

MACMA Bulletin July/August 2003

Legally Speaking: Litigation news From Mike Zinser

This month's column addresses two topics. The first development is a decision by the California Supreme Court that has terrible consequences for all employers and their email systems. The second development upholds management's right of free speech to express its desire to be "nonunion."

Disgruntled former employee invades email system

On June 30, 2003, the Supreme Court of California, reversing the state appeals court, ruled that under California law, the tort of trespass to chattel does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. The court ruled that such an electronic communication does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself.

On six occasions over a period of 2 years, the former disgruntled Intel employee sent emails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system. The employee's communications caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers. The content of the messages, however, caused discussion and disruption among employees and managers.

However, the court stated that the consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to the disgruntled employee's messages and the Company's efforts to block the messages, is not an injury to the Company's interest in its computers (which worked as intended and were unharmed by the communications) "any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipients mailbox, or the loss of privacy caused by an abusive telephone call would be an injury to the recipient's telephone equipment"

Justice Brown and Justice Mosk wrote vigorous dissents. Justice Brown correctly noted that Intel had invested millions of dollars to develop and maintain a computer system. It did not do this so it could be used as a public forum but to enhance the productivity of its employees. The disgruntled employee sent as many as 200,000 email messages to Intel employees. The time required to review and delete the disgruntled employee's messages diverted employees from productive tasks and undermined the ability of the computer system. "There may be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition." Justice Brown said, "this is such a case."

Dissenting Justice Mosk stated that "his action, in crossing from the public internet into a private internet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks." He went on to observe "as the court of appeal observed, connecting one's driveway to

the general system of roads does not invite demonstrators to use the property as a public forum.” He accused the majority of blurring the distinction between public and private computer networks in the interest of “ease and openness of communication.” He noted that their decision promotes unpredictability in a manner that can be as harmful to open communication as it is to property rights. It permits Intel to block Hamidi’s emails entirely, but offers no recourse if he succeeds in breaking through its security barriers, unless he physically or functionally degrades the system.”

Free speech of employer upheld by 5th Circuit

The U. S. Court of Appeals for the 5th Circuit, reversing the National Labor Relations Board, ruled on June 24, 2003, that “the employer’s speech at issue with regard to its nonunion position, is protected under Section 8(c) of the Act.” Brown & Root outbid another company for a contract. The other company had a bargaining obligation with the union. Brown & Root met with the employees of the other company and announced that upon application, they would be considered for employment with other applicants. Brown & Root stated, in unambiguous terms, that it was nonunion and would remain nonunion.

The NLRB found this comment to be coercive and used it as a basis to order Brown & Root to hire 48 of the other employers employees, and to bargain with the union without an election.

The statements were made in the context of a plant where Brown & Root already employed 200 nonunion employees, and if there was only one bargaining unit, 70 union employees would not change Brown & Root’s nonunion status.

The court stated:

In sum, Outlaw’s comments should be viewed as protected statements of Outlaw’s opinion, Brown & Root’s preferences, or objectively verifiable statements of the current state of affairs at Brown & Root—that it was nonunion—and of Brown & Root’s wholly lawful intention and preference that its employees remain nonunion. Illegal connotations cannot be attached to these lawful statements in the absence, as here, of any independent violations of labor law....

Finally, the fact that 66 of 68 employees persisted in applying to Brown & Root despite these allegedly threatening statements supports a reasonable inference that no threat was conveyed to these employees.

Post-Tribune Signs Open Shop Contract

After ten years of collective bargaining, the *Post-Tribune* in Gary, Indiana has signed a new collective bargaining agreement with the Gary Newspaper Guild. The parties had been in negotiations for four or five years, as of February 1998 when Hollinger, Inc. purchased the newspaper. At that time Hollinger disavowed the collective bargaining agreement and began negotiations anew. After five years of negotiations with Hollinger, the parties have reached agreement.

Key to reaching agreement from management’s point of view was the deletion of so called union security and union dues check-off provisions. The expired contract

contained them — the new contract will not. Employees will be members of the union and pay money only by their free choice.

Other key provisions include:

1. Management right's clause;
2. No strike clause prohibiting sympathy strikes;
3. Non-arbitrable merit pay - no across the board increases, no retroactivity;
4. Elimination of severance pay in the event of a discharge;
5. Employee pays 20% of health insurance for single coverage, 40% for family coverage;
6. Evergreen clause eliminated;
7. Successorship clause eliminated.

Under the leadership of Publisher Boni Fine and Hollinger chief negotiator Ted Rilea, the newspaper persevered through informational picketing, leafleting, and other types of concerted activity. At the end of the day, patience prevailed for management.

Winston-Salem Journal Settles with Mailers Union No. 133

After 30+ months of collective bargaining, the *Winston-Salem Journal* has reached an agreement with Winston-Salem Mailers Union No. 133, a local affiliated with the Communication Workers of America. Hard bargaining against a backdrop of three decertifications of other unions at the *Journal* resulted in a very management orientated contract.

The key provisions are as follows:

1. A two year agreement, nothing retroactive;
2. Merit pay, no across the board raises;
3. Management right's clause;
4. No strike clause;
5. Comprehensive discipline & discharge clause;
6. Elimination of past practice;
7. Total work assignment flexibility;
8. The union withdrew all pending grievances and unfair labor practices.

The final settlement came about at the offices of Commissioner John Everman in Charlotte, North Carolina. Bringing the parties to Charlotte seemed to be a catalyst to reaching agreement.

Note: L. Michael Zinser counseled the *Post-Tribune* during its negotiations and was the chief negotiator for *Winston-Salem Journal*.

es and that they were not unlawfully intimidated...

August Board of Directors Meeting

(Editor's Note: The following article contains highlights of Earle Woodward's report of the minutes of the most recent Board of Directors meeting.)

The Board of directors met on August 7th, 2003, in Winston-Salem, North Carolina. Attending were Jim Purdon, Don Wilson, Frank P. Mastromarino, Earle

Woodward, Tim Howard, Brett Ray, Scott Newcom, Jennifer Davidson, Gary Finley, Carol Moseley, John Hollenberger, Ray Bruett, Jim Puryear, Kathy Tolley, Kevin Hinterberger

President Jim Purdon called the meeting to order at approximately 12:00 noon and thanked everyone for taking time from his or her busy schedule to attend. He also thanked vendor rep Gary Finley for working his schedule so that he could attend.

Earle Woodward read the minutes from the previous meeting, which were accepted as read. President Purdon established that a quorum was present.

Treasurer Carol Moseley reported that as of Aug 6, 2003, MACMA had assets of \$47,907.20. She also reported 2 new MACMA members. It was estimated that we still had about \$6000 dollars out, which would include monies owed and ABC seminar profits. Another training seminar is scheduled, which should also generate a profit. President Purdon asked at what point we would violate our "non-profit" status, considering the amount of monies we had on hand. Treasurer Moseley will be checking with the accountant to find an answer. Suggestions were made to utilize the excess funds to find better quality speakers, to buy better entertainment for the conference, or to cut fees for the conference and seminars. All of these will be discussed at a future meeting.

Program Chair John Hollenberger reported that he has contacted the speakers for the ABC, NAA and Legal portions of the program, but everything else is still up in the air and he asked for input from the group as to topics for discussion. Jennifer Davidson reported that she had acquired Skip Prosser, Wake Forest coach, to be one of our speakers. Don Wilson suggested that we ask the ABC rep to zero in on the 3rd Party Topic. The topic of "Break-Out" sessions was brought up and it was suggested that ABC could be a session right after the ABC program, where individuals could ask specific questions about other topics. Break Out sessions were discussed positively. Another idea was to have the promotion winners explain their winning promotions as a round table or break out session. A suggest theme of "Thinking like Radio" or some other interactive newspaper promotion was also floated to the group. No theme has yet been chosen. Discussion will be continued at the next meeting

Vendor Representative Gary Finley suggested the idea of allowing vendors to solicit memberships for the organization in exchange for credits toward their sponsorships or registration fees. This would really help those vendors that pay their own ways. The idea was discussed favorably and will continue to be discussed at the October meeting. Gary will try to get more details from Gene Campbell as to how SCMA is working their program. Gary also brought up the traffic flow issue into the vendor area; he will bring some ideas back with him at the next meeting. Tim Howard has also been working on the idea. Don Wilson and Jennifer Davidson brought up that the vendor area for this years conference is right across from the meeting room and is considerably larger than the room in Charleston. We will make sure coffee and drinks are in the back of the room so people have to walk through the vendors to get refreshment. David Cartier welcomed us all to Winston Salem and pledged the support of the hotel in making our conference a success.

Tim Howard will be responsible for The Buyers Guide. Things are going well. Dennis Lenart was going to make contact with another printer to see if we could get a better price, but was unable to attend and give his report. The move to spiral bound

instead of a glued binding was discussed further and it appears to be the way the next guide will be bound. Carol Moseley reminded us that one of the reasons for changing printers was the large number of errors in the last edition, even after proofing.

Tim is going to use the same advertising format to vendors as last year.

Entertainment Chair Jennifer Davidson reported that she has secured a contract with the Adam's Mark Hotel to host the May 2004 conference. The golf tournament is booked for Tanglewood. Monday night will be casino night, with an auction or similar event as a finale. Jennifer is checking all legalities with that function, but doesn't see a problem. The matter of a cash bar vs. an open bar at casino night and the banquet came up and after a short discussion the matter was put off until the next meeting.

Frank Mastromarino continues as Training Chair. He began by thanking Durham for the use of their facility. The District Manager seminar held in June had 63 participants and yielded a profit to MACMA of \$4,422.48. Participants came from all three states represented by MACMA. Winston Salem and Asheville got a special thank you from Frank for sending so many participants. He also noted that this was the first use of sponsors in a MACMA seminar, and thanked all of the vendors involved. All agreed that it was an exceptional seminar. Scott Newcom suggested that we video our seminars and sell them to papers who can't send a representative, providing quality training for all and additional MACMA revenue.

ABC Chair Brett Ray reported that the ABC Seminar scheduled for Aug 8th had registered 38 people and had an estimated profit of \$3210. He had secured seven sponsors and thanked Frank Mastromarino for his advice and guidance.

Membership Chair Tommy Bridges was unable to attend, but sent a request for a list of past members. Carol Moseley said she possibly had a list and would get it to him.

Don Wilson is chairing the Nominating committee. He reported that MACMA is still short a director from South Carolina and asked for any help that we could give him in finding a person to fill that position. He is also looking for nominations for Honorary and Lifetime awards. He will be doing a mail out and e-mail with the qualifications for each.

Promotion Chair Kevin Hinterberger has received information from John Hollenberger about the promotion awards. He is working to update the material with current dates and times. Kevin was unclear about the qualifications to be one of the three judges. He was advised that one judge was a past president; one was from outside of the industry and the Promotion Chair. Don Wilson will act as this year's past president for the judging.

The next meeting of the MACMA Board of Directors will be held on October 23, at 12 noon.

MACMA Transitions and Member News

Members, please remember to send us information about the changes, promotions, and events about you and your newspaper. Also remember to let Earle Woodward know

about any changes that need to be made to your listing on the MACMA website.

FROM THE PRESIDENT: Jim Purdon

As we enter the final quarter of 2003, many of us are wrapped up in budgets and are working hard to make sure we meet our yearly goals. With circulation decreasing at many newspapers, new ideas and fresh promotions are always welcome.

Telemarketing restrictions have become the latest growth obstacle and are causing major setbacks in some markets. With all this going on, it's a wonder we can think straight! I guess that's why we are considered circulation professionals. These types of setbacks happen all the time in circulation. Outsiders often wonder in amazement at our cool-headedness and quick thinking when it comes to disaster. As members of MACMA, we have the opportunity to pool all this talent together and channel it into one fantastic conference each year. The latest ABC rulings, NAA updates, round table discussions, hot ideas and good old fashioned networking will all be a part of the action. Your participation in the MACMA conference as well as other MACMA programs will help you succeed as a circulation professional. Remember to budget in a few extra dollars and attend the conference next May in Winston Salem. I promise you won't be disappointed!

Editor Needed for Bulletin

MACMA President Jim Purdon is accepting inquiries for the position of MACMA Bulletin editor. The position will be available in January 2004.

The editor is a paid position responsible for publishing six Bulletins annually. The editor also attends all Board of Directors meetings and the annual conference.

Those interested should contact Jim at (336) 506-3020 or email him at jim_purdon@link.freedom.com

June HD Seminar Held In Durham

By Frank P. Mastromarino

Wow! What a day! The date was Friday, June 20, 2003, and the community room at *The Herald-Sun* was jam-packed with people from all over MACMA land to attend the MACMA one-day home delivery seminar, "District Managers... It All Begins Here."

When I say jam-packed, I mean jam-packed! There were 63 participants from newspapers throughout North Carolina, South Carolina and Virginia. For the small fee of \$80 they got another terrific day of learning and networking, with breakfast and lunch thrown in. I think they got their money's worth, too, judging by their participation throughout the day. I underlined networking because that was emphasized throughout

the day. Attendees were encouraged to spend as much time with people from other newspapers during the breaks and at lunch.

On behalf of MACMA and the training committee, I would like to thank *The Herald-Sun* and their Circulation Director, Ed Rose, for letting us use their facility for the seminar.

I would be remiss if I didn't mention the outstanding job that committee member Debra Morris did in coordinating the seminar in Durham. Debra, as you know, is the home delivery manager at *The Herald-Sun*. She and two other circulation people at *The Herald-Sun*, Jean Tate and Lori Walthall, did a super job with the continental breakfast and the fantastic luncheon from Heavenly Ham.

Debra wasn't feeling too good earlier in the week and her staff had to distribute 10,000 third party newspapers on the day of the seminar, but she came through as always... And smiling the whole day. I am very thankful to have her on the committee.

Debra kicked off the seminar with a "Welcome to Durham" and took care of all of the housekeeping guidelines for the day.

This was followed by an introduction of all of the attendees... Name, title and newspaper. Pretty interesting, too... We had circulation directors, circulation managers, zone managers and district managers.

Yours truly was up next. I presented a video on home delivery checks and balances. Several of the participants requested copies of the video and they are on the way.

Norrell Nelson, Circulation Manager at *The Daily News* in Los Angeles, California, led a great discussion on district manager responsibilities.

Ed Rose, Circulation Director at *The Herald-Sun* gave a terrific Power-Point presentation on best practices for carriers and how you involve them in the process.

After lunch, Rob Rubrecht, Circulation Sales & Marketing Manager at *The Fayetteville Observer*, led a discussion on effective sales management. Rob's session was highlighted by his rendition of, "The Retention Song", sung to the tune of "My Way". It was a show stopper!

Tim Krier, Circulation Manager at *The Free Lance-Star* in Fredericksburg, Virginia, followed with a Power-Point presentation on best practices for district managers.

Last, but not least was an audience participation exercise led by Tim Howard, Circulation Manager at the *News & Record* in Greensboro, North Carolina. Tim had everyone post their challenges and successes in different categories of circulation management and sales, and give a brief explanation to the group. Very effective!

Of course, all of the discussion leaders provided handouts so no one left empty-handed. And a big "thank you" to our sponsors for providing breakfast, lunch and a fine facility: PDI PLASTICS; WILSON GREGORY AGENCY INC; ADPRO MARKETING SERVICES; PRIME TIME PROMOTIONS; EXPERT NEWSRACK SERVICES; and THE HERALD-SUN.

MACMA conducts two of these seminars annually... One in the spring, and the other in the fall. The schedule for the next one-day seminar will be announced soon. If you have any thoughts or ideas that you would like to see discussed at future seminars, please feel free to contact me at mastromarinof@fayettevillenc.com.