MEDIA LAW AND DEFAMATION TORTS: RECENT DEVELOPMENTS

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I. DECISIONS OF THE UNITED STATES SUPREME COURT, 1990–91 TERM

A. Masson v. New Yorker Magazine, Inc.[1]: *When Does a Journalist's Alteration of a Quote Involve Actual Malice?*

Few cases in recent years have attracted as much pre-decision attention as *Masson v. New Yorker Magazine, Inc.*, the "altered quotes" case. The case came to the Court an as appeal by plaintiff from a summary judgment granted to defendants. Plaintiff Jeffrey Masson claimed he was defamed by Janet Malcolm's book *In the Freud Archives*, which Masson claimed used quotation marks to attribute to him statements he never made. Although defendants asserted that all of the quotes were accurate reports of statements—some taped and others not taped—made by Masson, they argued for purposes of their motion that those quotes not taken verbatim from a tape were not actionable in any event because they were substantially accurate summaries of taped statements, or were published without actual malice, or were embraced by the "incremental harm" doctrine. The district court granted defendants' motion for summary judgment, and the Ninth Circuit affirmed.[2] In a lengthy, blistering, and widely heralded dissent, however, Circuit Judge Kozinski wrote that the defendants' assertion of a "right to deliberately distort what someone else has said . . . debases the journalistic profession as a whole."[3] Judge Kozinski would have adopted "a five-step inquiry" to determine whether altered quotes are actionable:

> (1) Does the quoted material purport to be a verbatim repetition of what the speaker said? (2) If so, is it inaccurate [i.e., does it "differ from what he actually said"[4]]? (3)

1. 111 S. Ct. 2419 (1991).
2. 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).
3. *Id.* at 1570 (Kozinski, J., dissenting).
4. *Id.* at 1564 (Kozinski, J., dissenting).

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If so, is the inaccuracy material [i.e., substantive and not merely "cosmetic" or stylistic, "to clean up peripheral aspects" of the speaker's language']? (4) If so, is the inaccuracy defamatory?[6] (5) If so, is the inaccuracy a result of malice, *i.e.*, is it a fabrication or was it committed in reckless disregard of the truth?[7]

The Supreme Court unanimously reversed. Justice Kennedy delivered the opinion for the Court, with Justices Marshall, Blackmun, Stevens, O'Connor, Souter, and Rehnquist joining fully and Justices White and Scalia joining in part. The Court began its analysis by noting that a fabricated quotation may injure a speaker either because it attributes an untrue factual assertion to the speaker or, regardless of truth or falsity, because the manner of expression or mere fact that the statement was made indicates a negative trait or attitude that the speaker does not hold.[8] However, the Court "reject[ed] the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment."[9] Such a notion, according to the Court, would be "an unnecessary departure from First Amendment principles."[10] The Court instead applied the traditional common-law test of "substantial truth" — whether the presented quote captures "the substance, the gist, the sting" of the actual statement[11]—and concluded that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."[12] In so doing, the Court rejected the Ninth Circuit's view that an altered quotation is protected so long as it is a "rational interpretation" of an actual statement, noting that the inordinate discretion vested in journalists by such a standard would render virtually all misquotations inactionable.[13] In the Court's view, the "rational interpretation" doctrine of *Time Inc. v. Pape*,[14] while appropriate when a reporter is dealing with ambiguous sources and "interpretive license . . . is necessary," is inappropriate when a reporter is purporting to quote a source verbatim.[15]

Applying its analysis to the record before it, the Court determined that a legitimate jury question existed as to whether five of the six altered quotes at issue differed materially in meaning from Masson's actual statements.[16] The Court also found the case to present "an inappropriate application of the incremental harm doctrine."[17] The Court rejected "any suggestion that the incremental harm doctrine is compelled

5. *Id.* (Kozinski, J., dissenting).
6. Judge Kozinski rejected use of the "stillborn doctrine" of incremental harm in this step of his analysis. *Id.* at 1566 (Kozinski, J., dissenting).
7. *Id.* at 1562 (Kozinski, J., dissenting).
8. 111 S. Ct. at 2430.
9. *Id.* at 2431–32.
10. *Id.* at 2432.
11. *Id.*
12. *Id.*
13. *Id.* at 2433–34.
14. 401 U.S. 279 (1971).
15. 111 S. Ct. at 2434.
16. *Id.* at 2435–37.
17. *Id.* at 2436.

as a matter of First Amendment" law, but noted that traditional "state tort law doctrines of injury, causation and damages" might support assertion of the doctrine in appropriate cases.[18]

Justice White, joined by Justice Scalia, disagreed with the majority's "material change" standard, suggesting instead that "if reasonable jurors could conclude that the deliberate misquotation was libelous, the case should go to the jury."[19] Justices White and Scalia would have found all six "altered quotes" actionable.

The Court's year-earlier decision in *Milkovich v. Lorain Journal*[20] may account for the almost universal sigh of relief that greeted issuance of the *Masson* decision last June. Media attorney Cam DeVore, for example, said that Justice Kennedy's "scholarly" opinion in *Masson* "shows that he understands the craft of journalism."[21] Henry Kaufman of the press-sponsored Libel Defense Resource Center agreed, noting that the decision "seemed to recognize, in a number of ways, the concerns of journalists with regard to the difficulty of making quotations perfectly accurate."[22] This paean to the Court's opinion culminated with the respected Robert Sack's pronouncement that "the Court is in the mainstream of the last 25 years of libel law since the *Sullivan* case, that they seem willing, and indeed pleased to continue those protections in the libel context."[23] This reaction of relief and gratitude may have resulted in part from discomfort with the position being asserted by the *Masson* defendants—or, more accurately, the position attributed to the defendants by the press—that there exists a "right to alter quotes," or, as characterized in Judge Kozinski's dissent, a "right to deliberately distort what someone else has said . . . to lie in print."[24] Indeed, many in the media community privately, and in some cases publicly, have expressed agreement with Judge Kozinski that the assertion of such a position "debases the journalistic profession as a whole."[25]

While many could disagree with the Court's application of the principles announced in *Masson* to the particular facts involved, Justice Kennedy's articulation of the rules governing the actionability of an altered quote displays unusual sensitivity to the craft of journalism and the process of reporting. The opinion is a solid, well-grounded application of traditional rules governing substantial truth, suggesting none of the antipress sentiment that many sensed in *Milkovich*. *Masson*'s most serious blow to the press may be its rejection of the nascent doctrine of incremental harm. Even in that respect, however, the Court merely declined to find the doctrine rooted in the First Amendment, expressly suggesting that it may properly find its heritage in the traditional common-law tort elements of damages, causation, and injury to reputation.

18. *Id.*

19. *Id.* at 2438 (White, J., concurring in part and dissenting in part).

20. 111 S. Ct. 2695 (1990). For an analysis of the *Milkovich* decision, see Meyers, *Media Law and Defamation Torts: Recent Developments*, 26 TORT & INS. L.J. 314–21 (1991). The manner in which the lower federal and state courts have interpreted *Milkovich* is considered below.

21. *News Notes*, 18 MEDIA L. REP. (BNA) NO. 39 (JULY 2, 1991).

22. *Id.*

23. *Id.*

24. 895 F.2d at 1570 (Kozinski, J., dissenting).

25. *Id.* (Kozinski, J., dissenting).

B. Cohen v. Cowles Media Co.[26]: *The First Amendment Does Not Bar a Promissory Estoppel Claim for a Reporter's Breach of a Confidentiality Pledge*

Cohen v. Cowles Media Co. involved a genre of suit that has plagued the press increasingly in recent years: the assertion of nontraditional claims for publication of allegedly damaging material. Some of these suits have involved alternative torts, such as infliction of emotional distress, to which courts generally have applied the strict First Amendment-based libel standards of *New York Times v. Sullivan*[27] and its progeny. The press has had greater difficulty, however, with nontraditional claims based on a contract, rather than tort, theory. *Cohen* involved a nontraditional claim of this "contract-based" genre.

The plaintiff in *Cohen*—a Republican gubernatorial candidate's key advisor, who had provided reporters with material damaging to a Democratic candidate for lieutenant governor—sued the press for truthfully identifying him as the source of the material. Cohen alleged that the press had promised confidentiality to him, and that its breach of that promise had caused him to be fired. A jury awarded him substantial damages. The Minnesota Supreme Court reversed the trial court's judgment on the verdict, however, holding that Cohen's claims for breach of contract and fraudulent misrepresentation failed under state law.[28] The Minnesota court also declined to uphold the verdict under a promissory estoppel theory because, in its view, the First Amendment would prohibit enforcement of a reporter's promise of confidentiality under such a theory.[29]

The U.S. Supreme Court disagreed. In a 5-4 majority opinion in which Justices Stevens, Scalia, Kennedy, and Rehnquist joined, Justice White described the issue as "whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information."[30] The majority rejected the newspaper's contention that the issue should be governed by the First Amendment principle—applied by the Court in *Smith v. Daily Mail Publishing Co.*[31] and *Florida Star v. B.J.F.*[32]—that state officials may not constitutionally punish publication of truthful, lawfully obtained information absent a need to further a state interest of the highest order. The majority instead considered the case to be controlled "by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[33] The majority found Minnesota's promissory estoppel doctrine to be a law of general applicability that does not single out or target the press. In reaching its conclusion, the majority

26. 111 S. Ct. 2513 (1991).
27. 376 U.S. 254 (1964).
28. 457 N.W.2d 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991).
29. *Id.* at 205.
30. 111 S. Ct. at 2516.
31. 443 U.S. 97 (1979).
32. 491 U.S. 524 (1989).
33. 111 S. Ct. at 2518 (citing Branzburg v. Hayes, 408 U.S. 665 (1972), and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)).

also distinguished the Court's 1988 decision in *Hustler Magazine v. Falwell*,[34] which applied the *Sullivan* requirements to a claim of intentional infliction of emotional distress, noting that Cohen was not evading the strict constitutional requirements applicable to defamation claims because he was not suing for reputational harm.[35]

Finally, the majority curtly disposed of the argument, made by the newspapers and several amici, that allowing actions for source disclosure would create a serious disincentive for disclosure of a confidential source's identity when that identity in itself is newsworthy. In the view of the majority, this "is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."[36]

Justice Blackmun, in a dissent joined by Justices Marshall and, significantly, Souter, found *Falwell* "to be precisely on point."[37] Noting the Minnesota Supreme Court's observation that the promise here arose in " 'the classic First Amendment context of the quintessential public debate in our democratic society, namely a political source involved in a political campaign,' "[38] Justice Blackmun found the "generally applicable laws" line of cases inapposite because they "did *not* involve the imposition of liability based upon the content of speech."[39] Just as the Virginia law of general applicability at issue in *Falwell*—intentional infliction of emotional distress doctrine—became subject to First Amendment strictures when used to penalize the expression of opinion, Justice Blackmun reasoned, so the generally applicable Minnesota law of promissory estoppel should be subject to strict scrutiny when it penalizes publication of important truthful political speech:

> I perceive no meaningful distinction between a statute that penalizes published speech in order to protect the individual's psychological well being or reputational interest, and one that exacts the same penalty in order to compensate the loss of employment or earning potential. Certainly, our decision in *Hustler* recognized no such distinction.[40]

Justice Blackmun would have affirmed the Minnesota Supreme Court decision because, under the strict scrutiny analysis of *Falwell* and *Florida Star*, he found the state's interest in enforcing its promissory estoppel doctrine in the context at issue to be far from compelling.

Justice Souter, in a separate dissenting opinion joined by Justices Marshall, Blackmun, and O'Connor, agreed with Justice Blackmun "that this case does not fall within the line of authority holding the press to laws of general applicability where commercial activities and relationships, not the content of publication, are at issue."[41] Justice Souter opined that even content-based restrictions can be constitutional, adding: "[It is] necessary to articulate, measure, and compare the competing interests involved

34. 485 U.S. 46 (1988).
35. 111 S. Ct. at 2519.
36. *Id.*
37. *Id.* at 2521 (Blackmun, J., dissenting).
38. *Id.* at 2520 (Blackmun, J., dissenting) (quoting 457 N.W.2d at 205).
39. *Id.* at 2521 (Blackmun, J., dissenting) (emphasis original).
40. *Id.* at 2521 n.3 (Blackmun, J., dissenting).
41. *Id.* at 2522 (Souter, J., dissenting).

in any given case to determine the legitimacy of burdening constitutional interests, and such has been the Court's recent practice in publication cases."[42] Justice Souter emphasized that in making this comparison " '[i]t is the right of the [public], not the right of the [media], which is paramount.' "[43] To Justice Souter, the public's right to know Cohen's identity was overwhelming[44] and clearly outweighed any state interest in enforcing the newspaper's promise.

Cohen has not received the universal acclaim that greeted *Masson*. While the result in the case was hardly unexpected— perhaps the most surprising aspect of the decision was the closeness of the vote—the majority opinion is an unsatisfactorily glib treatment of the "generally applicable laws" rationale that fails to deal adequately with the dissenters, critiques of its superficial distinction of *Falwell*. There is, however, at least one diamond for the media among the coals of *Cohen* in the surprisingly strong pro-press dissent by Justice Souter (and in Justice O'Connor's concurrence in it). Justice Souter, whose views on First Amendment freedoms, like many other issues, generally were unknown before his confirmation, may turn out to be one of the more faithful and sensitive friends of the press on the new Court.

The media's delight at their newfound champion of free press interests, however, may be offset by significant substantive implications of the *Cohen* decision. The direct impact of the central issue in *Cohen*—the actionability of a breach of a reporter's promise of confidentiality to a source—is likely to be minimal, as the instances in which journalists make and then break promises of confidentiality are undoubtedly few. Of course, the media will now be subjected to more *claims* of broken confidentiality promises, or other promises, by sources or subjects displeased with the treatment accorded them in press stories. But there is likely to be more significant negative fallout from *Cohen*. Justice White's citation of *Branzburg v. Hayes*[45] for the proposition that the First Amendment provides no greater relief to reporters than to "all citizens" faced with a grand jury subpoena, "even though the reporter might be required to reveal a confidential source,"[46] is either sloppy dictum or a chilling warning that the end of the federal reporter's privilege may be coming. Justice Powell's key concurrence in *Branzburg*,[47] in combination with the four dissenting votes in that case,[48] spawned a now well-developed body of federal law, which the Supreme Court has let grow unchecked for almost twenty years, recognizing a qualified reporter's privilege.[49] Either the Justices who joined the majority opinion in *Cohen* failed to notice the significance of the *Branzburg* citation, or the federal reporter's privilege

42. *Id.* (Souter, J., dissenting).

43. *Id.* at 2523 (Souter, J., dissenting) (quoting CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)).

44. "The propriety of his leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should, I am ready to assume that it would be to the greater public good, at least over the long run." *Id.* (Souter, J., dissenting).

45. 408 U.S. 665 (1972).

46. 111 S. Ct. at 2518.

47. 408 U.S. at 709 (Powell, J., concurring).

48. *See id.* at 711 (Douglas, J., dissenting); *id.* at 725 (Stewart, J., dissenting).

49. *See generally, e.g.*, Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 17–25 (1986).

may be in for rough treatment when it next makes an appearance in the Supreme Court. Moreover, the Court in *Cohen* continued its trend, begun in *Gertz v. Robert Welch, Inc.*,[50] of deconstitutionalizing and returning to state law what it views as peripheral areas unnecessary to the basic core protections of *Sullivan*. This was evident in *Milkovich*, as well as in *Masson*'s debunking of a constitutional basis for the incremental harm doctrine. This trend, which is likely to continue and perhaps accelerate in the future, will again subject the press to the vagaries of fifty differing state laws, increased plaintiff forum-shopping, and a larger number of cases that will go to trial and be unreviewable by the U.S. Supreme Court in the event of an adverse verdict.

II. A SUPREME COURT DECISION APPLIED: THE EFFECT OF *MILKOVICH* ON OPINION CASES IN THE LOWER FEDERAL AND STATE COURTS

Last Term, in *Milkovich v. Lorain Journal Co.*,[51] the U.S. Supreme Court issued its long-awaited pronouncement on the protection from defamation liability afforded expressions of opinion by the First Amendment. Two throw-away sentences in Justice Powell's opinion for the Court in *Gertz v. Welch*—"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[52]—had spawned a well-developed body of constitutional law holding opinion to be protected absolutely and laying down multi-pronged tests for distinguishing between statements of opinion and those of fact. The most thoughtful and widely applied of these tests was set forth in then–Circuit Judge (now Solicitor General) Starr's opinion in *Ollman v. Evans*.[53]

In *Milkovich* Chief Justice Rehnquist, writing for a seven-Justice majority, rejected the notion that "this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion,' "[54] and declined to recognize "still another First Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.' "[55] The Court instead held that "existing constitutional doctrine" was adequate to protect expression "without the creation of an artificial dichtomy between 'opinion' and fact."[56] Noting that *Philadelphia Newspapers, Inc. v. Hepps*[57] requires "that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least . . . where a media defendant is involved,"[58] the Court in *Milkovich* indicated that "a statement of opinion relating to matters of public concern which does not contain a probably false factual connotation," as well as "statements

50. 418 U.S. 323 (1974).
51. 110 S. Ct. 2695 (1990).
52. 418 U.S. at 339–40.
53. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).
54. 110 S. Ct. at 2705.
55. *Id.* at 2706.
56. *Id.*
57. 475 U.S. 767 (1986).
58. 110 S. Ct. at 2706.

that cannot 'reasonably [be] interpreted as stating actual facts' about an individual"—such as "imaginative expression" or "rhetorical hyperbole"—would be protected under the First Amendment.[59]

Commentators initially were divided on whether *Milkovich* significantly altered substantive law on the constitutional protection of opinion and on the related question whether the decision would change fundamentally the way lower federal and state courts resolve opinion cases, particularly on motions to dismiss or for summary judgment.[60] It has been over a year since the *Milkovich* decision, and courts in more than two dozen published cases have attempted to interpret its pronouncements, with widely varying results.

Most of the courts to consider *Milkovich* (including most federal courts) have concluded that *Milkovich does* significantly alter substantive law in this area. These include the D.C. Circuit, which held in *White v. Fraternal Order of Police*[61] that *Milkovich* "rejected the practice, developed by the lower courts, of applying a strict dichotomy between assertions of fact and assertions of opinion,"[62] and the Ninth Circuit, which concluded in *Unelko Corp. v. Rooney*[63] that pre-*Milkovich* opinion cases, including Judge Starr's decision in *Ollman*, had been "effectively overruled" and that "the 'opinion' test . . . is now obsolete."[64]

Even within this group of cases, however, the perception of the degree of change in substantive law effected by *Milkovich* varies widely. In *Don King Productions v. Douglas*,[65] for example, Judge Sweet of the Southern District of New York observed that constitutional protection for opinion after *Milkovich* remains "considerably broader than might be imagined from a reading of popular reports of the opinion privilege's demise."[66] Other courts, however, have perceived *Milkovich*'s effect as quite significant. In *Schiedler v. National Organization for Women, Inc.*[67] Judge Plunkett of the

59. *Id.*

60. *Compare* Meyers, *supra* note 20, at 321 ("[T]he [opinion] defense has been eliminated . . . ."), *with The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 219 (1990) ("Because the criteria used by lower courts to distinguish fact from opinion are consistent with *Milkovich*'s limitations, the law of defamation will remain essentially the same.").

61. 909 F.2d 512 (D.C. Cir. 1990).

62. *Id.* at 522.

63. 912 F.2d 1049 (9th Cir. 1990) *cert. denied*, 111 S. Ct. 1586 (1991).

64. *Id.* at 1053. In addition to the circuit court decisions in *White* and *Unelko*, district court and state court decisions holding that *Milkovich* effectively abolished the opinion defense include Roffman v. Trump, 754 F. Supp. 411, 415-16 (E.D. Pa. 1990) ("The Court expressly overruled those decisions that had found an opinion privilege, finding that their reliance on the *dictum* from *Gertz* was 'misplaced.' "); Schiedler v. National Org. for Women, Inc., 751 F. Supp 743, 745 (N.D. Ill. 1990); Don King Prods. v. Douglas, 742 F. Supp. 778 (S.D.N.Y. 1990); West v. Bond Univ., 1990 U.S. Dist. LEXIS 15186 (N.D. Cal. Nov. 8, 1990); Gill v. Hughes, 278 Cal. Rptr. 306 (Ct. App. 1991); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1209 (D.C. 1991); Florida Medical Ctr., Inc. v. New York Post Co., 568 So. 2d 454 (Fla. Dist. Ct. App. 1990); Weissman v. Sri Lanka Curry House Inc., 469 N.W.2d 471 (Minn. Ct. App. 1991); *In re* Westfall, 808 S.W.2d 829, 833 (Mo. 1991); Benner v. Johnson Controls, Inc., 813 S.W.2d 16, 20 (Mo. Ct. App. 1991); Haueter v. Cowles Publishing Co., 811 P.2d 231 (Wash. Ct. App. 1991).

65. 742 F. Supp. 778 (S.D.N.Y. 1990).

66. *Id.* at 782.

67. 751 F. Supp. 743 (N.D. Ill. 1990).

Northern District of Illinois reconsidered a previously granted dismissal that had held an expression to be protected opinion,[68] and decided to reverse the dismissal "in light of *Milkovich*."[69] Similarly, the Ninth Circuit held in *Unelko* that while the district court's decision holding a statement to be protected opinion may have been correct under prior law, the statement was "not shielded from liability under the standard established in *Milkovich*."[70]

In contrast, a few courts have viewed *Milkovich* as a reaffirmation, rather than a curtailment, of strong constitutional protection for expressions of opinion on matters of public concern. In *Foretich v. Glamour*[71] District Judge Gesell stated that *Milkovich* "reasserted the constitutional rule" in *Hepps* and made it clear that "the privilege of fair comment which underlies First Amendment protection of opinions" cannot be overridden unless the plaintiff can prove falsity affirmatively.[72] Similarly, in *Lerner v. Capital Cities/ABC*[73] District Judge Patel characterized *Milkovich* as having "reaffirmed" strong constitutional press protections.

However, a significant number of courts—particularly state courts — have *expressly* viewed *Milkovich* as *not* having materially altering existing law on the protection of opinion. In *Kimura v. Superior Court*,[74] for example, a panel of the California Court of Appeal noted observations "that *Milkovich* does not change substantive law in this area"[75] and analyzed the protection of an expression under the pre-*Milkovich* tests articulated in *Baker v. Los Angeles Herald Examiner*[76] and *Ollman v. Evans*. Similarly, in *Hunt v. University of Minnesota*[77] the Minnesota Court of Appeals concluded that the "test used in *Milkovich* to identify protected opinions is very similar to the four-factor inquiry used by the Circuit Courts to distinguish fact from opinion."[78] Other state courts also have continued to apply the pre-*Milkovich* "totality of circumstances" approach in differentiating protected expressions of opinion from unprotected defamatory statements of fact.[79]

The important 1991 decision of the New York Court of Appeals in *Immuno A.G.*

68. 739 F. Supp. 1210 (N.D. Ill. 1989).
69. 751 F. Supp. at 745.
70. 912 F.2d at 1055.
71. 753 F. Supp. 955 (D.D.C. 1990).
72. *Id.* at 965–66
73. 1991 U.S. Dist. LEXIS 3102 (N.D. Cal. Mar. 11, 1991).
74. 281 Cal. Rptr. 691 (Ct. App. 1991).
75. *Id.* at 965–66.
76. 721 P.2d 87 (Cal. 1986), *cert. denied*, 479 U.S. 1032 (1987).
77. 465 N.W.2d 88 (Minn. Ct. App. 1991).
78. *Id.* at 94; *accord* Lund v. Chicago & N.W. Transp. Co., 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) (*Ollman* tests "are still helpful for determining whether a statement implies actual facts that can be proven false.")
79. *See, e.g.*, Weinberg v. Pollock, No. CV89 02 77 73S, 1991 Conn. Super. LEXIS 1435 (Conn. Super. Ct. June 19, 1991); Behr v. Weber, 568 N.Y.S.2d 948 (App. Div. 1991); 600 West 115th St. Corp. v. Von Gutfeld, 572 N.Y.S.2d 655 (App. Div. 1991); Mathias v. Carpenter, 587 A.2d 1 (Pa. Super. Ct. 1991); Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914 (Tex. Ct. App. 1991); *see also* Ward v. News Group Newspapers, Inc., 18 MEDIA L. REP. (BNA) 1140, 1142 (C.D. Cal. 1990) ("In the present case, the *Milkovich* case only presents 'new' law in that it expands upon its prior line of analysis.").

v. Moor-Jankowski[80] represents an effort by the highest court of one of the nation's most significant media states to preserve strong legal protection for expressions of opinion in the wake of *Milkovich*. The *Immuno* court first tried to cast the Supreme Court decision in the best light, noting that "*Milkovich* leaves in place all previously existing Federal constitutional protections" while debunking "the perception — as it turns out misperception—traceable to dictum in *Gertz* . . . that, in addition to all other Federal constitutional protections, there is a 'wholesale defamation exemption for anything that might be labeled opinion.' "[81] Upon considering the *Milkovich* test for protection of expressions of opinion, the New York court concluded:

> [I]f not alone from the Supreme Court's statement of the governing rules, then from its application of those rules to the facts of *Milkovich*, it appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of probably false fact will likely be actionable.[82]

To the New York Court of Appeals, this balance, even cast in its best light, would encourage a "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion.' "[83] This, the court concluded, could endanger press freedoms—an unacceptable danger given the state's prominent role in the publishing world. The court accordingly announced that it would continue to apply its own pre-*Milkovich* protections for expressions of opinion under the New York State Constitution.[84]

Courts continue to struggle with *Milkovich*. For many, it is an evolutionary process. In *Moyer v. Amador Valley Joint Union High School District*,[85] for example, the California Court of Appeal affirmed the dismissal of a teacher's defamation complaint arising out of the publication of an article calling him a "babbler" and "the worst teacher in the school." The court reviewed pre-*Milkovich* law, concluded that "*Milkovich* did not substantially change these principles,"[86] and proceeded to analyze the case using the "totality of circumstances" test enunciated in the California Supreme Court's 1987 decision in *Baker v. Los Angeles Herald Examiner*.[87] Since deciding *Moyer*, however, the same court, in *Weller v. American Broadcasting Cos.*,[88] explained its comment in *Moyer* that *Milkovich* "did not substantially change these principles" as standing merely "for the more narrow proposition that . . . statements that are clearly satirical, rhetorical or hyperbolic, continue to be protected."[89] The *Weller* court went on to make an additional observation that fairly summarizes the state of the

80. 567 N.E.2d 1270 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).
81. *Id.* at 1273 (quoting *Milkovich*, 110 S. Ct. at 2705).
82. *Id.* at 1275.
83. *Id.* at 1282.
84. *Id.* at 1277–82.
85. 275 Cal. Rptr. 494 (Ct. App. 1990).
86. *Id.* at 497.
87. *Id.* at 497.
88. 283 Cal. Rptr. 644 (Ct. App. 1991).
89. *Id.* at 650 n.7.

law after *Milkovich*: "The precise impact of the *Milkovich* decision on the viability of prior law distinguishing between fact and opinion remains to be seen."[90]

III. OTHER SIGNIFICANT LOWER COURT DECISIONS

A. Newton v. National Broadcasting Co.[91]: *The Scope of Independent Review of Actual Malice Credibility Determinations*

Entertainer Wayne Newton brought a much-publicized libel action against NBC following a news broadcast which Newton claimed conveyed the false impression that "'[t]he Mafia and mob sources' helped Newton buy the Aladdin [Hotel] in exchange for a hidden share of the hotel/casino and that Newton, while under oath, deceived Nevada state gaming authorities about his relationship with the Mafia."[92] A Nevada jury awarded Newton more than $19,000,000 in compensatory and punitive damages, then the largest punitive damage award in American libel history. The trial court sustained the verdict of liability, but reduced damages to just over $5,000,000.[93] In a strong and eloquently written opinion, however, the Ninth Circuit reversed the entire judgment, held that Newton had failed to prove actual malice with clear and convincing evidence as required by *New York Times v. Sullivan*[94] and its progeny, and dismissed the case.

Of particular significance is the manner in which the Ninth Circuit handled the vexing but often determinative preliminary issue of the standard of review. The court began by noting that the two guiding principles—the "clearly erroneous" standard generally applicable to appellate review of findings of fact and the mandate that appellate courts independently review the record in defamation cases involving First Amendment principles—"point in opposite directions."[95] The interplay of these two rules becomes particularly perplexing when the jury's evidentiary findings turn upon the credibility of a witness. Interpreting *Bose Corp. v. Consumers Union*[96] and *Harte-Hanks Communications, Inc. v. Connaughton*[97] as creating a "credibility exception" to the requirement of independent review, the Ninth Circuit held that credibility determinations should be accorded "special deference" in reviewing a finding of actual malice because of the jury's unique "opportunity to observe the demeanor of the witnesses."[98]

The *Harte-Hanks* case involved a libel claim by a candidate for a municipal judgeship. The defendant newspaper reported that the candidate had "used dirty tricks" to convince a woman to agree to a taped interview, in which she accused a member

90. *Id.* at 649.
91. 930 F.2d 662 (9th Cir. 1990).
92. *Id.* at 667.
93. 677 F. Supp. 1066 (D. Nev. 1987), *rev'd*, 930 F.2d 662 (9th Cir. 1990).
94. 376 U.S. 254 (1964).
95. 930 F.2d at 669.
96. 466 U.S. 485 (1984).
97. 491 U.S. 657 (1989).
98. 930 F.2d at 671.

of the incumbent judge's staff of bribery.[99] The source for the story was the woman's sister. Prior to publication, the newspaper turned down opportunities to question the woman and to listen to the recording, actions the candidate claimed would have cleared his name. The jury found the story to be false and found clear and convincing proof of actual malice. The Sixth Circuit affirmed, identifying the "core issue" of the case to be "simply one of the credibility to be attached to the witnesses appearing on behalf of the respective parties and the reasonableness and probability assigned to their testimony."[100] On appeal to the Supreme Court, the newspaper argued that the court of appeals had failed to review the record independently because it had accepted the jury's credibility determinations.[101]

The Supreme Court found, upon examining the trial court's instructions, the jury's answers to special interrogatories, and certain undisputed facts, that it was able to determine which testimony the jury "must" have found credible and which it "must have rejected." In particular, the Court determined that the jury "must" have rejected as incredible the reporter's testimony that he did not listen to the tape because he thought it would provide no new information; the jury must have concluded that the reporter actually did not listen to the tape because he knew or feared that its contents would prove his story false. Additionally, the Court determined that the jury "must" have rejected newspaper employees' testimony that they believed that the source's allegations about the candidate were substantially true.[102] The Court concluded, "When these findings are considered alongside the undisputed evidence, the conclusion that the newspaper acted with actual malice inextricably follows."[103]

The Court in *Harte-Hanks* thus conducted a two-step analysis. It first attempted to ascertain the undisputable credibility determinations of the jury. Then, working from those credibility determinations and other undispured evidence, the Court independently reviewed whether such evidence could sustain a finding of actual malice.

As in *Harte-Hanks*, the jury in *Newton v. NBC* heard testimony from both the journalists and the source for the story. Newton alleged that actual malice was shown by NBC's failure to mention in its broadcasts that his reason for contacting the Mafia was to obtain help in halting purported death threats against his family. According to Newton, the NBC reporters knew that he had contacted the Mafia about death threats and not about a financial problem, as alleged in the broadcasts. Newton claimed that the reporters must have known this because one of their sources, Moreno, Newton's friend and business advisor, purportedly told them so.[104] The reporters testified at trial that they did not report the death threats because they did not have sufficient credible evidence upon which to base such a report. In its *Newton* opinion

99. 491 U.S. at 660.
100. *Id.* at 662.
101. *Id.* at 664.
102. *Id.* at 690.
103. *Id.* at 690–91.
104. 930 F.2d at 682.

the Ninth Circuit equated the situation with the "double-layered credibility dilemma faced by the Supreme Court in *Harte-Hanks*."[105]

The Ninth Circuit clearly was troubled by the "credibility exception" to independent review because it considered the jury's apparent credibility determinations to be particularly suspect. A motion for change of venue from Las Vegas had been denied, leaving a local jury to decide whether a celebrated local hero—the Ninth Circuit noted that Las Vegas celebrates "Wayne Newton Day"[106]—had been defamed.[107] Newton, however, attempted to fit his case squarely within the rubric of *Harte-Hanks* by arguing that the jury "must" have rejected the journalists' testimony that they did not use Moreno's information because they did not consider him to be a believable source.[108]

Rather than defer to the jury's apparent assessment of the NBC reporters' explanation for rejecting Moreno's information, the approach Newton argued was required by *Harte-Hanks*, the Ninth Circuit, relying in part on language in Judge Kozinski's dissent in *Masson*,[109] created an exception to the "credibility exception":

> We conclude that the importance of protecting a journalist's use of diverse sources and investigative techniques requires that we apply the heightened First Amendment standard of review to the question of Moreno's credibility in the eyes of the NBC journalists. Accordingly, we will not pay special deference to how the jury *may* have regarded Moreno's credibility as a trial witness. The credibility of a source goes directly to the circumstances under which a journalist writes a story. The importance of permitting journalists to interview diverse sources, pursue multiple story lines, and draw their own honest and professional conclusions from their research dictates that the media should not fear that its journalists' professional judgments will be second-guessed by juries without the benefit of careful appellate review.[110]

"The credibility of a journalist's source," the Ninth Circuit held, "is a separate inquiry from the credibility of the journalist himself and . . . we apply a heightened review to the evidence regarding whether the publisher was reckless or knowingly false when he relied upon information provided by his sources."[111]

The Ninth Circuit is not alone in its concern about paying too much homage, in assessing actual malice, to a jury's assessment of the credibility of a journalist's evaluation of sources. Actual malice is, after all, a *subjective* test. In *Diesen v. Hessburg*,[112] for example, the Minnesota Supreme Court reversed a $785,000 judgment in favor of a county attorney in part because the evidence failed to establish actual malice. The *Diesen* court declined to speculate about what testimony the jury "must" have

105. *Id.*
106. *Id.* at 671.
107. "Wayne Newton's case poses the danger that First Amendment values will be subverted by a local jury biased in favor of a prominent local public figure against an alien speaker who criticizes that local hero." *Id.*
108. *Id.* at 682.
109. 895 F.2d at 1557 (Kozinski, J., dissenting).
110. 930 F.2d at 683 (emphasis original) (footnote omitted).
111. *Id.*
112. 455 N.W.2d 446 (Minn. 1990).

rejected, or the degree of credibility it may have given journalists' testimony concerning their subjective beliefs. The court's factual review appeared instead to be entirely independent, with no evaluation of jury credibility determinations.[113] A dissenting justice, citing *Harte-Hanks*, expressed concern that "the majority's decision reversing the jury's conclusion as to actual malice unreasonably discounts the value of the jury's opportunity to observe the demeanor of the witnesses, a factor that is significant in determining whether a defendant had a particular subjective state of mind."[114]

B. Braun v. Soldier of Fortune Magazine, Inc.[115]: *Media Liability for Incitement to Crime*

Last year's review of major media law developments reported a wave of cases in which courts dismissed negligence or incitement claims against the media for publication of information that allegedly led to conduct which physically harmed the plaintiff.[116] In the past year, however, a federal jury in Alabama, in *Braun v. Soldier of Fortune Magazine*, held a magazine publisher responsible for a murder that resulted from a published "gun for hire" personal services advertisement. The jury awarded the victim's next-of-kin $10,000,000, but the trial court reduced the award to $2,000,000. In denying the magazine's motion for judgment NOV, the court concluded that "[t]he question of whether a reasonable publisher should have foreseen that publication of the . . . ad presented an unreasonable risk that criminal activity would result was left properly to the jury."[117] According to the court, "It is apparent that an ad containing the terms 'Gun for Hire,' 'Discreet and very private,' and 'All jobs considered' will be reasonably construed as an offer to perform illegal acts."[118]

A similar claim against the same magazine was rejected by the Fifth Circuit just a year earlier in *Eimann v. Soldier of Fortune Magazine, Inc.*[119] The *Braun* court distinguished *Eimann*, which it interpreted narrowly, on the basis of a comparison of the language of the advertisements.[120] According to the court in *Braun*,

> The *Eimann* court did not hold that a publisher may never be held liable for publishing an ad that presents a risk that violent criminal activity will result, but rather, the court stated that "*[w]ithout a more specific indication of illegal intent* . . . we conclude that [the publisher] did not violate the required standard of conduct . . . ."[121]

113. *Id.* at 452–454.
114. *Id.* at 469 (Yetka, J., dissenting).
115. 757 F. Supp. 1325 (M.D. Ala. 1991).
116. Meyers, *supra* note 20, at 326–30.
117. 757 F. Supp. at 1328.
118. *Id.* at 1328–29.
119. 880 F.2d 830 (5th Cir. 1989). The case was reviewed in detail in last year's survey. *See* Meyers, *supra* note 20, at 327–28.
120. The language in the advertisement at issue in *Braun* stated in part: "GUN FOR HIRE. 37-year-old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Body guard, courier, and other special skills. All jobs considered." 757 F. Supp. at 1327. The language in the advertisement at issue in *Eimann* stated in part: "EX-MARINES—67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas." 880 F.2d at 831.
121. 757 F. Supp. at 1328 (emphasis original) (quoting *Eimann*, 880 F.2d at 838).

The *Braun* court considered the language of the ad at issue in *Eimann* to be more "ambiguous" about the illegal intent of the advertiser. Unlike the ad at issue in *Braun*, for example, the ad in *Eimann* did not contain the phrase "Gun for Hire."

C. Winter v. G. P. Putnam's Sons[122]: *Books Are Not "Products" Subject to Strict Products Liability*

Mushroom enthusiasts who relied on information in a book, *The Encyclopedia of Mushrooms*, sued the publisher for products liability, breach of warranty, negligence, negligent misrepresentation, and false representation after eating mushrooms the book labeled edible and becoming severely ill. In *Winter v. G.P. Putnam's Sons*, however, the Ninth Circuit affirmed a summary judgment against them.

The court rejected the plaintiffs' attempt to extend products liability law to embrace information pubished in a book. Products liability, according to the court, is "focused on the tangible world," and it would be a mistake to extend its scope to "the unique characteristics of ideas and expression."[123] The plaintiffs argued only for application of strict liability to "books that give instruction on how to accomplish a physical activity and that are intended to be used as part of an activity that is inherently dangerous."[124] They likened the mushroom book to published aeronautical charts, which sometimes *are* considered "products."[125] The Court rejected that analogy, however, explaining that such charts are "highly technical tools" like compasses, while the mushroom book is more "like a book on how to *use* a compass."[126] The plaintiffs also urged that a publisher has a duty to investigate the accuracy of the contents of the books it publishes.[127] The Ninth Circuit declined to recognize such a duty, however, due to the "gentle tug of the First Amendment and the values embodied therein."[128]

D. New Kids on the Block v. News America Publishing, Inc.[129]: *The First Amendment Bars Misappropriation/Right of Publicity Claims Concerning a "900" Telephone Survey, Notwithstanding Profit Motive*

A musical group, The New Kids on the Block, brought a misappropriation suit against two newspapers for conducting a "900 number" telephone poll to determine

122. 938 F.2d 1033 (9th Cir. 1991).

123. *Id.* at 1034; *see also* Smith v. Linn, 563 A.2d. 123, 126 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d. 309 (Pa. 1991).

124. 938 F.2d at 1035.

125. *Id.* at 1036.

126. *Id.* (emphasis original).

127. *Id.* at 1036–37.

128. *Id.* at 1037; *see also, e.g.*, First Equity Corp. v. Standard & Poor's Corp., 869 F.2d. 175, 179–80 (2d Cir. 1989) (investors who relied on inaccurate financial publications may not recover their losses); Jones v. J. B. Lippincott Co., 694 F. Supp. 1216, 1216–17 (D. Md. 1988) (publisher not liable to nursing student injured in treating self with remedy described in nursing textbook). *But see* Hanberry v. Hearst Corp. 81 Cal. Rptr. 519, 521 (Ct. App. 1969) (publisher who voluntarily assumed responsibility for product by giving its "Good Housekeeping's Consumer's Guaranty Seal" held liable for defective product).

129. 745 F. Supp. 1540 (C.D. Cal. 1990).

which New Kid is "the sexiest."[130] The band's theory was that the newspapers' reference to the band in announcing the surveys constituted a competitive misappropriation of its publicity rights, as the band had two of its own 900-number hotlines.[131] Because the newspapers used profit-making 900 lines instead of toll-free 800 lines for their poll, the band alleged that the newspapers were capitalizing on its name. The newspapers contended in response that their use of the New Kids' name and likeness was protected by the First Amendment "unless such use [was] wholly unrelated to constitutionally protected news gathering and dissemination."[132] The federal district court in Los Angeles granted summary judgment in favor of the defendants, rejecting the band's argument that the commercial component of the newspapers' activities constituted misappropriation and not news gathering.[133] The band argued that the newspapers' method of gathering information—a telephone "survey" for a charge — constituted a "collateral commercial enterprise," thus removing the newspapers' use of the New Kids name from the protection of the First Amendment. The court rejected this argument, however, explaining that "First Amendment protection does not hinge upon whether or not an activity is profitable or unprofitable."[134] To the court, "the fact that the use of the New Kids name was descriptive and related to the constitutionally protected activity of news gathering and dissemination and not merely commercial exploitation compels the conclusion that the activity is constitutionally protected."[135] The *New Kids* court distinguished *Zacchini v. Scripps-Howard Broadcasting Co.*,[136] in which the Supreme Court held that a broadcaster's airing of an entertainer's entire act had infringed his right to publicity, on ground that the newspapers' 900 polling was not a "substantial threat" to the economic value of the New Kids name.[137] The *New Kids* decision thus followed a now well-established line of decisions recognizing a narrowing of the "right of publicity" under California law in deference to First Amendment values.[138]

130. *Id.* at 1542.
131. *Id.* at 1542–43.
132. *Id.* at 1545–46 (footnote omitted).
133. *Id.* at 1547.
134. *Id.* at 1546.
135. *Id.*
136. 433 U.S. 562 (1977).
137. 745 F. Supp. at 1547.
138. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Cher v. Forum Int'l Ltd., 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983); Maheu v. CBS, Inc., 247 Cal. Rptr. 204 (Ct. App. 1988).

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