs. If newspapers can find new business models that cut print and distribution costs while preserving the best of print on some days,

they can theoretically offset the lower ad revenue from the online venue. Nearly a dozen or so newspapers have announced plans to scale back seven-day products to three, four, or five days a week.

Newspapers are getting smaller. Paper width size itself is shrinking. Remember when you had to hold your arms out wide to read an open *Wall Street Journal*? And the number of pages is already far less than what it was, primarily as a factor of advertising. Fewer ads mean fewer news pages.

Unprofitable papers with strong brands will fold their print products and put their remaining resources, primarily the journalists, to work on the Web. The *Christian Science Monitor* has already announced such a plan. And newspapers aren't alone . . . magazines are struggling as well. Half a dozen, including *Domino*, a popular home design magazine, have closed. The Hearst Corp. shuttered *Cosmopolitan* after the December issue, but will keep and expand its website.

Distribution will change. Fewer papers will be sent to home delivery customers, who will be selected by sophisticated demographic selection, geographic targeting, or both. That experiment is already underway in Detroit where newspapers are delivered only a few days a week, leaving subscribers with the option of buying single copies or relying on the Web.

Newspaper prices will increase. By and large, baby boomers will be able to afford price hikes so pricing alone will shrink circulation to more affordable cost structures. Consider this. High speed Internet costs $50 a month. Cable TV runs at least $50 a month. It costs $4 a week or $16 a month to have someone drop a newspaper on your doorstep, if you pay full price. It costs the newspaper more than $4 a week to get it there. A full week of a home delivered paper costs about the same as a Starbucks vente latte.

Print products will change and shrink. Distribution will change and shrink. Most important, costs will shrink, hopefully to a level that can sustain credible journalists for reportage—on the Web. Politico is an example of one business model. Former *Vanity Fair* and *New Yorker* editor Tina Brown last fall launched a news aggregation site called the dailybeast.com, which mixes news and opinion. According to Brown, "magazines can only survive if they try to look ahead, do investigative reporting that anticipates news." She points to the financial crisis as one situation that good reporting could have robustly anticipated and explained. Ariana Huffington made $10 million with her news and information site last year, HuffingtonPost.com. Some companies are seeking philanthropic grants. Laid-off reporters are forming investigative teams and seeking alternative funding sources, or finding news niches to fill. One such example is the recently launched GlobalPost.com, which hires foreign correspondents to cover cities overseas where newspapers have closed bureaus.

**New Models, New Risks?**

But as we experiment with new modes of reporting and new models for journalism, new standards are appearing and that also brings legal risks.

Last fall, the SEC was reported to be "investigating the origin of a false report from a citizen journalist website, that Apple's chief executive, Steven P. Jobs . . . had a heart attack and was hospitalized." That anonymous statement "proved to be enough to send Apple's stock plummeting. The company's shares fell by more than 10 percent shortly after the report's publication." The shares did not rebound "until Apple representatives came forward to adamantly deny the claims . . . and the report was removed." The AP pointed out that the website's "'citizen journalists' are not required to give their real name when registering." And remember last fall when the *Orlando Sentinel* posted an outdated online story that carried no timeline date, causing United Airlines stock to plummet.

These examples reinforce the importance of credible journalism, and I believe provide a huge competitive advantage for newspaper company journalists. Yes, we'll distribute the news and information differently, but one thing will not change: a free, open, and honest press that is a very cornerstone of a free society.

A few months ago, I heard a story on National Public Radio about an effort in Cambodia by American journalists to help a free press grow and prosper. One of the Cambodian journalists they were training said simply: "Journalism is to a free society what the sun is to the earth."

The work we do—you and I—must continue. Who else will credibly shine light in dark corners? Who will fund and fight the First Amendment battles if not us?

The *Washington Post*'s Anne Hull commented last spring after the paper won a Pulitzer for the Walter Reed hospital stories: "As a journalist you go about your daily work life trying to get a story out or make someone's life better or shine light on wrongdoing. . . . The Walter Reed stuff landed with a ferocious wallop. Washington—Congress, the Pentagon, the White House—all reacted in dramatic fashion. It was a reminder to everyone in the *Post* newsroom that journalism is still this mighty tool for good."

## What will newspapers look like? . . . Different.

Reason enough for all of us to want, in fact, to demand the survival of credible newsgathering and reporting. Perhaps that will be in a different form. Perhaps not as a daily newspaper. But the substance and credibility and civility of what newspaper journalism has stood for are a treasure this country cannot do without.

It is my hope and belief that when we come out of this period of transition we will have transformed ourselves into something even better. After all, it was only nine years ago when the survey of Americans listed newspapers as the No. 2 product they wanted to stick around for the twenty-first century and beyond. Perhaps newspapers just didn't change enough or fast enough in these past nine years.

But the makers of Oreos saw the need to change to keep up with consumer demands. We don't just have one Oreo anymore. We have dozens. Oreo Wafer Sticks, Golden Oreos, Double Stuf Oreos, 100 calorie pack Oreos, and, yes, Mini Oreos, to list a few. We live in a world of niches. If there is an Oreo for every taste, maybe there needs to be a newspaper or trusted newspaper website for every type of news consumer. Our purpose and resolve are to do so. Our founding principles as a cornerstone of democracy demand nothing less.

## IN MEMORIAM

# Alexander "Sandy" Wellford 1930–2009

DAVID C. KOHLER

The last part of 2008 wasn't kind to the media bar. First, in the fall we lost Cam DeVore, whose incredible career is honored in this issue. Then early in the morning on New Year's Eve Sandy Wellford left us. He was 78.

Sandy may not have been as widely known as Cam, but he was another member of the generation of media law pathfinders who paved the way for all of us. All of you are intimately familiar with at least one of Sandy's cases—*Richmond Newspapers v. Virginia.* When Hanover Circuit Court Judge Richard "Dickie" Taylor tossed the *Richmond Times Dispatch* and *Richmond News Leader* reporters from a murder trial, it was Sandy who got the call. When the case reached the Supreme Court, Sandy remained closely involved but brought in the notable Harvard constitutional law professor Lawrence Tribe. He did this because he thought it was in his client's best interest—that Tribe's presence might help get the Court's attention and secure certiorari.

This says something about Sandy and others of his generation—the selfless devotion to the client even when it might not have served his own personal interests. How many of us today can honestly say in this era of law-firm marketing, self-promotion, and fierce competition that if we were in the same position we would—on our own motion without pressure from anyone—stand aside if we had a realistic prospect of a Supreme Court argument? I know from personal knowledge that he did this—put his client's interests ahead of all others—because he was my mentor and, more importantly, my friend.

Although *Richmond Newspapers* was Sandy's biggest case, it was by no means the only one that had a significant impact. When *Flynt v. Falwell* was first appealed to the Supreme Court, Sandy was one of the few mainstream media lawyers to recognize early on its potential impact, and he convinced his longtime client Media General to fund an amicus brief in support of the certiorari petition—the only amicus brief that was filed at that stage of the case.

Sandy is a member of the Virginia Journalism Hall of Fame. He was a pillar of the Richmond Bar, a devoted husband, the father to four successful children, and the best damn teacher a young lawyer like me could ever have asked for. Our bond far transcended the practice of law and I miss him every day. Let's all hope 2009 is a kinder, gentler year for all of us.

*David C. Kohler is director of the Donald E. Biederman Entertainment and Media Law Institute and professor of law at Southwestern Law School in Los Angeles.*

## *A Potentially Powerful New Weapon for Media Defendants*

*(Continued from page 26)*

success on the claims to overcome a defendant's anti–SLAPP motion.[35]

Thus, although the California, Indiana, and Louisiana anti–SLAPP statutes take into account the ultimate defenses, the Illinois CPA seems to focus solely on whether the defendant was exercising its protected rights in hopes of government or electorate action. The merits of the underlying claim should be irrelevant. For example, as seen in the Planned Parenthood case, there was no need for the court to determine whether the plaintiff might ultimately prevail on several of the claims because the court decided that the defendants' acts were in furtherance of their constitutional rights and intended to procure government or electorate action.[36]

The *Shoreline* decision, however, seems to suggest otherwise when it states that "[a]nti-SLAPP legislation does not permit a person to actually defame another and then seek the protection of the statute." The court's reasoning seems contrary to the plain language of the CPA and also somewhat contradictory to the *Shoreline* ruling itself. *Shoreline* apparently was not persuasive to the courts in *Sandholm* or Planned Parenthood, which both had the *Shoreline* decision before them when they dismissed many claims under the CPA notwithstanding the potential defamatory nature of the statements. Indeed, the *Sandholm* court explicitly rejected that part of the *Shoreline* holding.

### Applying the CPA to Media Defendants

*Sandholm* is the only available Illinois decision on a CPA motion brought by a media defendant, although others have been filed. One of the first CPA motions to be filed came in a high-profile defamation case against a media defendant. In *Thomas v. Page*,[37] Illinois Supreme Court Justice Robert Thomas sued the *Kane County Chronicle* for an article that criticized how Thomas handled a

prosecutor's disciplinary hearing. After Justice Thomas was awarded a $7-million-dollar jury award (subsequently reduced to $4 million by the trial judge), Illinois passed the CPA. Defendants filed a petition for relief from judgment, seeking to afford themselves of the protections under the newly enacted anti–SLAPP statute. Before the court could rule on defendant's motion, including the issue of whether the CPA could apply retroactively, the parties settled for an amount less than the trial judge award.

Given the breadth of the CPA itself and the underlying policy rationale, the CPA seems applicable to media defendants. The reasoning and holding in *Sandholm* support this conclusion. As with any statutory argument, the first place to look is the language, and the CPA has some of the broadest language of any state anti–SLAPP statutes.[38] The CPA considers corporations and organizations to be "citizens," which means that media entities can be citizens within the meaning of the statute.[39] The CPA also defines "government" to include the "electorate."[40] This means that acts attempting to influence the voting public, as opposed to merely trying to directly influence the government, are protected by the CPA.

Additionally, the reasoning in decisions concerning other states' anti–SLAPP statutes supports the conclusion that the CPA applies to media defendants. As detailed above, the CPA specifically invokes the constitutional right of free speech. Courts in other states have recognized the right of free speech as the foundation upon which to provide anti–SLAPP protection to news-gathering activities. This should be especially true under the CPA, which specifically provides that its protections are to be construed broadly.[41]

Among other issues, the courts have yet to address the scope of protection for the news media. Strong arguments can be made for broad protection of media activities, including the fact that the press serves as a check on government and the actions of public officials. This type of argument was advanced in the *Doubek* case, resulting in a voluntary dismissal by the plaintiff.

## Conclusion

In the coming months, there are likely to be additional decisions on CPA motions that should provide guidance as to how the CPA will be applied in practice. This guidance should include how the CPA will be applied in cases involving media defendants, whether the court's inquiry is limited to the nature of the defendant's conduct and not the merits of the underlying claim, how broadly the courts will interpret "acts attempting to influence the government or the electorate." So far, it appears based on the language of the CPA itself, and the few decisions to date, that the CPA could be one of the strongest anti–SLAPP laws in the country affording significant protections to media defendants who are engaged in traditional First Amendment activities.

## Endnotes

1. 735 ILCS § 110/1 (2007).
2. 499 U.S. 365 (2001). In *Omni*, an outdoor advertising company brought an antitrust action against a competitor and city that adopted rezoning ordinances restricting billboards. The Court held that the *Noerr-Pennington* doctrine, which was only one of several issues in the case, protects a party from incurring liability under the antitrust laws if the alleged anticompetitive acts were "genuinely aimed at procuring favorable government action." *Id.* at 380–82. That language is commonly referred to as the sham exception because it is supposed to preclude *Noerr-Pennington* protection for parties who conduct campaigns that are ostensibly directed toward influencing government action but in reality are attempts to interfere with the business of a competitor. Given the breadth of the CPA, it appears that the Illinois General Assembly ultimately provided similar *Noerr-Pennington*–like protection in a wider variety of situations, albeit with the same sham exception discussed in *Omni*.
3. S.B. 1434, 95th Gen. Assemb., Reg. Sess. (Ill. May 31, 2007), House of Representatives Transcript, p. 58, *available at* http://www.ilga.gov/house/transcripts/htrans95/09500065.pdf.
4. 735 ILCS § 110/5 (2007).
5. *See, e.g.*, 735 ILCS § 5/13-201 (Illinois statute provides one-year limitation for "[a]ctions for slander, libel or for publication of matter violating the right of privacy"); Schaffer v. Zekman, 554 N.E.2d 993 n.2 (Ill. App. Ct. 1990) (one-year statute of limitations applies to both defamation and false light invasion of privacy claims).
6. No. 07 CH 062783 (Cook Co., Ill.).
7. Mar. 25, 2008 Order, at 9.
8. *Id.*
9. *Id.* at 10–12.
10. *Id.* at 13.
11. *Id.*
12. No. 07 L 513 (Kane Co., Ill.).
13. Sept. 2, 2008 Order, at 9 (citing 735 ILCS 110/15).
14. *Id.* at 3.
15. *Id.* at 3–5.
16. *Id.*
17. *Id.* at 5 (citing Minn. Stat. Ann. § 554.03).
18. *Id.* at 6.
19. *Id.* at 8–9.
20. No. 07 L 10487 (Cook Co., Ill.).
21. No. 05-L-83 (St. Clair Co., Ill.).
22. Aug. 13, 2008 Order.
23. No. 07-L-68 (Macon Co., Ill.).
24. May 27, 2009 Order.
25. *E.g.*, e-cash Tech., Inc. v. Guagliardo, 127 F. Supp. 2d 1069, 1083–84 (C.D. Cal. 2000) (awarding attorney fees and costs notwithstanding plaintiff's voluntarily dismissal of the action after the defendants filed anti–SLAPP motion).
26. Doubek v. CBS Broadcasting, Inc., No. 08-L-4627 (Cook Co., Ill).
27. *See, e.g.*, Boxcar Dev. Corp. v. New World Commc'ns of Atlanta, Inc., No. 08CV2248, 2008 WL 1943313 (Ga. May 1, 2008) (applying anti–SLAPP law to television broadcaster and holding "[b]y its very nature, an investigative news report is a medium that seeks to influence the public or State government.").
28. No. 08 L 19 (Lee Co., Ill.).
29. No. 07 L 3680 (Cook Co., Ill.).
30. No. 07 L 004940 (Cook Co., Ill.).
31. Cal. Civ. Proc. Code § 425.16 (b)(1).
32. 110 Cal. App. 4th 156, 166–67 (2003).
33. *Id.*
34. *See* Shepherd v. Schurz Commc'ns, Inc., 847 N.E.2d 219, 225–26 (Ind. Ct. App. 2006).
35. *See* Johnson v. KTBS, Inc., 889 So. 2d 329, 332 (La. Ct. App. 2004) (affirming dismissal of anti–SLAPP motion for a news broadcast about murder victims where plaintiffs could not establish defamation was of and concerning them and could not present evidence of actual malice).
36. Scheidler v. Trombley, 07 L 513 (Kane Co., Ill.), Sept. 2, 2008 Order, at 8.
37. No. 04 LK 13 (Kane Co., Ill.).
38. For a comparative review of various anti–SLAPP statutes and their applications to media defendants, see Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti–SLAPP Law and the Media Defendant*, 41 Val. U. L. Rev. 1235 (2007).
39. 735 ILCS § 110/10 (2007).
40. *Id.*
41. *Id.* § 110/30(b).

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