Part I

Recent Legal Developments Affecting the Magazine Business

An overview of issues that concern editors.

By Lawrence Savell

In these difficult economic times for the magazine industry, avoidance of litigation defense expenditures (to say nothing of possible adverse judgments) is critical. Magazine professionals must be aware of and anticipate areas of potential liability, so steps can be taken to reduce the risk of a claim. Recognizing that laws and court rulings vary around the country, this article reviews some recent significant legal developments and suggests some preventive measures.

Products Liability Claims Against Publishers

Although you might associate product liability claims with things like exploding gas tanks or soda bottles containing foreign objects, claims have been made that the publication of a magazine article or advertisement caused personal injuries to a reader who relied on the information presented. Such allegations are of concern to magazines that publish "how-to" articles or advertisements positively describing potentially dangerous activities or items, such as exercise routines, recipes, or weapons, or providing medical or health advice.

Fortunately for publishers, so far the courts have not given much credence to such claims, often on grounds that publications are not "products" or due to overriding First Amendment concerns. But they continue to be brought, as reflected most recently by the Texas case of *Way* v. *Boy Scouts of America*.

Way claimed that an advertising supplement on "shooting sports" in *Boys' Life* magazine motivated her twelve-year-old son and his friends to experiment with a rifle, resulting in his death. She alleged "negligent publication" and that the supplement was a "defective product."

The Court of Appeals ruled for the magazine, concluding that Texas law did not recognize a cause of action for publishing an article or ad that allegedly caused harm under such circumstances. It said the boy's experimentation with the rifle was not a reasonably foreseeable consequence of the publication, and that the supplement's encouraging safe, supervised, and responsible use of firearms was of significant social value.

The court further noted that the essence of a products liability claim is the existence of a "product." It emphasized that Way was not complaining about the physical properties of the supplement, such as the toxicity of the ink or the sharpness of the paper. Instead, she had alleged that the ideas and information contained in the magazine encouraged children to engage in dangerous activities.

Despite the trend of decisions refusing to find publishers liable for physical injuries to readers, courts may be more willing to hold a magazine publisher liable for a defective advertised product if the publisher expressly guarantees or endorses the item. Moreover, there has been at least one court opinion upholding a claim against a chemistry textbook publisher, and a report of a settlement by another of over a million dollars.

How can you reduce the risk of such a claim? *Don't make any guarantees* regarding the accuracy of information presented or the safety of products or activities described. *Consider printing a disclaimer* in each issue specifically putting readers on notice that the magazine is not making any guarantees regarding safety. To avoid having to pay monetary damages if liability is found, *check your insurance policies* to verify that the magazine is covered for personal injury claims and, if not, consider negotiating for such coverage. *Obtain indemnification from advertisers* for all claims relating to or arising from their advertisements and the products or services mentioned. Consider doing the same for information provided by manufacturers for stories regarding their products or services. Require that such coverage or indemnification include reimbursement of often-steep litigation defense costs in addition to damage payments.

Defamation/Libel

On May 3, in *Moldea* v. *New York Times Company*, the District of Columbia Court of Appeals, essentially retracting its opinion to the contrary issued less than three months before, affirmed the dismissal of a libel lawsuit regarding a book review. The *Times* had published a largely-unfavorable review of *Interference:*

How Organized Crime Influences Professional Football. The book's author claimed that the review's assertion that his book contained "too much sloppy journalism" (despite the vagueness and subjectivity of that phrase), and its citation of examples of the work's alleged journalistic shortcomings, were personally defamatory.

The court focused on the fact that "the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." It acknowledged "a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." While recognizing that "a bad review necessarily has the effect of injuring an author's reputation to some extent — sometimes to a devastating extent," it emphasized that critics "must be given the constitutional 'breathing space' appropriate to the genre." Although statements in book reviews are not automatically exempt from defamation claims, "commentary [is] actionable only when the interpretations are unsupportable by reference to the written work." Thus, if the publisher can show that the statements in the review are supported by specific errors, omissions, or other weaknesses in the book, the defamation claim will likely be dismissed.

Another significant pending libel case is *Masson* v. *The New Yorker Magazine Inc.*, which was tried last year in California and will be tried again. Author Janet Malcolm had taped several interviews with psychologist Jeffrey Masson and, as a narrative writing device, enclosed lengthy passages attributed to Masson in quotation marks.

In 1991, the United States Supreme Court ruled that (1) a fabricated quotation may injure reputation by attributing an untrue factual assertion to the speaker, or by indicating a negative personality trait or an attitude that the speaker does not hold; and (2) a reasonable reader could understand quotations attributed to Masson to be nearly verbatim reports of his statements.

Last summer, the jury ruled that Malcolm acted with "reckless disregard" in publishing two quotes attributed to Masson; it found that three other quotations were fabricated and defamatory, but were not published with "actual malice." The jury also concluded that Malcolm was an independent contractor (not an employee of *The New Yorker*), and that the magazine had not acted with reckless disregard. It was unable to agree on damages to be awarded to Masson. The court granted a new trial against only Malcolm, covering both liability and damages and all five quotes.

On a lighter subject, the Michigan Court of Appeals ruled last November that statements disparaging a plaintiff's golfing skills and attire were not capable of a defamatory meaning. In *Havens* v. *McLain*, the court stated that "while it is conceivable that lighthearted, jestful comments may rise to the level of defamation, a certain degree of latitude must be expected" and that "the fact that the subject of an article takes the matter more seriously than the writer chose to treat the matter does not establish defamation."

Two cases addressed whether posing a question may be defamatory. In *Chapin* v. *Knight-Ridder, Inc.*, the Fourth Circuit held that the question posed ("Who Will Benefit More?" from a charity, its beneficiaries or the charity and its organizer) was not actionable. The court stated that "A question can conceivably be defamatory, though it must be reasonably read as an *assertion* of false fact; inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." However, in *Keohane* v. *Wilkerson* (currently on appeal to the Colorado Supreme Court), the court ruled that a question regarding a judge's decision — "What do you think, was he paid off with drugs or money?" — did imply an accusation of wrongdoing. The court stated that "if a 'hypothetical' question reasonably implies a defamatory factual assertion, it may be actionable."

Punitive damages continue to be a serious concern in libel cases. Last October, the Philadelphia Common Pleas Court in *Sprague* v. *Philadelphia Newspapers Inc.*, upheld a jury verdict for $34 million, including $31.5 million in punitive damages. The court viewed the newspaper's actions as revengeful and "an extreme departure from professional publishing standards." However, last November, in *Prozeralik* v. *Capital Cities Communications, Inc.*, New York's highest court reversed a punitive damages award of $10 million that had been assessed against a broadcaster (the total verdict was $15.5 million). The court ordered a new trial, noting that "actual malice" alone is insufficient by itself to justify an award of punitive damages, which requires a level of outrageous conduct that is malicious, wanton, reckless, or in willful disregard of another's rights.

Despite these huge awards, according to a study by the Libel Defense Resource Center released in February, damages awarded in libel cases against the media are decreasing. Comparing the last two years to prior periods, the average number of libel cases that went to trial dropped, as did the percentage of trials lost by media defendants. Nevertheless, the

average damage award over the two years still exceeded $1,000,000, averaging $907,409 in compensatory damages and (when awarded) $563,667 in punitives.

The costs of litigating libel claims and the risks of exorbitant judgments might be reduced if states enacted the proposed "Uniform Correction or Clarification of Defamation Act." The Act requires a prospective plaintiff to (1) request that a publisher print a correction or clarification before bringing a defamation suit, and (2) upon demand, provide the publisher with evidence in the prospective plaintiff's possession that relates to the falsity of the alleged defamation. If the publisher makes a sufficient correction or clarification (or if the demanded material regarding falsity is not provided), then the plaintiff can recover "only provable economic loss caused by the defamatory publication, as mitigated by the correction or clarification" — thus, no punitive damages. Last August, the National Conference of Commissioners on Uniform State Laws adopted the Act, which was then approved earlier this year by the American Bar Association. The next step is for Commissioners from selected states to submit the Act to their legislatures for consideration.

In Part II we will discuss issues of confidentiality of sources, copyright and trademark issues, employment/labor problems, and tax concerns.

Lawrence Savell is an attorney specializing in media, intellectual property, and product liability litigation defense and counseling with the law firm of Chadbourne & Parke in New York City, and is legal columnist for Car Collector *and* Golf for Women *magazines.* ♦