



Texas Entertainment and Sports Law Journal

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Entertainment & Sports Law Section

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FOR THE LEGAL RECORD

Not working on programs such as Jim Rome's show, *The Last Word*, has been part of the complaint filed by minority employees. Alleging racial discrimination, 11 black and Hispanic employees seek \$25MM in compensatory damages plus punitives from Fox Sports Net. The claims include denial of opportunities to work on higher paying shows. Plaintiffs' attorney Steve Blum alleges that "[A]n overall culture that tolerates discrimination ... has to be tolerated at a high level for widespread [discrimination] to exist." Each of these allegations has been "fully investigated and every one of these claims ... is completely without merit ..." responds Tom Myrer, vice-president for Fox Television ... Racial discrimination is also at the heart of South Carolina's controversy over the Confederate flag. Virginia and North Carolina supported the National Association for the Advancement of Colored People tourism boycott of South Carolina. Nine ACC teams supported the boycott by refusing to stay at

hotels in South Carolina. The NAACP claims the flag is a hateful symbol. However, Alexandria Stevenson, daughter of basketball great Julius Erving, took part in the Family Circle Cup Tennis Tournament, despite a boycott of the tournament by the NAACP. World-ranked player Serena Williams (No. 6) joined the boycott. The South Carolina Senate and House passed resolutions to take the flag down and fly a similar square flag at a Confederate monument on statehouse grounds.

Beware of the letter of recommendation you write. Former Stratford High School, (Houston) football coach Oscar Cripps provided a letter of recommendation for a former assistant coach. The school district claimed that Cripps provided the letter despite knowing that former coach Tim Schmitt had harassed 3 female students. Claiming that he was forced to resign, Cripps filed a grievance with the State Board of Education. Cripps' grievance was denied

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CHAIRMAN'S REPORT

The Entertainment and Sports Law Section publishes this Journal three (3) times a year in an effort to provide quality reading and discussion about current issues to Section members. We hope that you find it useful in your respective practices. We again extend our appreciation to the Editor, Sylvester Jaime, as well as to all of the people who develop and write the articles. Our membership now totals over 525 members including lawyers, law students, paralegals, industry personnel and other interested persons.

The annual meeting of the State Bar is being held this month in San Antonio at the Convention Center downtown. Our Section Annual Meeting will be held on Friday, June 23, 2000. Our proceedings begin with a council meeting at 11:00 a.m. in Room 209 of the Convention Center, followed by a luncheon in the same room from 12:00 to 1:30 p.m. and then a CLE program from 1:30 p.m. to 3:30 p.m. in Room 218. All section members are invited to attend all or any of these functions.

At the annual meeting of our practice section, which will be held just before the CLE program at 1:30 p.m. in Room 218, the following individuals, having been nominated by our council nominating committee, will be presented for a section vote for the following positions:

Rob Carter - Chair

Susan Benton Bruning - Treasurer and Chair Elect

J. Edwin Martin - Secretary

Chris Kalis - Director, Term expiring 2003

Russell Rains - Director, Term expiring 2003

Steve Ellinger - Director, Term expiring 2003

We would also like to officially welcome Evan M. Fogelman as a council member whose term is expiring in 2001. Evan is CEO of the Fogelman Literary Agency in Dallas.

We have a terrific CLE program lined up. At 1:30 p.m. Bill Stapleton, an Austin sports agent and attorney, will discuss what it's like to represent a famous athlete, specifically Lance Armstrong. At 2:30 p.m., Sandy Crawshaw, a partner in New York City with Proskauer Rose LLP, and former partner of mine, will relate some of her experiences in representing clients such as Madonna, Meat Loaf, Shania Twain, Sting and U2 as well as numerous record labels, publishing companies and industry leaders. Should be fun, interesting and informative. Please join us!

Thank you for your support during my tenure as section chair. As the worlds of high tech and entertainment continue to coalesce, I see our section becoming one of the Bar's most vibrant and relevant.

Best wishes

Larry Waks



State Bar of Texas Entertainment & Sports Law Section

Notes...

The statements and opinions in the Texas Entertainment and Sports Law Journal are those of the editors and contributors and not necessarily those of the State Bar of Texas or the Entertainment & Sports Law Section. This publication is intended to provide accurate and authoritative information with respect to the matters covered and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

Join the Section

All members of the Entertainment & Sports Law Section are encouraged to make sure that their dues are paid. All dues payments are to be made directly to the Section's Treasurer. An application for joining the Section is provided in this publication.

Invitation to Publish

Think you have the talent to write an article? This is your invitation to put that talent to use. The Entertainment and Sports Law Journal is soliciting articles to publish in upcoming issues. Article formats vary from long footnoted analyses to more informal discussions, and topics may span the spectrum of the sports and entertainment fields. Contact the editor and discuss the possibility of writing an article on a subject that interests you.

Comments on the Journal and articles may be submitted to:

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FOR THE LEGAL RECORD

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following the Board's finding that Cripps acted inappropriately because "It's a fact the assistant coach was approaching girls inappropriately, more than once." ... Inappropriate contact was also the focus of the charges against AAU coach Myron Piggie. Piggie was charged with defrauding 4 major basketball programs. Piggie faces a federal indictment of defrauding UCLA, Duke, Missouri and Oklahoma State. The universities gave scholarships to players whom Piggie allegedly paid. The scholarships were awarded after the players had accepted payments to play in AAU tournaments, and thus were no longer amateurs when they played at the schools. Piggie was held without bond and faces up to 49 years in prison and fines in excess of \$1.8MM.

NCAA president Cedric Dempsey is leading the NCAA's efforts to ban legal betting on college sports. A congressional panel is considering banning all gambling on amateur sports. Despite the NCAA's position against betting on college sports, according to FBI statistics, as many as 10MM people wagered as much as \$2.5 billion on the men's Final Four alone. Bill Saum, NCAA director of gambling, claimed that 20% of college referees and official who responded to a NCAA survey gambled on the men's basketball tournament.

The good news for NASCAR comes from the Texas Motor Speedway: beer will be sold during NASCAR races! The Texas Alcoholic Beverage Commission issued the speedway a permit to sell beer during events in specified controlled areas ... The bad news for NASCAR is that the Roger Penske and Michael Kranefuss team was penalized \$50,000 for using illegal fuel in the Diehard 500 at Talladega, Ala. The team and its driver Jeremy Mayfield came under investigation following their first win in the NAPA Auto Parts 500 in California. Following their second win 2 weeks later, the team's owners were ordered to pay the fine, and the crew chief was suspended from the team. Kranefuss did not deny the charges. NASCAR officials detected a fuel enhancing substance in Mayfield's Taurus following the race at Talladega. NASCAR has taken more than 500 random fuel samples this season in an effort to ensure competitors are not gaining an unfair advantage by using souped-up fuel.

The wave of the future? Judges equipped with heart rate monitors? Canadian physician Jane Moran, a medical advisor for the International Skating Union, recruited figure skating judges in Nice, France, and equipped them with heart rate monitors at the world championships in an effort to monitor the stress related to judging competitors. Are courtroom judges next? ... Apparently stress was too much for Dallas Stars goalie Eddie Belfour. Belfour offered Dallas police officers \$100,000 and then \$1 billion if they would not jail him. Belfour was booked for assault after a scuffle at a Dallas hotel ...

Stress also may have lead to bigamy and assault charges against San Diego Padres' Al Martin. Martin, represented by super-agent Jeff Moorad, was present at a ceremony he claimed he did not know was a wedding and then got into a fight with the woman who claims she became his wife. Already being married, Martin and the woman claiming to be his wife were arrested and later released on their own recognizance. Martin categorically denies the charges and claims to have known the woman for several years.

The release of grades is at the center of a lawsuit by former University of Texas basketball player Luke Axtell. Axtell is suing UT, DeLoss Dodds and former coach Tom Penders. Penders suspended Axtell from the team claiming Axtell had academic problems. Former assistant coach Eddie Oran took the blame for the release of Axtell's grades, but Oran was not a named defendant. UT determined that the former player was in good academic standing at the time of the suspension. Oran claimed in sworn testimony in another lawsuit that he took the blame for Penders. Axtell is seeking unspecified economic damages against Penders for the suspension, and against Dodds and UT claiming they should have done something to stop Penders.

And to show that some people just don't get it ... Denver Broncos cornerback Dale Carter was suspended for violating the NFL's substance abuse policy. A two-time violator, Carter's agent Mitch Frankel claimed that his client "did not fail any recent drug tests." With the suspension, Carter faces the loss of \$3.5MM in base salary and reimbursing the Broncos a portion of his \$7.5MM signing bonus ... Darryl Strawberry drew a one year suspension from Commissioner Bud Selig following another failed drug test. Strawberry's cocaine use drew the suspension because it was his third violation in five years. Strawberry was suspended for 60 days in 1995 for cocaine use, and suspended again in 1999 for cocaine possession and solicitation of a prostitute ... Shawn Patrick Phillips gave a little league pitcher \$2 to bean another youngster. An Allentown, PA jury deliberated 2 hours before convicting the former police officer of corruption of minors and solicitation to commit simple assault ... Miami Heat rookie guard Rodney Buford was arrested for marijuana possession, the 3rd marijuana related offense for Buford within the last year. The Heat being in the playoffs with the Heat did nothing to convince Buford to stay clean ... Dennis Rodman was sued by a Las Vegas cocktail waitress for allegedly grabbing her breasts. The federal lawsuit accused Rodman of battery and intentional infliction of emotional distress. The waitress, Connie Wilcox, said "I think he needs to be reprimanded for his conduct, so that he will not do this to anybody else ..."

Sylvester R. Jaime, Editor

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law
Sports and Entertainment Law Society
Tamer Morsi, Student Casenote Editor

Female Athletes Win Big Under Title IX

In *Pederson v. Louisiana State University*, 201 F.3d 388 (5th Cir. 2000), the Fifth Circuit found that Louisiana State University (LSU) had intentionally discriminated against female student athletes in violation of Title IX by failing to provide facilities and teams for intercollegiate athletic competition. The case arose after three female students attending LSU filed suit alleging that LSU had violated Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the United States Constitution by denying them equal opportunity to participate in intercollegiate athletics, equal opportunity to compete for and receive athletic scholarships, and equal access to benefits and services provided to its male varsity intercollegiate athletes. Plaintiffs sought declaratory, injunctive, and monetary relief on behalf of themselves and all those similarly situated. The defendants included LSU, Athletic Director Joe Dean, Chancellor William E. Davis, and the individual members of the LSU Board of Supervisors.

After finding that the female student athletes had standing to sue and that Congress had the authority to abrogate a State's Eleventh Amendment immunity for purposes of Title IX, the Fifth Circuit focused on the merits of the Title IX claim. Title IX prohibits gender discrimination in education programs or other activities receiving federal financial assistance. According to regulations promulgated by the Department of Health, Education, and Welfare, "no person shall, on the basis of sex, . . . be treated differently from another person or otherwise discriminated against in any interscholastic, intercollegiate, club, or intramural athletics . . ." The Fifth Circuit then recognized that the Policy Interpretations to Title IX provided the proper analytical framework for assessing a Title IX claim. These Policy Interpretations required an analysis of (1) the disproportionality between the university's male and female participation, (2) the university's history of expanding opportunities for women, and (3) the university's plan to effectively accommodate the interests of its female students. The Fifth Circuit found that credible evidence showed that LSU failed all three prongs and had intentionally discriminated against female athletes in violation of Title IX.

The Fifth Circuit found intentional discrimination based on LSU's arrogant ignorance of the law and remarkably outdated view of women and athletics which created resistance to change. According to the Court, LSU perpetuated antiquated stereotypes about women's athletics and discriminated in many ways. First, LSU officials acted according to the outdated assumption that women athletes did not want to participate to the same extent as its men. The Court found that these paternalistic and stereotypical assumptions about women's athletics showed that LSU intended to treat women differently because of their sex. In fact, LSU continued to adhere to deprecatory nomenclature when referring to women

athletes, refused to authorize additional sports for women, and seemed content that the few women's teams fielded by LSU performed well in competition. Furthermore, LSU consistently approved larger budgets for travel, personnel, and training facilities for the men's teams versus the women's teams. All of these examples showed that LSU's treatment of women athletes was "remarkably outdated, archaic, and outmoded." The Court rejected LSU's argument that schools sued for discrimination under Title IX should be subjected to the "actual knowledge of discrimination" standard used in sexual harassment cases under Title IX. Instead, the Court found that LSU "acted with deliberate indifference to the condition of its female athletic program" and this was enough to show intentional discrimination.

By: Tamer Morsi

Artist Barred From Suing The Texas Arts Commission

In *Rodriguez v. Texas Commission On the Arts*, 199 F.3d 279 (5th Cir. 2000), an artist brought a claim for copyright infringement against the Texas Arts Commission for misappropriation of his license plate design. The artist claimed that the Arts Commission infringed on his copyrighted license plate design when it began selling its "State of the Arts" license plates to Texas residents. The District Court dismissed the suit for lack of subject matter jurisdiction because the Eleventh Amendment prohibits citizens from bringing suit against a State or any instrumentality thereof without the State's consent.

On appeal, the artist claimed that Congress' enactment of the Copyright Remedy Clarification Act of 1994 repealed the State's sovereignty from suit in copyright matters. The Fifth Circuit analyzed the sovereign immunity issue by using a two-prong test. First, the Court asked whether Congress expressly intended to abrogate sovereign immunity. Second, the Court asked whether Congress acted within its power in abrogating sovereign immunity in the Copyright Act. In answering the first question, the Court found that the Copyright Act plainly stated that Congress intended to abrogate the States' immunity in copyright matters. However, on the second prong, the Court recognized that recent United States Supreme Court precedent had held that Congress could not repeal sovereign immunity pursuant to its Article I powers. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Thus, the Court recognized that the abrogation of sovereign immunity could only be constitutionally justified under the Fourteenth Amendment. Then, relying on another recent United States Supreme Court decision which found that Congress' abrogation of sovereign immunity in the Patent Remedy Act was not justified, the Fifth Circuit found that the abrogation of sovereign immunity in the Copyright Act could likewise not be justified as a means to enforce the due process guarantees of the Fourteenth

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Amendment. See *Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Savings Bank*, 527 U.S. 627 (1999). In essence, the Fifth Circuit found sufficient similarity between the interests of Congress in passing the Patent Remedy Act and the Copyright Act to decide that Congress could not abrogate a State's sovereign immunity under either Act. For these reasons, the Fifth Circuit determined that the Copyright Remedy Clarification Act of 1994 did not invalidate a State's sovereign immunity granted by the Eleventh Amendment and dismissed the artist's suit.

By: Cindy Smith

Texas Misappropriation Law Not Preempted By Federal Copyright Law

The Fifth Circuit recently held that the Texas tort of misappropriation was not preempted by Federal Copyright law. *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000). In this case, a music producer gave a record company permission to commercially exploit master recordings that included performances by certain Texas musicians and songwriters. The music producer represented to the record company that he possessed the authority to give the record company permission to use the names and likenesses of all those whose performances appeared on the master recording. As a result, the record company manufactured and distributed CD's and tapes with the names and likenesses of the musicians and songwriters. Also, the music producer sold posters or videotapes with the names and likenesses of musicians and songwriters. The musicians and songwriters sued the record company and music producer alleging copyright infringement and misappropriation of their names or likenesses under Texas tort law. The jury agreed that the musicians' and songwriters' names and likenesses had been misappropriated by the record company and music producer.

On appeal, the record company's main argument was that the Federal Copyright Act preempted the Texas tort of misappropriation. The Fifth Circuit disagreed and affirmed the judgment below. The Fifth Circuit found that the Copyright Act itself did not preempt Texas' misappropriation tort law and that conflict preemption did not exist.

The Court first examined whether the Copyright Act specifically preempted Texas' misappropriation law. According to the specific provision within the Copyright Act, preemption occurs only if: (1) the content of the protected State right falls within the subject matter of copyright, and (2) the nature of rights guaranteed under State law are equivalent to any of the exclusive rights within the general scope of a federal copyright. The Fifth Circuit found no preemption because the nature of the rights protected by the Texas tort of misappropriation differed from the nature of the rights protected by the Copyright Act. The Texas tort of misappropriation protects a person's persona and the unauthorized use of one's name, image, or likeness. It is best understood as a species of the right of publicity or of privacy. By contract, the Copyright Act only protects tangible works of authorship and a person's persona does not fit within the subject

matter of Copyright Act because it is not a writing or authorship. Thus, the Court concluded that a person's name or likeness is not copyrightable and therefore the Copyright Act itself could not preempt Texas misappropriation law because the rights protected by the tort do not fall into the subject matter of copyright.

Next, the Fifth Circuit considered whether conflict preemption existed. The Supremacy Clause mandates that a state law is preempted if the state law prevents the achievement of the purposes and goals of the federal law enacted by Congress. The Court noted that the Copyright Act had several purposes: (1) to encourage the development of sciences and arts; (2) to create uniformity in enforcing rights; (3) to allow scholars and the public to benefit from copyrighted materials; and (4) to improve international dealings in copyrighted materials. The Court then found that the state tort of misappropriation did not interfere with these purposes for several reasons. First, the tort of misappropriation promoted the Copyright Act's goal of encouraging people to develop artistic and scientific endeavors. Second, because the industry practice was to transfer publicity rights when a copyright was transferred, the right of publicity claims would "rarely interfere with a copyright holder's use of the creator's name or likeness in connection with the copyright." Finally, the legislative history of the Copyright Act showed that Congress was aware of the operation of state laws, such as misappropriation, and indicated its intention that such State law causes of actions remain. In fact, a United States Supreme Court case warned that "the States remain free to promote originality and creativity in their own domains . . . [and] the case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165, 166-67 (1989). For these reasons, the Fifth Circuit concluded that there was no conflict preemption.

Since the Copyright Act did not specifically preempt the state misappropriation law and conflict preemption did not exist, the Texas tort of misappropriation was not preempted by the federal Copyright Act.

By: Shawna Martin

FIND US ON THE WEB

This and previous published Journal may be accessed on the web at www.stcl.edu/txeslj/txesljhp.htm

The Section attempts to maintain and update the Journal on-line in conjunction with South Texas College of Law. Although it is endeavored to be current, we apologize if there is a lag from the time the Journal is published and the Journal is up-dated on-line.

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FROM THE EDITOR

The Texas Entertainment and Sports Law Journal is published quarterly. If you are not on the mailing list and wish to be included, forward your name and address to the Section Treasurer along with a check for \$25 payable to the Entertainment and Sports Law Section and indicate that you wish to be included on our mailing list.

We are now accepting advertisements in the Journal. Anyone wishing to advertise in the Journal, should contact the Editor for information on getting your ad in the Journal. Ad rates are: 1/8 page: \$50.00; 1/4 page: \$100.00; 1/2 page: \$150.00; 3/4 page: \$175.00 and full page: \$200.00.

Student Writing Contest

The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are soliciting articles for the fourth annual writing contest for students currently enrolled in Texas law schools for the best article on a sports or entertainment law topic.

The winning student's article will be published in the Journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the Journal. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 15, 2000.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½ x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-2905.

Defamation and Privacy Laws Face the Internet

Sheri Hunter

Sheri Hunter is an associate in the corporate/intellectual property section in the firm of Jackson Walker L.L.P., in Austin, Texas

Imagine the following scenario:

While cruising around in cyberspace, you enter a chat room where the participants are discussing the safety of a new laser eye procedure. As an optometrist familiar with the procedure, you enter the discussion and offer information and advice. A new user subsequently enters the room, using the pseudonym *Laserman* and immediately states that you are not really an optometrist; you are a zookeeper. After calling you a fraud, *Laserman* leaves the room. Do you have legal recourse for these defamatory statements? How can you find out *Laserman's* identity? Can you sue the online service provider that allowed the statements to be "published"?

Now imagine instead that you purchase a pregnancy-testing kit over the Internet, believing the purchase to be confidential because the Web site advertises that it is "secure." Two days later you receive an e-mail from an anti-choice group begging you to keep the baby if you are indeed pregnant. Later that same day you receive another e-mail, this time from a pro-choice organization, offering counseling should you be facing a difficult decision. Furious at this invasion, you learn that the site where you bought the kit sold your personal information, including a list of your purchases, to a marketing service. Can you sue the Web site owner or the organizations that sent the e-mails for an invasion of privacy?

These and many more questions are currently challenging the traditional laws of defamation and privacy, developed in the era before the Internet. Should the laws be adapted to encompass evolving technologies, or should completely new laws be developed?

Although some federal laws currently protect online users, they are extremely limited. The government has thus far adopted the position that the Internet, because of its international reach, should be self-regulated by the private sector. This article discusses emerging issues affecting defamation and privacy laws and identifies and analyzes potential and available remedies.

Defamation

The elements of defamation vary slightly by state; but, generally, a statement is defamatory if it is false, unprivileged, and harms the reputation of another, or deters third persons from associating or dealing with another.¹

Defamation includes the common law torts of slander and libel, but this article addresses only libel because it is more likely to occur in the online context (although digital cameras and video telephones may soon make slander claims feasible). Libel occurs when a defamatory statement is published via writing in a relatively permanent format, with some degree of fault.² Both the original and subsequent publishers of the statement may be held liable for libel, because each publication constitutes a separate and distinct cause of action. However, an entity that merely distributes a defamatory statement,

such as a bookstore or newspaper stand, cannot be held liable, unless it knew or had reason to know of the defamatory statement at issue, because it is under no obligation to verify the content of the publications it sells.³

Early "cyberlibel" cases focused on whether Web site operators, Internet access providers, and online service providers (OSPs) should be held liable as publishers and/or treated as distributors when a third party publishes a defamatory statement on the provider's site. In some electronic rooms, anyone with access can submit or post a comment, and, although bulletin boards are typically static (comments may remain publicly posted for years), chat rooms are generally interactive and operate in real time. Comments may or may not be deleted after the chat has concluded, depending on the provider.

Two New York courts were the first to address the issue, with divergent results. In the first case, *Cubby, Inc. v. CompuServe, Inc.*,⁴ the defendant operated a bulletin board that contained a daily newsletter called *Rumorville*. When the plaintiff began a competing bulletin board called *Skuttlebutt*, *Rumorville* published statements about it that included allegations that it was a "start-up scam."⁵ Cubby sued the creators of *Rumorville* for libel and sued CompuServe on the grounds that it had republished the defamatory statements.

The court held that CompuServe was merely a distributor, focusing on the fact that CompuServe did not exercise control over the bulletin board and had contracted with an independent business to "manage, review, create, delete, edit, and otherwise control [its] contents."⁶ The court further noted that CompuServe had no opportunity to review the content of, and therefore had no editorial control over, *Rumorville* before it was made available to subscribers.⁷

The next court to consider the issue reached the opposite result. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁸ an anonymous user of Prodigy's Money Talk board posted comments claiming that the plaintiff, a securities firm, had committed criminal and fraudulent acts and was a "cult of brokers who either lie for a living or get fired."⁹ Anticipating that the defendant would utilize the "distributor's defense" that had worked for CompuServe, Stratton Oakmont moved for summary judgment on the limited issue of whether the defendant exercised sufficient editorial control over its online services to be deemed a publisher. The court found that Prodigy did exercise substantial control, through its use of screening software and bulletin board leaders who were paid to monitor content. In the eyes of the court, these actions exposed Prodigy to greater liability than OSPs with a less active role.¹⁰

In the wake of this decision, Congress passed the Communications Decency Act of 1996 (CDA).¹¹ Section 230(c), Protection for "Good Samaritan" Blocking and Screening of Offensive Material, provides a safe harbor for OSPs by immunizing them from liability for information originating from third parties. The impact of Section 230 is that OSPs are no longer penalized for restricting access to objectionable material.

The first case to be decided after the enactment of the CDA was *Zeran v. America Online, Inc.*¹² On April 25, 1995, messages were posted anonymously on America Online's (AOL) bulletin board advertising T-shirts with tasteless slogans concerning the Oklahoma City bombing that had occurred just a few days earlier. *Zeran's* home phone number was included. After receiving numerous harassing

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phone calls and death threats, Zeran immediately requested that America Online (AOL) remove the postings. AOL agreed to do so but refused to post a retraction as a matter of policy. It is unclear exactly how long it took AOL to remove the original message, but an anonymous party continued to post additional messages advertising even more offensive products during the next four days. During this time, Zeran repeatedly contacted AOL and was told that the account from which the messages were being posted would soon be closed. Meanwhile, he was receiving abusive phone calls approximately every two minutes; compounding the problem even further, an announcer on an Oklahoma City radio station urged listeners to call Zeran's number.

Zeran subsequently sued AOL for negligence, alleging that it had unreasonably delayed in removing the defamatory messages, refused to print retractions, and failed to screen similar postings. After the district court granted judgment for AOL, Zeran appealed, arguing that Section 230 imposes liability on OSPs that have notice of defamatory material posted on their sites. The Fourth Circuit affirmed the judgment for AOL, stating that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions . . . are barred," and that holding AOL liable under these circumstances contradicted an important purpose of Section 230, namely, "to encourage service providers to self-regulate the dissemination of offensive material over their services."¹³

Several other courts have broadly interpreted Section 230 as providing absolute immunity for OSPs with respect to content originating with a third party, even extending such protection beyond causes of action for defamation.¹⁴ The question remains, however, whether an OSP will be held liable for knowingly distributing defamatory messages. It seems that under such circumstances, OSPs should not be afforded the protection of the "distributor" status granted under section 230.

Defenses to a Defamation Claim

Like the publisher-versus-distributor dichotomy, traditional defenses to defamation take on a different spin in cyberspace. Furthermore, new defenses may be available to defendants accused of publishing defamatory statements, have yet to resolve many of the issues presented in applying current defenses to electronic messages. Following are examples of defenses that present questions requiring resolution by the courts.

In order for a statement to be defamatory, there must be a "publication." However, the point when something is "published" in cyberspace remains less than clear. The date of publication determines the statute of limitations and possibly sets the deadline by which a plaintiff must demand a retraction or file suit.¹⁵ At common law, a statement is "published" each time it is distributed, with the exception of publications subject to the Uniform Single Publication Act (USPA), which has been adopted in most states. The USPA provides that all issues of a mass-media publication be treated as one; the statute begins to run when the first copy of an issue is distributed.¹⁶ It remains to be seen whether this rule will work with online publications. It may be that each day that comments remain "published" on an electronic bulletin board creates a separate and distinct cause of action with a new statute of limitations.¹⁷ In a similar context, many Web pages now advertise that the page can be e-

mailed to a friend through a hypertext link. If a page containing defamatory content is e-mailed to another person, does this constitute "republishing," and does another statute of limitations begin to run from the date that e-mail was sent? These issues have yet to be addressed by the courts.

Online defendants may also be able to avail themselves of the "public figure" defense. The public figure doctrine provides a privilege defense against plaintiffs pursuing a defamation claim. Pursuant to this privilege, a plaintiff who is a public figure must prove "actual malice," a higher standard of fault than private plaintiffs are required to prove. The actual malice standard requires plaintiffs to show, with clear and convincing evidence, that the defendant published the disputed statement with knowledge of, or in reckless disregard of, its falsity.¹⁸ Because the actual malice standard is difficult to meet, most of the cases using this test are resolved in favor of the defendant.

When defamatory statements are posted on an electronic bulletin board or during a chat room discussion, a possible defense arises under the public figure privilege. A plaintiff who has been participating in an online discussion might be characterized as a "limited purpose" public figure who must meet the actual malice standard.¹⁹ The definition of a limited purpose public figure varies slightly by state, but the basic elements are the same. California, for example, defines a limited purpose public figure as a person who (1) voluntarily takes part in a discussion about a public controversy, and (2) has access to the media or effective channels of communication to make an opinion available to the public.²⁰ Arguably, a plaintiff who regularly posts messages online might be deemed to have voluntarily assumed an increased risk of defamation by courting attention and inviting comments. It is likely that such plaintiffs will be classified as limited purpose public figures because they have access to the same audience that viewed the defamatory message and can rebut the statements almost immediately, simply by posting a response.

Protection from defamation liability is afforded in many jurisdictions through retraction or correction statutes. Application of a retraction statute might at least allow a defendant to limit damages. Whether or not retraction statutes protect cyberspace defendants is often unclear. Several jurisdictions designate only newspapers and other traditional printed materials as falling within the statutes' protections, although others include radio and television stations. Only a few apply to defamation published in any medium.²¹ It will be interesting to see how broadly or narrowly these statutes are interpreted with regard to Internet publications. For example, are online newspapers that share the content of their traditional print counterparts covered by retraction statutes specifically applicable to newspapers?

To date, only one court has published an opinion on the applicability of a state correction statute to a statement published online. The Wisconsin Court of Appeals, in *It's In The Cards, Inc. v. Fuschetto*,²² reversed a grant of summary judgment based on the plaintiff's failure to request a correction prior to filing suit, as required by the retraction which applies to "any libelous publication in any newspaper, magazine, or periodical."²³ The statements at issue were posted on a bulletin board run by SportsNet, an online service that bought and sold sports memorabilia. The appellate court held that the retraction statute does not apply to bulletin board postings for

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the following reasons: (1) the plain meaning of the word “periodical” covers only publications that appear at regular or stated intervals; (2) a previous judicial interpretation found the statute applicable only to “print” media, which this court held inapplicable to computer bulletin boards; and (3) because the statute predates the Internet, the court determined that the legislature must address the growing issues of electronic libel.²⁴

Even in states where it is questionable whether publication of a retraction is required by law, online entities might be best served by complying with a demand for one. Retractions still serve the traditional functions of mitigating damages and providing evidence of good faith.²⁵ The retraction should be accessible through a number of different avenues on the Web site, thereby improving the likelihood that it will reach substantially the same audience as the original statement. Retraction statutes generally require that the corrective statement be published prominently, in as conspicuous a place and type size as the original defamatory statement.²⁶ Those posting Internet retractions would be wise to follow these guidelines, even when the state retraction statute is inapplicable to online media, or where no such statute exists.

Web sites may be able to limit their liability for defamatory materials posted by third parties through disclaimers in visitor agreements. To provide sufficient protection against user-supplied content, the disclaimer should: (1) disclaim responsibility for content in chat rooms, bulletin boards, and similar areas that may not be regularly monitored and/or could be offensive, controversial, or both; (2) warn users not to post statements that are defamatory or otherwise unlawful; and (3) reserve the right of the Web site to remove any user-supplied content at its discretion.²⁷

Two recent cases from the Seventh Circuit suggest that online visitor agreements of which the user has notice may be valid, even if the user never signs a contract.²⁸ Currently, Web site operators are bringing visitor agreements to the attention of the user in a number of ways. Some require that the user “click through” a visitor agreement before being granted access.²⁹ While this gives the operator a convincing claim that the user read and agreed to the contract, the argument is easily rebutted by the fact that users often link into pages that bypass the home-page visitor agreement. To get around this, some sites have posted prominently displayed links to their visitor agreements on all site pages.

The agreement itself usually states that, by using the Web site, the user agrees to be bound by the terms of the agreement.³⁰ In light of the case law addressing the credibility of “shrink-wrap” software licenses and mail-order computer agreements, it is likely that the terms of such visitor agreements will be enforceable.³¹ Of course, unconscionable provisions will still be subject to traditional contract laws that limit their enforceability.

Several defamation issues also assume unique complexities in the online context. They are briefly discussed here in order to facilitate awareness of their existence, although it is not certain how these problems will be resolved.

Through the technology used by electronic “remailers,” it is possible for an individual to send messages anonymously over the Internet.³² To do this, a person sends the e-mail to a remailer, who strips the message of anything that can be traced back to the sender

and forwards it to the recipient. As a result, it can be difficult for the victim of a defamatory statement to determine the identity of the author. The question then arises whether a court can demand that the remailer identify the author. It seems unlikely that legal privilege would protect the remailer (or an OSP) from producing, under the rules of discovery, the identity of a potential defendant.

This is important to the defamed individual for two reasons. First, because Section 230 of the Communications Decency Act prohibits a plaintiff from suing the OSP based on third-party content, the injured party must find the individual who actually posted or sent the message. Second, the plaintiff must sue within the applicable statute of limitations, and discovery rules state that the statute begins to run on the date the plaintiff learns of the defamatory statement, not the date the plaintiff identifies the defendant.³³

The Supreme Court traditionally has recognized that anonymous speech falls under the protections of the First Amendment.³⁴ The right is not absolute, and the Court has balanced the freedom to speak anonymously with the need for accountability. When the anonymous speech is conveyed over the World Wide Web, however, the Court’s authority in applying the rights guaranteed by the Constitution may be brought into question. Due to the lack of jurisdictional boundaries, a U.S. court’s rulings may not be enforceable.

The advent of anonymous Internet communication, coupled with the difficulty of tracing authors of anonymous Internet messages, may render the court’s decisions wholly ineffective because of the impossibility of enforcement. Because of the global scope of Internet communication, the ability of Congress to pass enforceable legislation is also questionable. Therefore, the Constitution’s supremacy and permanency in governing anonymous communication becomes increasingly suspect.³⁵

Whether the Court is trying to protect the freedom of speech of an anonymous user or, conversely, attempting to make a remailer disclose the identity of an individual, the international scope of the Internet may limit the sovereign authority of national governments.³⁶ Some may see this jurisdictional problem as evidence of the futility of one country’s attempt to regulate the Internet. However, if U.S. law regarding online communications is rendered ineffective, what would prevent the U.S. government itself from tracking down the identities of anonymous users who post criticisms of politicians, the government, or Supreme Court decisions? Essentially, no one on the Internet would be entitled to the protection of the First Amendment.³⁷ As more countries gain access to the Internet and more individuals rely on online communications as their source for news and political debates, this issue takes on an urgent need for resolution.

Similar to using the protections afforded by anonymity, using pseudonyms has become a popular way to speak freely on the Internet. The application of defamation laws to pseudonyms is rather questionable, however. Assume that an individual enters a chat room using a pseudonym for identification. The individual chats often, using the pseudonym, claims to be a priest, and engages in controversial debates on a variety of topics. Regular participants in the chat room learn to expect conservative views and ideas from the person using that name. On one occasion, the user enters the chat room and states, “I have been lying to you all, I am really a convicted

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murderer out on parole; you had better lock your doors,” before immediately signing off. At some later point, the user enters the chat room again but claims that someone else had used her pseudonym and made the defamatory statement.

The question then becomes: Can a pseudonym be defamed? The user has created an identifiable persona known to the other participants in the chat room; if the statements caused harm to the true owner of the user name, the pseudonym “thief” should be held liable for defamation. But this is an area where traditional laws fail to address the realities of the Internet.³⁸ Defamation laws clearly focus on the concept of the person; when the defamatory statement is made using a pseudonym, courts generally require that plaintiffs prove that the public was aware that the statement attached to them personally. Thus, plaintiffs can be defamed only if the public knows their true identities.³⁹ To counteract the failure of the law to protect pseudonymous personalities, one commentator has suggested that individuals create untraceable “digital signatures” for their pseudonyms by combining cryptography and remailers.⁴⁰ As a result, a pseudonym could not be impersonated without access to the owner’s private encryption key.

Privacy in the Electronic Age

Many people are unaware that as they casually browse the Internet, every electronic move may be being watched. Although this may sound like science fiction, it is true that many Web sites use new technologies to track the identities, activities, and preferences of site visitors. As a user “surfs” the Internet, each Web site visited and each page viewed within a site are logged by the user’s OSP. The OSP typically keeps a record of each user’s e-mail communications and “click stream data,” such as advertisements viewed and purchases made.⁴¹ Operators also record user activities using “cookie” technology that personalizes the site with the user’s preferences, based on earlier visits to that site. Cookies are sent from a server to the user’s hard drive during browsing sessions. The cookies label one’s Web browser with an electronic serial number so that the originating site can then identify the user the next time he or she enters.⁴²

Many Internet users understandably feel that this collection of data is an illegal invasion of privacy. They believe that such practices violate the users’ rights to “information privacy,” which is defined as the right of an individual to control the acquisition, disclosure, and use of personal information.⁴³ Site operators argue that the collected information is a valuable commodity, and that they have the right to exploit it commercially. This argument is strengthened by the fact that the “postindustrial economy generally and the telecommunications sectors particularly are seeing increased competition . . . [prompting] firms to exploit every competitive advantage, including the use of personal information.”⁴⁴ The Federal Trade Commission issued a report on Internet privacy in June 1998, stating that 92 percent of commercial Web site operators surveyed collected personal information about visitors, but that only 14 percent actually disclosed to the visitors how the information is used.⁴⁵ Both the federal government and the private sector are attempting to resolve this conflict in numerous ways.

Federal Protection of Privacy

The Electronic Communications Privacy Act of 1986 (ECPA)⁴⁶

prescribes what information may be disclosed by providers of electronic communication services and remote computing services. The ECPA specifically forbids providers from divulging the contents of electronic communications during transmission or storage. However, this protection is limited, as one critical scholar has noted:

Although this may seem to her communication providers from peddling personal information in the marketplace, such privacy protections are illusory. The . . . bar applies solely to the contents of communications, not to transactional records, that may be freely disclosed to anyone other than a governmental entity. Unfortunately, the line is not bright between the contents of a communication and the transactional data about that communication . . . The legislative history adds little light, except to make clear that “contents” do not include “the identity of the parties or the existence of the communication.”⁴⁷

The ECPA may not prohibit disclosure of personal information to the private sector, but Section 2703 does strictly limit the information that electronic communications providers and OSPs may give to the government. Pursuant to sections 2703(a) and (b), in order for a government entity to obtain user information, it must first obtain a subpoena, warrant, or court order.⁴⁸ If the government seeks the contents of a communication rather than the records pertaining to a user, more stringent procedural safeguards apply. For communications that have been in electronic storage for 180 days or fewer, the government must obtain a warrant from the U.S. Attorney General or an equivalent state warrant. If the communication has been stored for more than 180 days, the government must obtain either a warrant, subpoena, or court order and give the user notice before the contents are released.⁴⁹ Subsections (a) and (b) clearly apply to the conduct of the government; but two courts have directly contradicted each other in determinations regarding subsection (c), which lists the only instances in which an electronic communications service provider may disclose subscriber information (exclusive of content) to a government entity. At issue is whether this section imposes restrictions on government actions or only on actions of the service provider.

In *Tucker v. Waddell*,⁵⁰ police officers in North Carolina obtained the plaintiff’s telephone records from GTE South using improper subpoenas. The plaintiff sued the City of Durham for violations of her rights under the ECPA. The Fourth Circuit, in interpreting Section 2703(c)(1)(B) of the ECPA, held that the language of Subsection (c) does not expressly bar any action by governmental entities, but only prohibits the actions of electronic communications providers and remote computing services. The court noted that “the inclusion, within the same section, of two subsections limiting governmental access to information and one subsection limiting provider disclosure of information makes the distinction between the two eminently clear.”⁵¹

Conversely, in *Timothy R. McVeigh v. William Cohen*,⁵² the D.C. District Court issued a preliminary injunction forbidding the U.S. Navy from discharging a sailor for violating the “don’t ask, don’t tell” policy as the result of statements made in his AOL profile. A Navy employee received an e-mail message regarding a children’s

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toy drive from the alias "boysrch," signed by "Tim." The employee searched AOL's member profile directory in an attempt to identify the actual sender and later learned that "boysrch" was a man named Tim who lived in Hawaii, worked in the military, and identified himself as homosexual. Having communicated with the plaintiff on other occasions with respect to the toy drive, the employee forwarded this material to her husband, who was an officer on the same ship as the plaintiff. Eventually, the message was forwarded to the plaintiff's commanding officer. A Navy paralegal contacted America Online to confirm that the profile of "boysrch" was indeed that of plaintiff; upon verification, the Navy proceeded to discharge the plaintiff for making a "statement of homosexuality" in violation of the "don't ask, don't tell" policy. The plaintiff filed an action against the Navy, alleging that the government violated his rights under the ECPA. The district court, also interpreting Section 2703(c)(1)(B), concluded that the section must be read in the context of the statute as a whole, with the ultimate purpose being to protect consumer privacy. Thus, this court held that Subsection (c) provides a cause of action against the government as well as the service providers.

Federal Trade Commission Proposal

The FTC, after conducting its June 1998 survey, proposed a legislative model that identifies four elements necessary to protect consumer privacy on commercial Web sites. The directive would require operators to: (1) provide notice to consumers on how their personal information is used; (2) give consumers a choice about whether and how their information is used; (3) provide security for personal information collected; and (4) allow consumers access to their own information to promote accuracy. The FTC subsequently charged GeoCities, Inc., with violating the FTC Act by misrepresenting to users that personal information collected through membership applications would be used only to provide members with requested advertising, and that "optional" information given in the application would not be released.⁵³ The FTC and GeoCities reached a settlement under which GeoCities agreed to post a privacy notice explaining to members what information is collected, the purpose for which it is collected, third parties to whom the information will be released, and procedures by which members can view and remove their information.⁵⁴ This settlement is generally regarded as a model for OSP privacy statements.⁵⁵ However, absent further legislation or self-regulation, OSPs may decide to protect themselves from liability by not issuing a privacy policy statement, thereby avoiding the possibility of its being deemed deceptive.⁵⁶

As the issue of online privacy has become more controversial, the government has recognized the need for further protections in the private arena. However, progress has been slowed by the desires of both the public and private sectors to allow self-regulation of the Internet. Indeed, the Clinton administration is still attempting to implement self-regulation, even as Congress is pushing for legislation to limit the rights of Web sites to collect personal information without the consent of users.⁵⁷

Several private organizations have begun the self-regulation process. Services like TRUSTe and BBBOnline (Better Business Bureau) work to promote the appropriate use of personal data by requiring participating Web sites to disclose their collection process to users.⁵⁸ These organizations will also investigate complaints from

consumers who suspect their privacy rights have been abused by a member Web site. However, the majority of sites do not participate in these programs. TRUSTe had only about 500 members as of April 1999, although this included many of the largest sites such as Yahoo! and Microsoft. BBBOnline, which started in March 1999, had fewer than 100 approved participants as of August 1999, although members included several large companies such as Amazon and Dell Computers. Both Microsoft Explorer and Netscape Navigator give the user the option of setting a preference that alerts the user each time a site tries to send a cookie. The user can choose to refuse the cookie but still enter the Web site. There are also companies that have developed software that either blocks cookies or allows the user to set cookie preferences.⁵⁹

Although the collection of personal data is the major focus of privacy concerns regarding the Internet, there are other invasion of privacy causes of action that require revamping with regard to the Web. An example is the privacy tort of intrusion that traditionally arises when the personal space of the plaintiff is invaded either physically or visually.⁶⁰ The typical online intrusion occurs through "spamming," the mass distribution of unsolicited and unwanted e-mail. Courts are rapidly confronting spammers and so far have consistently held in favor of plaintiffs.⁶¹ Congress is also attacking this issue, and in June 1997, the Electronic Mailbox Protection Act of 1997⁶² was introduced to protect consumers and OSPs from such unsolicited e-mails.

With the uncertainties the Internet has generated in traditional privacy law, it might be wise to protect one's privacy with cyber-generated tools such as encryption. Encryption allows an individual, using a cryptographic algorithm and a key, to turn a message into gibberish. Once the message is sent to the intended recipient, the gibberish is decoded and becomes readable.⁶³ The strongest type of safeguard is public key encryption, where whatever has been encoded with one key can be decoded only by the person with its complement. This encryption method is used by Web browsers to enable confidential transmission of credit card numbers.⁶⁴ Of course, the ability to transmit "secret" messages makes it easier to send harmful or criminal communications. The government will want to ensure that it has a way to decode encrypted messages obtained with a warrant. However, even if the government preserves this power, it should be limited to criminal situations.

Conclusion

There are no definite answers on how defamation and privacy laws will develop in order to encompass online violations. It remains to be seen whether the federal government will intervene or continue to depend on self-regulation. Legislation thus far has established only limited protections via the CDA and the ECPA, and the courts have yet to address the elements of defamation in an online context. Cases have focused to this point on whether an OSP can be held liable for content posted by a third party and on the proper interpretation of Section 230 of the CDA. Critical jurisdictional issues need to be resolved before either the U.S. government or courts can enforce defamation or privacy laws on the Internet. Accordingly, an international solution will likely be necessary in order to regulate ongoing Internet abuses. While this may solve the problems encountered by current privacy and defamation laws, it may also

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mean that the U.S. Constitution will become secondary to international law when the action involves the global environment of Internet communications.

There is a spark of hope, however. "Virtual Magistrate" has developed as an alternative dispute resolution program on the Internet. For a minimal fee, users can participate in nonbinding arbitration designed to resolve disputes arising from statements published online.⁶⁵

Endnotes

1. *See generally*, ROBERT D. SACK, SACK ON DEFAMATION, LIBEL, SLANDER, AND RELATED PROBLEMS (3d ed. 1999).

2. *Id.*

3. *Id.*

4. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

5. 776F. Supp. at 141.

6. *Id.* at 143.

7. *Id.* at 140.

8. *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).

9. *Id.* at 1795.

10. *Id.* at 1797.

11. 47 U.S.C. §230..

12. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

13. *Id.* at 330-31.

14. *See* *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Aquino v. Electriciti, Inc.*, 26 Media L. Rep. (BNA) 1032 (Cal. Super. Ct. 1997); *Doe v. America Online, Inc.*, 718 So. 2d 385 (4th Fla. Dist. Ct. App. 1998), *review granted*, 729 So. 2d 390 (Fla. Apr. 12, 1999); *Lunney v. Prodigy Serv. Co.*, 683 N.Y.S.2d 557 (N.Y. App. Div. 2d Dep't 1998).

15. *Online Liability Issues: Defamation, Privacy and Negligent Publishing*, 520 PLI/Pat. 707, 730 (1998).

16. *Id.*

17. *Id.*

18. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773, *cert. denied*, 475 U.S. 1134 (1986).

19. 520 PLI/Pat at 733-34.

20. *See Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 254 (1984), *cert. denied*, 478 U.S. 1009 (1986).

21. *Cyberspace Liability*, 523 PLI/Pat. 123, 161 (1998).

22. *It's In The Cards, Inc. v. Fuschetto*, 535 N.W.2d 11 (Wis. Ct. App. 1995).

23. *Id.* at 14.

24. *Id.*

25. 523 PLI/Pat. at 163.

26. *Id.* at 164; *see, e.g.*, UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT § 6(b)(1) (1993); Cal. Civ. Code § 48a(2) (1997); Fla. Stat. Ann. § 770.02(1) (1997).

27. *Id.* at 169.

28. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) *cert. denied*, 118 S. Ct. 47 (1997).

29. 523 PLI/Pat. at 169.

30. *Id.*

31. *See Zeidenberg*, 86 F.3d at 1447; *Hill*, 105 F.3d at 1147.

32. Michael H. Spencer, *Anonymous Internet Communication and the First Amendment: A Crack in the Dam of National Sovereignty*, 3 Va. J.L. & Tech. 1 (1998).

33. *See, e.g.* V.T.C.A. Civ. Prac. & Rem. Code § 16.002.

34. *See Thomas v. Collins*, 323 U.S. 516 (1945); *Watkins v. United States*, 354 U.S. 178 (1957); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

35. Spencer, *supra* note 32.

36. *Id.*

37. *Id.*

38. Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. Online L. art. 2, ¶ 38.

39. *Id.*

40. Michael Froomkin, *Anonymity and Its Enmities*, 1995 J. Online L. art. 4, ¶¶ 31-35.

41. *Cyberspace Liability*, 523 PLI/Pat. 23, 173 (1998).

42. *Id.*

43. INFORMATION INFRASTRUCTURE TASK FORCE, PRIVACY AND THE NATIONAL INFORMATION INFRASTRUCTURE: PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION (1995)

44. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stanford L. Rev. 1193, 1238 (1998).

45. FEDERAL TRADE COMMISSION, PRIVACY ONLINE: A REPORT TO CONGRESS (June 4, 1998).

46. 18 U.S.C. §§ 2510-2522; 2701-2709; 3121-3126 (1988 & Supp. 1994).

47. Kang, *supra* note 44, at 1234-35.

48. 18 U.S.C. §§ 2510-2522; 2701-2709; 3121-3126 (1988 & Supp. 1994).

49. *Id.*

50. *Tucker v. Waddell*, 83 F.3d 688 (4th Cir. 1996).

51. *Id.* at 693.

52. *Timothy R. McVeigh v. William Cohen*, 983 F. Supp. 215 (D.D.C. 1998).

53. *In re GeoCities, Inc.*, FTC, File No. 9823015 (1998).

54. *Id.* (settlement reached Aug. 13, 998).

55. *Internet Law Developments*, 538 PLI/Pat 1051, 1087 (1998).

56. *Id.*

57. *See, e.g.* Data Privacy Act of 1997 H.R. 2368, 105th Cong. (1998); Consumer Internet Privacy Protection Act of 1997, H.R. 98, 105th Cong. (1997); Communications Privacy and Consumer Empowerment Act, H.R. 1964, 105th Cong. (1997).

58. *U.S. Still Pushing for Self-Regulation of the Internet Regarding Privacy Issues*, REUTERS (Apr. 9, 1999). *See* Communications Media Center at New York Law School, <<http://www.cmcnyls.edu/publicbulletins/usspsrip.html-ssi>>.

59. *Cyberspace Liability*, 523 PLI/Pat 123, 174 (1998).

60. *See Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463 (Cal. App. 2d Dist. 1986).

61. *See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

62. S. 875, introduced by Sen. Robert Torricelli on June 11, 1997.

63. Kang, *supra* note 44, at 1241.

64. *Id.* at 1242.

65. The Virtual Magistrate project is located at <<http://www.law.vill.edu>>.

THE INTERNATIONAL SPORTS SCENE

Following a hearing before U. S. Magistrate Ronald Boyce, former U. S. Olympic director of international affairs Alfredo La Mont plead guilty to tax fraud. In a case involving bribery and special favors, La Mont admitted to 2 felony counts of tax fraud and agreed to cooperate with the Justice Department. The Justice Department is investigating Salt Lake City's victory in getting to the 2002 Winter Olympics and Rome's failed bid for the 2004 Summer Olympics. The allegations are that Salt Lake City officials gave more than \$1MM in cash, gifts and scholarships to IOC members to get the games. The investigation involves Atlanta, Nagano, Salt Lake City, and Sydney, site of the 2000 Summer Games. La Mont's attorney, Lee Foreman, is hopeful that La Mont's cooperation will result in a favorable sentencing recommendation from the Justice Department. La Mont faces 5 years in jail on one charge and 3 years on the second. Each charge carries a fine of \$250,000.00. La Mont created a sham Mexican company to conceal over \$48,000, money which was to be used to bribe IOC officials. Allegedly La Mont contracted to receive \$2,500 for each IOC confirmed vote for Salt Lake City to host the 2002 Winter Olympics.

Canadian officials have charged Boston Bruins defenseman Marty McSorley with one count of assault for his attack on Vancouver's Donald Brasher. McSorley claimed that he was disappointed that British Columbia prosecutors "don't know .. how much I've already lost." McSorley hired Vancouver lawyer Bill Smart to defend him. The NHL does not agree with the prosecution, having suspended McSorley for the remainder of the season (costing McSorley about \$72,000 in lost salary) but has agreed to fully cooperate in the prosecution of the case. McSorley faces a maximum of 18 months in jail if he is found guilty.

The Manila Basketball Association ordered San Antonio player Matthew Gaerlan deported after Gaerlan danced and sang the U. S. national anthem while the Philippine anthem was being played during a pre-game flag ceremony. The U. S. player was deemed to be disrespectful of the country, will not be allowed to re-enter the country, and has been placed on an immigration blacklist for his conduct.

Houston immigration attorney Harry Gee came to the rescue of the world's fastest marathoner. Following the news that the hearing examiner,

who processed Moroccan-born Khalid Khannouchi's citizenship application, was dismissed following a conviction involving fraud, Khannouchi thought his chance for U. S. citizenship prior to the U. S. Olympic trials had ended. However, Gee used Section 319b of the Immigration and Nationality Act to help the world's fastest marathoner become a citizen just prior to the U. S. Olympic Trials for the marathon. Section 319b provides in pertinent part that a person can become a U. S. citizen if he is married to a U. S. citizen who is stationed abroad while employed by the U. S. government. Gee was assisted in his efforts when Senator Charles Schumer (D-N.Y.) and Congresswoman Sue Kelly (R-N.Y.) took an active role in accelerating the process with the Immigration and Naturalization Services. Despite Gee's efforts, Khannouchi was unable to compete for a spot on the U. S. Olympic team because of injury ... But twenty year old high school student Oscar Peralta was not so lucky. Despite a Houston jury being unable to reach a verdict on whether Peralta was guilty of assault after being prosecuted for swinging at another player in a high school soccer match, the INS decided that because the prosecution resulted in the discovery that the high school senior was in the U. S. illegally, he should be deported. Peralta's Houston attorney, Mario Madrid, worked out a deal with the prosecutors for Peralta to do community service and stay out of trouble for 11 months, but the INS nonetheless escorted him to his Mission, Texas, home and then across the border to Mexico.

But it is still a matter of who you are (or how much money you earn?) even if the trend is to stiffer fines and no-nonsense treatment of airline passengers. Tennis superstar Anna Kournikova got away with threats to attendants and causing problems on a flight to Miami. Kournikova was not charged by the FBI for refusing to put her miniature Doberman pincher in a carrying case. FAA rules mandate that the dog had to be in the carrying case, but the FBI brought no charges after being satisfied that no further investigation was necessary even after Kournikova and her mother forced the intervention of the pilot on the flight after their refusal to cage the dog ...

Sylvester R. Jaime, Editor

ENTERTAINMENT & SPORTS LAW SECTION of the STATE BAR of TEXAS MEMBERSHIP APPLICATION

The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has over 500 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

The "Entertainment & Sports Law Journal", published three times a year by the Section, contains articles and information of professional and academic interest relating to entertainment, sports, intellectual property, art and other related areas. The Section also conducts seminars of general interest to its members. Membership in the Section is from June 1 to May 31.

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of \$25.00 (made payable to ENTERTAINMENT & SPORTS LAW SECTION) to Susan Benton Bruning, Treasurer, 1227 Strathmore Drive, Southlake, Texas 76092

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The State Bar of Texas Annual Meeting**San Antonio, June 21-23, 2000**

Location: Henry B. Gonzalez Convention Center
The Section Meeting for the Entertainment and Sports Law Section
1 p.m. on Friday, June 23, 2000,
and the site will be posted at the Convention Center

Two Speakers have been confirmed for the Section Meeting

1:30 p.m. BILL STAPLETON,

Austin Sports Agent and Attorney for Olympic Gold Medalist Lance Armstrong

2:30 p.m. SANDY CRAWSHAW,

Partner with Proskauer Rose LLP, New York City
Representative for such clients as Madonna, Meat Loaf, Shania Twain, Sting & U2

The Council will meet at 12 noon and the location will be posted at the Convention Center.

It is expected that there will be two speakers for the Section Meeting,
one from the entertainment field and one from the sports field.

The Speakers have not yet been confirmed.

The Section meeting will likely have 2 hours of CLE.

Voting for new officers and directors will also take place at the meeting.

The following are the nominations for the section officers for the year 2000-2001.

Rob Carter - *Chair*

Susan Bruning - *Treasurer/Chair Elect*

J. Edwin Martin - *Secretary*

Steven Ellinger - *Director, Term Expiring 2003*

Russell Rains - *Director, Term Expiring 2003*

Chris Kalis - *Director, Term Expiring 2003*

Attendance fee for the Section Meeting is included in the registration fee for the Annual Meeting.

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