BUSINESS AFFAIRS

Arbitration and No-Contest Clauses in Copyright Contracts: A Critique of Saturday Evening Post Co. v. Rumbleseat Press

by David Nimmer

Given the high cost of litigation, entertainment industry contracts are increasingly embodying mandatory arbitration clauses. In a slightly different vein, copyright owners are increasingly requiring "no-contest" clauses - that is, agreements by licensees not to contest the licensor's copyright ownership or the validity of the copyright, in the event of a subsequent dispute. Given that a panel of the federal court of appeals in Chicago recently pronounced rules for both of those situations, the issue is timely for analysis.

In Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191 (7th Cir. 1987), the Post granted to Rumbleseat Press "an exclusive license to manufacture porcelain dolls derived from certain illustrations done by the artist Norman Rockwell and published in The Saturday Evening Post." (Id. at 1193.) After cancellation of the agreement, Rumbleseat continued manufacturing the dolls in contravention of the terms of the license agreement. The Post sued, seeking to require Rumbleseat to submit to arbitration as provided in the license agreement. The Post also relied on the agreement's "no-contest" clause in opposing Rumbleseat's defense of copyright invalidity.

I. Validity of Arbitration Clauses

Arbitration of General Contract and Copyright Cases

We begin with the question whether copyright disputes are arbitrable. This question must be answered in two parts, because the result of a dispute between an assignor and assignee (or a licensor and licensee) of copyrighted property can be either a contract action or a copyright infringement suit. (See 3 Nimmer on Copyright sec. 10.15[A].)

In a contract dispute, if the parties to the contract on which the suit is based have provided that any disputes among themselves will be settled by arbitration, there is no reason for a court to hesitate to implement the will of the parties with respect to matters of contract interpretation, damages, and the like. Such was the holding in Rumbleseat, which approved a stay of federal court proceedings and referral of the case for arbitration pursuant to the federal arbitration code. (9 U.S.C. sec. 1 et seq.)

(Note that with respect to contract/copyright disputes, this provision would be invoked in federal court only pursuant to diversity jurisdiction, because a pure contract dispute falls initially in the jurisdiction solely of the state court system. Id. at 1194-96. See 3 Nimmer on Copyright sec. 12.01[A].)

In a copyright infringement action between two parties who at one time had been parties to a contract concerning copyrighted property, if the instrument of transfer provides that any infringement suit at any time between the parties shall be settled by arbitration, two resolutions are possible. On the one hand, the court could give effect to that contractual provision just as it would to an arbitration clause in a straight contract dispute.

On the other hand, given that the plaintiff in such a case had opted, by hypothesis, to treat the contract as rescinded or otherwise of no operative effect (at least for purposes of the lawsuit), and is relying on copyright principles that are applicable even when the defendant had never entered into a contract with the plaintiff, the court could determine that it should treat such an infringement action no differently from any other infringement case (in which the parties never had a contract). (See 3 Nimmer on Copyright sec. 10. 15 [A].) The first perspective views such cases as arbitrable, the second as not arbitrable.

In one of the only opinions on this subject, the Second Circuit in Kamakazi Music Corp. v. Robbins Music Corp., 684 F.2d 228 (2d Cir. 1982), upheld the referral to arbitration of an infringement claim based on the arbitration clause entered into by both parties. However, that case involved the unusual circumstance that the party complaining to the court about the results of the arbitration had been the party who had demanded arbitration at the outset. Moreover, it seems that both parties in Kamakazi acquiesced in arbitration at the district court level. (See Kamakazi Music Corp. v. Robbins Music Corp., 522 F.Supp. 125, 128 (S.D.N.Y. 1981).) For these two reasons, Kamakazi provides only weak support for the proposition that a court may send an infringement suit to arbitration over a party's objection. Nonetheless, since in doing so, a court would merely be effectuating a contract term that presumably was freely bargained, this alternative seems to reflect the better view.

Arbitration of Copyright Validity

If a case is referred to an arbitrator, the further question arises whether the arbitrator may pass judgment on the validity of a copyright, or whether that issue so implicates matters of public policy that such a decision should be reserved to a judicial officer. In a contract action, there is no reason why that issue may not be sent for arbitration along with other questions of fact and law. And in Rumbleseat, the court did hold that "federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute." (816 F.2d at 1199.)

In an infringement case however, the weight of authority bars the arbitrator from determining the validity of the copyright. (See Kamakazi Music Corp. v. Robbins Music Corp., 522 F.Supp. 125, 131 (S.D.N.Y. 1981). Cf.Janus Films, Inc. v. Miller, 801 F.2d 578 (2d Cir. 1986), citing the "public" nature of copyright judgments and refusing to enforce a confidentiality provision on which all parties had agreed.) Yet in light of the conclusion stated above that arbitration pursuant to agreement of the parties reflects the better view, there is little reason not to extend arbitration to include a determination of the validity of a copyright, so long as the parties intended the arbitration clause to be construed that broadly when they entered into their contract.

II. Validity of "No Contest" Clauses

On a slightly different note, the question arises whether a defendant can be precluded from challenging the validity of a plaintiff s copyright before a judge or an arbitrator. This question could arise when a plaintiff files a suit for copyright infringement or for breach of a copyright assignment or license agreement. In either event, the defendant may reply that it is not liable, because of the plaintiff s lack of ownership of copyright. In an infringement action, this defense negates an essential element of the plaintiff's case. (See 3 Nimmer on Copyright sec. 13.01[A].) And in a contract action, this defense may excuse the defendant from liability for breach by establishing lack of consideration on plaintiffs part or a breach of warranty by the plaintiff. (Tams-Witmark Music Library, Inc. v. New Opera Co., 298 N.Y. 163, 81 N.E.2d 70 (1948). See Lear, Inc. v. Adkins, 395 U.S. 653 (1969); Golden West Melodies, Inc. v. Capitol Records, Inc., 274 Cal.App.2d 713, 79 Cal.Rptr. 422 (1969).) In reply to such a defense, the plaintiff would argue that the contract between the parties estops or otherwise forbids the defendant from challenging the very copyright that it had contracted to acquire.

Copyright Invalidity and the Doctrine of Estoppel

In some of the early cases, the courts precluded defendants from raising the defense of copyright invalidity. (G. Ricordi & Co. v. Columbia Graphophone Co., 263 Fed. 354 (2d Cir. 1920). See Fitch v. Schubert, 20 F.Supp. 314 (S.D.N.Y.1937). Cf. Public Ledger Co. v. Post Printing & Publishing Co., 294 Fed. 430 (8th Cir.

1923).) This result relies on application of the doctrine of estoppel, which applies in these cases to estop the defendant from denying the validity of a copyright concerning which it had entered into a contract. Other cases rejected such a construction, holding the plaintiff's lack of copyright fatal to any recovery, regardless of any alleged estoppel. (Tams-Witmark Music Library, Inc. v. New Opera Co., 298 N.Y. 163, 81 N.E.2d 70 (1948). Cf. County of Ventura v. Blackburn, 362 F.2d 515 (9th Cir. 1966).)

The Effect of Lear v. Adkins on Licensee Estoppel

The Supreme Court resolved this conflict in Lear, Inc. v. Adkins, 395 U.S. 653 (1969). In that patent case, the Court reviewed a decision by the California Supreme Court that "a licensee should not be permitted to enjoy the benefit afforded by the agreement while simultaneously urging that the patent which forms the basis of the agreement is void." (Id. at 656.) After reviewing "the uncertain status of licensee estoppel in the case law" (Id. at 668), the Court reversed, citing "the strong federal policy favoring the full and free use of ideas in the public domain." (Id. at 674.) On the basis of Lear, which has been applied outside the patent realm to copyright cases as well (e.g., Golden West Melodies, Inc. v. Capitol Records, Inc., 274 Cal.App.2d 713, 79 Cal.Rptr. 422 (1969), plaintiffs may no longer argue licensee estoppel.

There still remains the further question of whether an explicit agreement by a defendant may preclude it from challenging the plaintiff's copyright. In other words, even granting Lear's holding that the mere fact of an agreement regarding a copyrighted work does not by itself estop the defendant from challenging the copyright, if a defendant has explicitly covenanted not to challenge the copyright, can the courts enforce that covenant? Although the foregoing cases are silent on that score, several other decisions have confronted circumstances in which the defendant entered into a consent decree with the plaintiff, explicitly agreeing that the copyright at issue was valid. In such circumstances, at least one pre-Lear case estopped the defendant from subsequently challenging the copyright. (See Wilson v. Haber Bros., 275 Fed. 346 (2d Cir. 1921).) But can that result survive the Supreme Court's ruling in Lear?

Rumbleseat Distinguished from Lear

Few cases have addressed this question. In one, the court provisionally accepted the terms of a consent decree, but expressly reserved decision on whether the defendants were bound by their concession of copyright validity. (Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971).) Thus in Rumbleseat, the Seventh Circuit was writing on a virtually clean slate. The "no-contest" clause in the copyright license agreement there under review provided that the defendant "shall not, during the Original Term [of the agreement] or any time thereafter, dispute or contest, directly or indirectly,. . the validity of any of the [plaintiffs] copyrights...." (816 F.2d at 1193.) The court upheld such clauses under two circumstances, and emphasized that both are "holdings." Broadly, it upheld no-contest clauses so long as the pertinent copyright agreement does not violate the antitrust laws by restraining trade; narrowly, it upheld no-contest clauses as long as no issue that the work is in the public domain is presented. (Id. at 1200-21.)

The court distinguished the facts of Rumbleseat from those of Lear on two bases. First, Rumbleseat involved a negotiated license containing an express no-contest clause rather than the doctrine of licensee estoppel which in effect reads a no-contest clause into every copyright contract. (Id. at 1200.) Second, Judge Posner differentiated the economics underlying Lear's patent holding from those pertaining to copyrighted works. (Id.)

The first rationale is questionable in light of the following paragraph from Lear: "The parties' contract, however, is no more controlling on this issue than is the State's doctrine of estoppel, which is also rooted in contract principles. The decisive question is whether overriding federal policies would be significantly frustrated if licensees could be required to continue to pay royalties during the time they are challenging patent validity in the courts." (395 U.S. at 673.) In this passage, Justice Harlan disclaims any greater reliance on negotiated terms than on the general principles of estoppel, which the Court rejected. Nonetheless, the foregoing language leaves the question whether any overriding federal policy would be implicated by a nocontest clause in a copyright assignment or license. Rumbleseat's negative answer to that question corresponds to the second rationale discussed by the Seventh Circuit for distinguishing Lear.

As to the second point, Judge Posner notes that copyrights confer a smaller economic monopoly than do patents. (816 F.2d at 1201.) From this premise, he concludes that "the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain" - part of the concern cited by the Court in Lear - is concomitantly narrower in copyright cases. (Id. at 1200.) That it is narrower may be conceded to be correct; whether it is sufficiently narrower to warrant a departure from Lear's holding is more debatable, given that the Court in Lear does not address this point and it is the subject of virtually no discussion outside the conclusion of the Rumbleseat opinion itself.

Rumbleseat Applied

Even apart from the economics of patents versus copyrights, however, another reason exists for questioning Rumbleseat. Consider a case (drawn loosely from the facts in Tams-Witmark Music Library, Inc. v. New Opera Co., 298 N.Y. 163, 81 N.E.2d 70 (1948)) in which "A" represents and warrants to "B" that "A" is the exclusive copyright owner of "The Merry Widow" opera and licenses rights therein to "B" for a term of five years at $50,000 per year. "B" in turn executes a contract containing a no-contest clause, and pays $50,000 for the first year's license. During the course of the first year, however, "B" is unable to restrain "C" from exploiting "The Merry Widow" in competition with "B", because the truth emerges that "A" had no right or interest in the opera to convey, as the work is either in the public domain or belongs exclusively to "B". "B" thereupon refuses to make any further license payments. At the beginning of the second year, "A" sues "B" under the contract for payment of the remaining $200,000 in royalties; "B" counterclaims for return of its initial $50,000 license payment, claiming that "A" breached its warranty of title and utterly failed to provide consideration for the contract.

Since this license is not in restraint of trade, the broad holding of Rumbleseat applies; assuming, further, that the work belongs to "C" rather than being in the public domain, the narrow holding of Rumbleseat also applies. Under both these holdings, "B" would be barred from resisting its obligation to make royalty payments; "B" further could not offer evidence of "A's" breach of warranty or the failure of consideration under the contract, as both those courses would involve at least "indirectly" disputing the validity of "A's" copyright, in breach of the terms of the contract's no-contest clause. The upshot is that "A" would prevail both under its own complaint and in defending "B's" counterclaim.

One could contend that "B" simply acted at its peril in executing the no-contest clause. Nonetheless, it is foolish to hold "B" to its word under that clause of the contract when the rest of the contract has been so flagrantly violated by "A" and ought to be legally nullified for "Ms" failure of consideration. Moreover, the contracting parties could scarcely have intended such a result. (See Tams-Witmark Music Library, Inc. v. New Opera Co., 298 N.Y. 163, 81 N.E.2d 70 (1948); Golden West Melodies, Inc. v. Capitol Records, Inc., 274 Cal.App.2d 713, 79 Cal.Rptr. 422 (1969).) As applied to the foregoing facts, Rumbleseat is therefore manifestly unjust.

Alternatively, consider a case in which "D" sues "E", not under the contract as in Rumbleseat, but for copyright infringement. "D" may feel that the contract has been rescinded, for instance, or is otherwise of no further legal effect. (See 3 Nimmer on Copyright sec. 10.15 [A].) In such a circumstance, it is patently unfair for "D" simultaneously to disavow the contract and yet attempt to hold "E" to the no-contest clause embodied in the contract. (See id. at n. 24.)

Thus, even assuming that the economic analysis of Rumbleseat is accepted as sufficient to distinguish its holding from Lear, nonetheless Rumbleseat should be construed very narrowly, if followed at all. It should not apply to validate no-contest clauses in infringement suits; and in contract suits, it should not apply if the contract itself is subject to attack for failure of consideration or otherwise.

David Nimmer, current author of Nimmer on Copyright, practices law Of Counsel to Irell & Manella, Los Angeles' California. An expanded version of this article will appear in the forthcoming revision to Nimmer on Copyright. Copyright by David Nimmer 1988.
[ELR 9:9:3]

RECENT CASES

Dispute between Boston Symphony Orchestra and Vanessa Redgrave is remanded by Federal Court of Appeals for reduction of consequential damages award in breach of contract claim, and for entry of judgment on actress' claim under the Massachusetts Civil Rights Act because orchestra, in this case, did not have a First Amendment defense of "artistic integrity"

The Boston Symphony Orchestra has received a critical review from a Federal Court of Appeals for its performance with respect to canceling a scheduled program featuring actress Vanessa Redgrave. The court vacated a Federal District Court decision setting aside a jury verdict awarding damages of over $100,000 to the actress, and remanded the matter for further proceedings.

Federal Court of Appeals Judge Coffin recalled that in March 1982, the orchestra hired Redgrave to narrate the presentation of Stravinsky's "Oedipus Rex" in a series of concerts in Boston and New York. Orchestra subscribers and other community members objected to Redgrave's hiring because of the actress' support for the Palestinian Liberation Organization and because of her views about the state of Israel. In April 1982, the orchestra cancelled its contract with Redgrave and its performances of "Oedipus Rex."

Redgrave sued the orchestra for breach of contract and for violating the Massachusetts Civil Rights Act. The jury awarded Redgrave her performance fee of $27,500 on the breach of contract claim, and $100,000 in consequential damages based on a finding that the orchestra's cancellation had damaged Redgrave's career by causing the loss of future professional opportunities. The District Court overruled the grant of consequential damages, finding that Redgrave had not met the standards required by the First Amendment for the recovery of such damages, and also entered judgment against Redgrave on her civil rights claim.

Judge Coffin pointed out that Redgrave's claim for injury to her reputation did not involve her general reputation as a professional actress, but rather, a claim that a number of specific movie and theater performances were not offered to her as a result of the orchestra's cancellation. In response to special interrogatories, the jury found that the cancellation did cause harm to Redgrave's career and that the harm was a consequence within the contemplation of the parties. The court held that although Redgrave did not present sufficient evidence to establish harm to her professional career in the amount of $100,000, a party may receive consequential damages if it is proved with sufficient evidence "that a breach of contract was the proximate cause of the loss of identifiable professional opportunities. This type of claim is sufficiently different from a non-specific allegation of damage to reputation that it falls outside the general rule that reputation damages are not an acceptable form of contract damage."

Redgrave did not have to meet any additional requirements for finding consequential damages because of First Amendment considerations, stated Judge Coffin, but the actress' evidence, upon careful review by the court, supported a finding that such damages amounted to $12,000, less expenses.

All three members of the Court of Appeals panel agreed with Judge Coffin's breach of contract section of opinion. The next part of the opinion was written by Judge Bownes; Judge Selya concurred with Judge Bownes, but Judge Coffin did not (see below).

In turning to Redgrave's claims under the Massachusetts Civil Rights Act, Judge Bownes stated that the actress contended that the orchestra's contract cancellation interfered with her federal and state constitutional rights to freedom of speech and association. The Court of Appeals had certified two questions of law to the Supreme Judicial Court of Massachusetts. The Supreme Judicial Court (ELR 9:1:10) held that a party might be held liable "for interfering with the rights of another person, by 'threats, intimidation, or coercion,' if the party had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights." With respect to the second question, the Supreme Judicial Court answered "No" in response to the question of whether a party, if held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, can offer the defense of showing that its actions were independently motivated by additional concerns, such as "the threat of extensive economic loss, physical safety, or particular concerns affecting the party's course of business."

Judge Bownes chose to discuss a reference to "artistic integrity" contained, in dictum, in Chief Judge Hennessey's opinion, i.e., did the orchestra have a free speech artistic integrity right to cancel Redgrave's contract? According to Judge Bownes, the orchestra claimed a First Amendment right to perform without interruption by the audience. But the court found no precedent for extending First Amendment protection to artistic integrity in this context, and held, as a matter of law that under the facts of this case, there was no First Amendment artistic integrity defense under the Massachusetts Civil Rights Act. Allowing such a defense would withdraw the protection of the statute from artists, including Redgrave, who express unpopular political views.

The case therefore was remanded to the District Court for the entry of judgment in favor of Redgrave for consequential damages as set forth above; reversal of the order entering judgment for the orchestra on the civil rights claim; consideration of Redgrave's claims for compensatory damages available under the Civil Rights Act and not included in the award of contract damages; and an award of attorney's fees and costs.

In dissent, Judge Coffin expressed the view that Judge Bownes' opinion looked in the wrong direction and missed "the main action." Apparently, a majority of the

Supreme Judicial Court suggested that the orchestra exercised a "free speech right" when it cancelled its performances of "Oedipus Rex" and its contract with Redgrave. And, assuming this to be true, the court stated that the Massachusetts legislature would not have intended the Civil Rights Act to apply to the orchestra in this case. Judge Coffin would have declined to overlook the Supreme Judicial Court's " authoritative explications" of state law, and thereby risk imposing liability under the Civil Rights Act where the legislature did not intend liability to fall.

For Judge Coffin, the right in question was that the orchestra was claiming that the state was "attempting to dictate how 'Oedipus Rex' should be performed," in that the orchestra faced the potential imposition of damages under a state statute for exercising its artistic discretion in deciding how and whether to perform "Oedipus Rex." At a minimum, stated Judge Coffin, the right included the orchestra's right not to speak, or to change the message it wished to convey, in response to circumstances that it believed would alter or dilute its intended artistic expression. Assuming the orchestra cancelled the production of "Oedipus Rex" and its contract with Redgrave, for reasons having to do with the artistic integrity of the production, that was an exercise of artistic expression which was " protected from state interference under the First Amendment. It would be sufficient that the [orchestra] was unwilling, for artistic reasons, to take the chance of interruptions."

Since the orchestra had established its disruptionavoidance motivation, Judge Coffin would have held that the orchestra was not liable to Redgrave under the Civil Rights Act. Recognizing the orchestra's First Amendment right of artistic integrity did not mean that an audience would dictate who shall perform and what shall be played; rather, it would allow artists to decide. Rejecting the defense would mean that the state could determine what and how artists should perform, and Judge Coffin concluded that "such a turn of events would, in my opinion, not be a very happy one for the First Amendment."

Redgrave v. Boston Symphony Orchestra, 831 F.2d 339 (1st Cir. 1987) [ELR 9:9:6]

Foreign recording company subsidiaries and affiliates of CBS Inc. were subject to jurisdiction in Federal District Court in New York in connection with copyright infringement claim involving the song "Wiggle and a Giggle All Night"

A Federal District Court in New York has denied a motion by CBS Inc. to dismiss, for lack of personal jurisdiction, a copyright infringement action brought by

Larball Publishing Company against the record company and several of its foreign subsidiaries.

Larball, the holder of the copyright in the song "Wiggle and a Giggle All Night," written by L. Russell Brown and Sandy Linzer, claimed that a song entitled "Don Diablo," written by Miguel Bose, copied a portion of the music of the Brown and Linzer composition. At the time he wrote "Don Diablo," Bose was under contract to record for Discos CBS, S.A., a company wholly owned by CBS Columbia, A.G., a Swiss corporation, which, in turn, was wholly owned by CBS. CBS admitted that parts of the two songs at issue were identical.

Judge Kevin Thomas Duffy found that CBS acted as an agent for its foreign subsidiaries and affiliates in conducting sales of various versions of "Don Diablo" Although noting that the existence of a parent-subsidiary relationship is, in and of itself, an insufficient basis for finding in personam jurisdiction over the subsidiary, the court determined that sufficient evidence was presented that the subsidiary companies in this case were doing business in New York through their agent CBS. It was pointed out that licensing agreements between CBS and its subsidiaries or licensees in Argentina, Brazil, Costa Rica, Mexico and Spain required the subsidiaries to grant to CBS the exclusive right to manufacture and distribute recordings made from the subsidiaries' matrices in the "outside territory;" CBS' control over the distribution of its subsidiaries' recording worldwide was "almost absolute" CBS was conducting all the business its subsidiaries could do were they present by their own officials, stated Judge Duffy.

In denying partial judgment to CBS, the court commented that it did not conclude that all licensing agreements would automatically subject foreign licensees to jurisdiction in the New York courts-any such determination still must be based on the facts of each case.

Larball Publishing Company, Inc. v. CBS Inc., 664 F.Supp. 704 (S.D.N.Y. 1987) [ELR 9:9:7]

California appellate court upholds judgment ordering former Oakland Raiders football team to pay over $140,000 in stadium rental fees due to Oakland-Alameda County Coliseum

In June 1966, the then-Oakland Raiders entered a contract with the Oakland-Alameda County Coliseum. The Raiders obtained a license, which eventually was extended to the end of the 1979 football season, to use the Coliseum to play National Football League games in return for a rental payment in the amount of 7 1/2 percent of gross receipts from paid admissions on the first $41.5

million of such receipts each season and 10 percent of the gross receipts above that amount.

A rent adjustment clause in the 1966 contract provided that if, during the term of the contract, the Coliseum rented its premises to a major league baseball franchise for a rental payment amounting to less than five per cent of the franchise's gross receipts from ticket sales, the Raiders would be entitled to a reduction in rent. In 1968, the Coliseum entered a contract with the Oakland Athletics baseball team.

A dispute concerning the rental payments owed by the Raiders to the Coliseum arose in connection with a December 7,1980 game between the Raiders and the Dallas Cowboys, and with a game played on December 13, 1981 between the Raiders and the Chicago Bears. The Coliseum claimed that the rent due from the December 7, 1980 game was about $71,000, and that the rent due from the December 13, 1981 game was about $73,000.

The Raiders denied liability for the rental claims on the basis of the rent adjustment clause; the football team and Al Davis, the general partner of the Oakland Raiders, Ltd. limited partnership, claimed that the clause had been incorporated by reference into the one year license contracts entered into by the Raiders and the Coliseum in 1980 and in 1981.

A trial court found that the rent adjustment clause did not apply during the terms of the 1980 and 1981 contracts; granted summary judgment to the Coliseum; and entered judgment ordering the Raiders to pay the Coliseum rent in the amount of $144,000 for the two games at issue; interest to the date of entry of judgment in the amount of about $53,000, plus costs.

A California appellate court has upheld the trial court's decision. Judge Channell, after noting that from 1968 through 1979, the Raiders never claimed, nor were they given, a rent adjustment under the subject clause, stated that it was undisputed that during the single-football-season terms of the 1980 and 1981 contracts, the Coliseum did not enter into any contract with owner of a major league baseball franchise. The Raiders sought to introduce extrinsic evidence to support the argument that the parties intended, in the 1980 and 1981 contracts, to extend the 1966 contract and all of the terms therein. But Judge Channell declared that the extrinsic evidence did not support the interpretation of the contract suggested by the Raiders, and thus was not admissible to add to, detract from or vary the term of the contracts.

Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd., Case No. A035353 (Ca.Ct.App., Jan. 21, 1988) [ELR 9:9:7]

United States Information Agency, acting under new regulations adopted pursuant to Federal District Court order, certifies documentary film "Whatever Happened to Childhood?" for duty-free status abroad, grants certification to another film only with "propaganda" warning label attached, and denies certification to four other documentary films

The United States Information Agency, under new regulations adopted in accordance with the order of a Federal District Court in California, has revised its opinion refusing to certify two documentary films for duty-free status abroad, but has left uncertified four other films.

In October 1986, Federal District Court Judge A. Wallace Tashima considered an action brought by several independent film makers and film distributors alleging that the Agency violated their constitutional rights by refusing to certify their films as "educational" under an international treaty known as the Beirut Agreement.

Under the Beirut Agreement, signatory nations agree to exempt certified materials from customs, duties and license requirements. After applying for a certificate of educational, scientific or cultural character from the appropriate government agency, the party seeking duty-free treatment submits the certificate to the importing country, which, in turn, is required to give "due consideration" to the exporting country's determination of exempt status.

The film makers challenged two Agency regulations, the first of which stated, in part, that "The Agency does not certify or authenticate materials which by special pleading attempt generally to influence opinion, conviction or policy (religious, economic or political propaganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion. . ." The second challenged regulation provided that the Agency would not certify any material which might "lend itself to misinterpretation, or misrepresentation, of the United States or other countries, their peoples or institutions, or which appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices."

The films which were denied certification under the criteria set out in Agency regulations included "In Our Own Backyards: Uranium Mining in the United States;" "Peace, A Conscious Choice;" "Whatever Happened to Childhood?;" "Save the Planet;" "Ecocide: A Strategy of War;" "The Secret Agent;" and "From the Ashes ... Nicaragua Today."

In denying treaty certification, the Agency found that the films either "espoused a cause," were "inaccurate" or "imbalanced" or might be "misinterpreted or misunderstood by foreign audiences lacking adequate American points of reference.

The film makers argued that by granting certificates to films such as "To Catch a Cloud: a Thoughtful Look at Acid Rain," by the Edison Electrical Institute, and "The Family; God's Pattern for Living," by the Moody Institute of Science, the Agency engaged in selective censorship by "rewarding the film makers whose views are ideologically 'correct..'".

Judge Tashima first found that the film makers had standing to sue because while not specifically alleged, the films at issue, as a result of the Agency's denials of certification, were placed at a competitive disadvantage in foreign markets relative to films that did receive certificates. And there was no reason to believe, stated the court, that the actions of the importing countries, as independent third parties would render ineffectual the court's orders-the Agency cited no instance where an importing country has overridden the certification decision of the exporting country.

Judge Tashima next noted that a certificate from the exporting country is an "indispensable prerequisite" to obtaining the benefits of the Beirut Treaty; that by entering the Treaty, the United States elected to make those benefits available to its citizens; and that the Agency could not withhold the benefits on the basis of "unconstitutional conditions."

Before considering the film maker's argument that certification was denied them due to the exercise of their First Amendment rights, Judge Tashima paused to consider the proper standard of review, given that the communications in this case would be directed toward foreign audiences. The court determined that in the absence of an overriding governmental interest, such as "a clear and direct threat to national security," the First Amendment "protects communications with foreign audiences to the same extent as communications within our borders," rejecting the Agency's argument that when United States citizens direct their speech to foreign audiences, the government may regulate such speech on the basis of content. In the instant case, there was no contention that national security interests were at stake, and the Agency's asserted foreign policy interests were not sufficiently strong to justify content regulation or the issuance of impermissibly vague regulations.

The court then found that the regulations were unconstitutionally vague in failing to set forth objective criteria to evaluate applicant films, commenting that the regulations were not "merely 'flexible,' [but] boundless."

The film makers also were correct in arguing that the regulations unconstitutionally discriminated on the basis of political content, concluded the court. In particular, the section rejecting materials that "misrepresent" the United States was viewed by the court as "perhaps the most offensive of the entire regulatory scheme, because it places the government in the position of determining what is the 'truth' about America, politically and otherwise."

And the court agreed that prohibiting the certification of materials that state a point of view impermissibly limited the expression of opinion on issues of public controversy. The denial of such certification further violated the First Amendment because any definition of "educational," in order to be constitutionally acceptable, must accommodate materials that purport to reach a conclusion or take a stand.

The regulation incorporating the Treaty's definition of "educational" also was found facially inconsistent with the First Amendment because of vagueness and the possibility of non-neutral content examination.

Judge Tashima concluded by considering the possibility of devising regulations that would be consistent with both the Constitution and the Treaty. The court cited, solely as an example of the feasibility of developing constitutionally acceptable criteria, a test used by the Internal Revenue Service for determining if organizations qualify as "educational."

It should be noted that Judge Tashima distinguished the case before him from the decision in Block v. Meese, 793 F.2d 1303 (ELR 8:8:10) in which a Federal Court of Appeals upheld the Justice Department's classification "as political propaganda" of three films produced by the National Film Board of Canada. In Block v. Meese, the government classification may have "disparaged" the three films; in this case, stated the court, the government exercised its power to deny a tangible benefit to the film makers because, in the government's view, their films could be construed to be "propagandistic," rather than "educational."

Judge Tashima granted summary judgment on behalf of the film makers declaring the challenged sections of the Agency's regulation governing the "World-Wide Free Flow of Audio-Visual Materials" to be invalid and permanently enjoining the Agency from enforcing the regulations and denying "educational" certificates to any film under the Beirut Agreement, based on the challenged regulations. The Agency was ordered to reconsider the eligibility of each of the films at issue for certification under the Beirut Agreement under standards consistent with the First and Fifth Amendments.

After undertaking the court-ordered review, the Agency, in late 1987, adopted interim regulations allowing the labelling of documentary films as "propaganda" when certifying them for duty-free distribution abroad, if in the Agency's view, the films contain material which intends to promote a particular political, religious or economic point of view. The regulations also require applicant documentaries to offer a wide range of opinions on controversial topics and present film subjects in a "primarily factual manner." An organization representing several documentary film makers has filed an action challenging the revised regulations.

In accordance with the regulations, the Agency granted duty-free status to "Whatever Happened to Childhood?" The film "From the Ashes. . ." was granted duty-free status with a "propaganda" warning label attached. But the remaining four films were denied certifications.

Bullfrog Films, Inc. v. Wick, 646 F.Supp. 492 (C.D.Ca. 1986) [ELR 9:9:8]

New York psychologist prevails in libel action against Shana Alexander and Doubleday & Co., the author and publisher of the book "Nutcracker"

Herman Weiner was entitled to summary judgment on the issue of liability in his $1 million libel action against Doubleday & Co., the publisher of the book "Nutcracker" by Shana Alexander, a New York trial court has ruled.

"Nutcracker," as described by New York County Acting Judge Louis Grossman, was a non-fiction account of the widely publicized murder of multi-millionaire Franklin Bradshaw. Bradshaw's daughter, Frances Schreuder, along with her son, was convicted of the murder; Alexander's book reported on the family history which may have led to the crime.

Weiner, a licensed psychologist, treated Frances Schreuder on occasion during the years 1963 through 1973. In her book, Alexander commented on Schreuder's mother's apparent dislike of the psychologist. The author also set forth observations concerning

Weiner's appearance during courtroom proceedings where he supposedly was "eccentrically costumed in bright red slacks and a loud plaid jacket;" and repeated comments by Ms. Schreuder's friends and relatives about Ms. Schreuder's suspected "hankypanky" with her "shrinks."

Judge Grossman found that the statements referring to Weiner's alleged sexual intimacy with Ms. Schreuder constituted libel per se because a reader would reasonably believe that the psychologist engaged "in morally and professionally unethical behavior." And the statement that "Frances always slept with her shrinks" was "an outrageously irresponsible statement to make," declared the court. An interview subject had stated "just a wonder" about the relationship between Ms. Schreuder and Weiner; in the book, however, the statement became "They'd suspected 'hanky-panky,' they confessed."

Alexander then added "The Reagans said they were not at all surprised."

Doubleday actively participated in the editorial process of the book, including extensive review of the substantiation for the author's statements, observed the court, and could not avoid liability by showing that it relied upon the integrity of a reputable author.

Judge Grossman held that Weiner met his burden of showing by a preponderance of the evidence that the author and publisher conducted their substantiation investigation in a "grossly irresponsible" manner. There were no genuine issues of fact to preclude summary judgment and the court accordingly granted Weiner's motion and set the case for trial for damages.

Weiner v. Doubleday & Company,Inc., N.Y. Law Journal, p.14,col.2 (N.Y.Cnty., Dec. 10, 1987) [ELR 9:9:9]

Claus von Bulow agrees to settle lawsuit brought by his comatose wife's children by a former marriage; prior to settlement, Federal Court of Appeals rules that publication of Alan Dershowitz's book concerning von Bulow's criminal trials did not result in broad waiver of attorney-client privilege

In May 1986, Random House published a book entitled "Reversal of Fortune-Inside the von Bulow Case," by Alan Dershowitz. Dershowitz was the attorney who successfully appealed Claus von Bulow's conviction on two counts of assault with intent to murder for allegedly injecting his wife Martha von Bulow with insulin, causing her to lapse into an irreversible coma. Upon retrial, von Bulow was acquitted by a Rhode Island trial court jury. "Reversal of Fortune" discussed the events surrounding von Bulow's first criminal trial, the appeal, and the acquittal.

Soon after the acquittal, Martha von Bulow's children (the Auerspergs) from a former marriage sued von Bulow on behalf of their comatose mother alleging, inter alia, common law assault, negligence and fraud. The Auerspergs obtained an advance copy of Dershowitz's book and notified the attorney that they would consider publication of the book a waiver of the attorney-client privilege.

When "Reversal of Fortune" was published, the Auerspergs moved to compel discovery of certain discussions between von Bulow and his attorneys, based on the alleged waiver of the attorney-client privilege with respect to the communications related in the book. A Federal District Court found a waiver of the privilege and ordered von Bulow and his attorneys to comply with the discovery request.

A Federal Court of Appeals has granted von Bulow's petition for a writ of mandamus directing the District Court to vacate its discovery order.

Judge Cardamone first found that the District Court properly concluded that von Bulow, by acquiescing in and encouraging the publication of "Reversal of Fortune," consented to his attorney's disclosure of his confidences and effectively waived his attorney-client privilege. However, the District Court extended the waiver to the entire contents of all conversations from which Dershowitz published extracts in his book; the four relevant conversations were the initial one between von Bulow and Dershowitz, and the ones regarding the bail hearing, appellate strategy and von Bulow's decision to testify on his own behalf. Broadening discovery to include those parts of the four conversations not made public in the book was improper, ruled Judge Cardamone, who held that "the extrajudicial disclosure of an attorney-client communication-one not subsequently used by the client in a judicial proceeding to his adversary's prejudice-does not waive the privilege as to the undisclosed portions of the communication."

The District Court also erred in extending the purported waiver to subject matter areas related to the published conversations with Dershowitz and to von Bulow's conversations with all other defense attorneys which related to the subject matter disclosed in the book.

According to news reports, the Auerspergs have agreed to settle their action against von Bulow who has renounced all claims to his wife's fortune. In addition, von Bulow agreed to divorce his wife and relinquish his claims to an annual trust fund payment of $120,000.

In re von Bulow, 828 F.2d 94 (2d Cir. 1987) [ELR 9:9:10]

Wayne Newton was entitled to damages of about $5.3 million in libel action against NBC, rules Federal District Court, in ordering reduction of jury's award of damages

As reported in ELR 9:7:19, Federal District Court Judge Myron Crocker has reduced a jury award granting damages to entertainer Wayne Newton in Newton's libel action against NBC.

Judge Crocker agreed that Newton met his burden of proving by clear and convincing evidence that NBC, in voluntarily editing and combining the audio and visual portions of certain news stories, "not only had serious... doubts as to the truth of the broadcasts, but also intended to defame [Newton]." The "clear and inescapable" impression made by the broadcasts was that

Newton received financial help from Guido Penosi, an individual allegedly associated with organized crime, to purchase the Aladdin Hotel.

NBC knew the impression was defamatory because giving anyone a hidden interest in a gaming casino is a violation of law. Furthermore, the impression was false because a Nevada bank had provided the money for Newton to purchase the Aladdin Hotel; because NBC parties had been told that Newton called Guido Penosi in connection with death threats to his daughter and himself; and because the broadcasts inferred that Newton had committed perjury when he purportedly did not tell the Nevada Gaming Board of his alleged hidden partner in the hotel.

The court noted that evidence of ill will on the part of NBC refuted the broadcaster's claim of an honest mistake in airing its report, and that the cumulation of circumstantial evidence supported the jury verdict as to punitive damages. However, the award of $5 million for damages to reputation "shocked the conscience of the court" because the broadcasts apparently did not tarnish Newton's reputation; Judge Crocker found that Newton was entitled to presumed damages for injury to reputation of $50,000.

Newton did not establish by a preponderance of the evidence that the challenged broadcasts had a causal connection to any alleged loss of past or future income, and these awards by the jury were set aside. The jury award of $225,000 for Newton's physical and mental suffering was upheld, as was an award of $5 million in punitive damages. Judge Crocker again observed that the punitive damages award was supported by the evidence, and that since NBC had a net worth of $2 billion, the award was not excessive.

Since the damages awarded by the jury were, in some instances, found excessive, NBC's motion for a new trial was granted unless Newton filed a remittitur of all sums except for $5 million in punitive damages, $225,000 for physical and mental injury, and $50,000 for presumed damages to reputation.

Newton v. National Broadcasting Company, Inc., 14 Med.L.Rptr. 1914 (D.Nev. 1987) [ELR 9:9:10]

Federal Court of Appeals upholds damage award of $325,000 in libel action against Gentleman's Companion magazine

A Federal Court of Appeals has upheld a judgment entered following a jury trial; the jury determined that gentleman's Companion magazine libeled Donna Dalbec, and awarded Dalbec and her husband damages of $325,000.

In its May 1980 issue, the magazine published a personal ad in its "Classified Information" section purporting to describe the attributes of a 22-year-old resident of East Greenbush, New York named "Donna Newbury." The advertisement and consent form actually were submitted by one James Bruni. However, Donna Dalbec, whose maiden name was Newbury, soon began receiving telephone calls at her East Greenbush home seeking sexual liaisons.

Judge Meskill did not consider irrational the jury's finding that the magazine acted with gross irresponsibility in failing to verify the statement at issue, a statement which identified Donna Dalbec by her full maiden name and residence and wrongly suggested that she was promiscuous.

The magazine argued that Dalbec's reputation was so impeccable that no one would have believed that she placed the ad and, thus, the statement was not "of and concerning" Dalbec. Judge Meskill disagreed, pointing out that people did not necessarily have to believe that Dalbec placed the ad; they needed only to believe that it was about her.

Referring to the statement as a "brutally disparaging depiction;' the court next stated that the evidence supported the jury's awards for injury to reputation, mental anguish and loss of consortium.

Judge Meskill concluded that the jury also could reasonably have concluded that a purported "retraction" in December, which in part, referred to "Donna Newbury" as a "phon[y]," also was libelous, particularly because the magazine had been served with the summons and complaint relating to the May statement at least one month before it published the December statement.

Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921 (2d Cir. 1987) [ELR 9:9:11]

Actor featured in cigarette commercial was not entitled to damages under New York Civil Rights Law for rebroadcasts of commercial in connection with advertising industry awards event

In June 1986, the Benson & Hedges cigarette commercial known as "Disadvantages" won induction into the "Clio Hall of Fame." The commercial, which ran from 1967-1971, was shown during the awards broadcast; a nine second portion of the commercial also was included in a segment on "PM Magazine" concerning the Clio Awards.

Charles C. Welch, an actor featured in "Disadvantages" sought damages for the rebroadcasts of his picture, claiming a violation of his rights under sections 50151 of the New York Civil Rights Law.

A New York trial court has dismissed Welch's claim because the actor's picture was not used for the purposes of advertising or trade. "There was no solicitation for patronage, nor was the use of the segment one which was intended to promote the sale of a collateral commodity or service," noted Supreme Court Judge Martin Evans. The PM segment was not advertising in disguise, but rather commented on the development of television commercials and their past history - a newsworthy matter for persons in the advertising and television field, and for general consumers as well, stated the court.

Welch v. Group W Productions, Inc., New York Law Journal, p.4, col.4 (N.Y.Cnty., Dec. 29, 1987) [ELR 9:9:11]

Film company may attempt to remove purported "cloud on title" created by archivist's alleged wrongful filing of renewal copyright claims in four films, rules New York trial court, but was not entitled to pursue claims with respect to the films "It Happened Tomorrow," "Hangmen Also Die," and "Voice in the Wind"

In a dispute over the right to the ownership of renewal copyrights in seven films, a New York trial court has ruled that with respect to three of the films "It Happened Tomorrow," "Hangmen Also Die," and "Voice in the Wind," Tele-Pac, Inc. was not entitled to have Film Archives Co. or Film Archives Trading Co., entities owned by Raymond Rohauer, declared the constructive trustee of the renewal copyrights in the films.

Tele-Pac claimed that it acquired valid ownership to each of the seven renewal copyrights in the films through a series of assignments from the original owners dating back to the 1940's, and alleged that Rohauer, a noted film archivist and curator who died in late 1987, caused the wrongful filing in the Copyright Office of certificates renewing the films' copyrights in the name of one or the other of Rohauer's companies. Tele-Pac did not state a cause of action for copyright infringement. Rather, alleging that Rohauer's companies engaged in acts of copyright "piracy," Tele-Pac sought to have the Rohauer companies declared the constructive trustees, on behalf of Tele-Pac, of the renewal copyrights in the three films mentioned above. Tele-Pac also sought a declaratory judgment establishing its ownership of the renewal copyrights in the remaining four films, "Carnegie Hall," "Fun on a Weekend," "Lured," and "Scandal in Paris."

New York State Supreme Court Judge Edith Miller first noted, with regard to the latter four films, that both

Rohauer and Tele-Pac filed renewal certificates with the Copyright Office within the period required by the Copyright Act, although in each case Rohauer filed several months earlier than did Tele-Pac. Under the former Copyright Act, the copyright on a film had to be renewed within twenty-eight years of its original publication; if not renewed, the copyright would lapse, and the film would be in the public domain.

Judge Miller, assuming for the purpose of the motion, that Tele-Pac was the owner of the copyrights in the "Carnegie Hall" group of four films, stated that the company correctly renewed the copyrights within the statutory period and still was the rightful owner of the copyrights, regardless of the allegedly unauthorized renewals filed by Rohauer.

Tele-Pac's attempt, with respect to the "Carnegie Hall" group, to obtain the equitable relief of removing a purported cloud on the company's title to the films - a cloud arising, not from the allegedly wrongful renewal, but from the alleged continuing trespass by Rohauer - was not barred by the statute of limitations, held Judge Miller.

In turning to the "Hangman" group of films, Judge Miller noted that Tele-Pac did not timely file renewal copyrights in the films. The court thus was unable to clear a cloud on title the company did not have. And the causes of action seeking to establish a constructive trust were subject to Rohauer's statute of limitations defense. The acts giving rise to Tele-Pac's claims occurred in 1970 and 1971, stated the court, for Rohauer filed each renewal certificate at a time when Tele-Pac presumably still had the right to renew the copyrights in its name. Since these acts occurred more than six years before Tele-Pac brought its lawsuit, the actions were time-barred.

Judge Miller further found that because Tele-Pac did not show that the copyrights were properly renewed prior to the expiration of the twenty-eight year period, the company could not maintain a cause of action to establish a constructive trust as a matter of law.

It was then pointed out that the renewals held by Rohauer would be equally invalid, if it were found that Rohauer filed the renewals falsely, as alleged by Tele-Pac. Thus, Rohauer would not be holding the copyright renewals adverse to any valid interest of Tele-Pac; such an adverse holding is an essential element in a cause of action to establish a constructive trust.

Tele-Pac also was not entitled to maintain an action to compel the assignment of the invalid copyrights based on a purported 1972 misrepresentation by Rohauer. The company's failure to renew caused its loss of the three copyrights in the "Hangman" group of films, and Tele-Pac's causes of action with respect to these films, apparently now bereft of a valid copyright holder, was dismissed.

The court concluded by refusing to dismiss Tele-Pac's claim for damages arising from Rohauer's alleged interference with a distribution contract. Tele-Pac claimed that Rohauer's actions caused the cancellation of a distribution contract between Tele-Pac and International Video Entertainment, Inc. Judge Miller found that there was a genuine issue of fact concerning the events surrounding the cancellation of the contract.

Tele-Pac, Inc. v. Rohauer, New York Law Journal, p.12, col.4 (N.Y.Cnty., Jan. 8, 1988) [ELR 9:9:11]

United States Supreme Court lets stand ruling by California appellate court upholding the constitutionality of a Los Angeles business tax ordinance challenged by newspaper publishers

The United States Supreme Court has let stand, for lack of a substantial federal question, a California appellate court ruling upholding a Los Angeles ordinance imposing greater business taxes upon newspapers, magazines and television stations than upon film producers.

When the Times Mirror Company, the publisher of the Los Angeles Times, and two other newspaper publishers sought declaratory and injunctive relief and the recovery of taxes paid under protest, a Los Angeles trial court determined that the city's business tax was constitutional in that it did not impose a special or discriminatory tax on the newspapers or the media in general.

The ordinance in question set an annual business tax on wholesale newspaper sales of $20 per year for the first $20,000 of gross receipts, and $1 for each additional $1,000 of gross receipts or fraction thereof. Retail newspaper sales were taxed at the rate of $18.75 for the first $15,000 of gross receipts plus $1.25 for each additional $1,000 of gross receipts or fraction thereof. Revenue generated from the sale of advertising by publishers was included within gross receipts. And radio and television broadcasters became subject to the same tax rates imposed on retail newspaper sales.

The ordinance also required parties engaged in renting or leasing tangible personal property, including motion picture rentals, to pay a tax of $30 on the first $12,000 of gross receipts, and $2.50 for each additional $1,000 or fraction thereof. With respect to motion picture and cartoon production, the measure of tax was based upon the total of the gross costs of production and gross receipts from the lending of employees and the furnishing of studio facilities from other film producers. The tax was graduated, ranging from $125 for the first $50,000 of gross receipts and production costs, up to a maximum of $10,750 when the measure of the tax reached $4.2 million and above.

The newspapers argued that the business tax unjustifiably imposed a differential tax burden on a variety of First Amendment activities, and discriminated between First Amendment and non-First Amendment enterprises. According to an example provided by the newspaper parties, the tax on $50 million in production costs for the motion picture industry would be $10,750; the same gross receipts received in a year by a newspaper or $50,000 on its wholesale receipts; a radio or television broadcaster would owe $62,500.

On appeal, Presiding Judge Compton noted that the provision of the First and Fourteenth Amendments do not exempt newspapers and the business of newspaper publication from economic regulations and taxes. The court rejected the newspapers' argument that, as in Minneapolis Star v. Minnesota Commissioner of Revenue, 460 U.S. 575 and City of Alameda v. Premier Communications Network, 156 Ca.App.3d 148 (ELR 6:12:17), the structure of the Los Angeles business tax treated them differently than other similarly situated taxpayers and impermissibly impinged on their exercise of First Amendment rights. According to Judge Compton, the statute at issue in Minneapolis Star was declared unconstitutional because it singled out the press, without adequate justification, for differential tax treatment. In Premier Communications, the court struck down a local business license tax on television subscription service companies. Although the ordinance at issue applied to 87 types of businesses, only four were required to pay a gross receipts tax and of these four, only two, television subscription and emergency communications services, were required to pay three per cent of their gross receipts, without the option permitted to other businesses of paying an "in-lieu" gross receipts tax. The court found that Premier was taxed differently than the great majority of businesses and in a more burdensome manner, solely for the purpose of producing revenue.

In the instant case, the Los Angeles ordinance applied to all parties engaged in wholesale or retail business activities, and did not resemble "a penalty directed at only a few publications," stated Judge Compton.

The court next pointed out that municipalities have broad powers to classify businesses for the purpose of taxation as long as the burden of a tax falls equally upon all members of a class. The classifications created by the Los Angeles ordinance were found neither arbitrary nor unreasonable; within each broad classification, all businesses were taxed similarly - all members of the press were treated alike, the press and all other publishing enterprises were treated similarly, and all publishing enterprises were treated identically with other wholesalers and retailers.

The fact that the city used a different method of computing the tax payable in connection with motion picture production or radio and television broadcasting did not render the tax scheme unconstitutional because the "inherent difference" between the various forms of mass media was obvious-the ultimate products were different in the manner of production, dissemination and exhibition. And a classification within an ordinance does not violate equal protection if the distinction has a rational basis. The court therefore found that "the tax rate distinctions which may exist between different members of the media and between the media and other taxpayers [were] constitutionally permissible and in no way impinge[d] upon the exercise of [the newspapers'] rights under the First Amendment."

An apportionment provision of the ordinance also was upheld; allowing the city clerk to apportion the amount of gross receipt taxes to be collected in order to prevent the tax from having an extraterritorial impact did not infringe the newspapers' First Amendment rights, concluded the court, since the official solely determined the manner in which the tax was to be computed based upon contentneutral objective criteria.

The Times Mirror Company v. The City of Los Angeles, Case No. B023000 (Ca.Ct.App., May 28, 1987) [ELR 9:9:12]

New York trial court dismisses malicious prosecution cause of action asserted by party involved in dispute over production of a documentary film

In Bear Creek Productions, Inc. v. Saleh (ELR 9:1:14), Federal District Court Judge Edward Weinfeld dismissed, primarily on the basis of a lack of jurisdiction, various copyright and trademark infringement claims arising from a dispute over the production of a documentary film about homeless children. Bear Creek's civil claim against Angelika Saleh based upon the Racketeer Influenced and Corrupt Organizations Act also was dismissed; the court found that the complained-of acts were not within the scope of a civil RICO action.

The New York trial court now hearing Saleh's complaint against Bear Creek, alleging breach of contract, tortious interference with contractual relations and malicious prosecution, has refused to allow Saleh to add a cause of action against Berger and Steingut, the law firm for Bear Creek (Berger and Steingut's predecessor firm commenced the Federal District Court action for Bear Creek). Apparently, Bear Creek's law firm, during the course of the Federal District Court proceeding, sent letters advising distributors and exhibitors of the pendency of the lawsuit and of the "peril" of dealing with Saleh and her associates.

Saleh claimed that Bear Creek's civil RICO claim was commenced without probable cause and with malice, and that the law firm's correspondence with Saleh's business clients provided the necessary element, for the malicious prosecution claim, of interfering with Saleh's property.

In denying Saleh's motion to add a party defendant, granting Bear Creek's motion to dismiss the malicious prosecution causes of action, and severing the remaining cause of action, State Supreme Court Judge McCooe stated that the act of Bear Creek's law firm in sending letters to distributors and exhibitors was insufficient to establish interference with Saleh's person or property by the use of a provisional remedy. It was found that there was probable cause for the assertion of the civil RICO claim in November 1985, and that the commencement of the action in the circumstances of this case would not sustain an action for malicious prosecution.

The court also noted that adding the Berger and Steingut firm as a party defendant in the case would prejudice Bear Creek by "creating confusion in the trial of unrelated claims and by requiring the disqualification of the B&S law firm as attorneys for the corporate defendant."

Saleh v. Bear Creek Productions, Inc., New York Law Journal, p.12, col.2 (N.Y.Cnty., Jan. 8, 1988) [ELR 9:9:13]

Art dealer's claim seeking rescission and damages against seller of oil painting for misattribution of the work was barred by statute of limitations, rules Federal District Court

In August 1981, Firestone & Parson, Inc., an art dealer, paid $500,000 to the Union League of Philadelphia for an oil painting known as the "Bombardment of Fort Sumter." The painting was generally regarded as being the work of American landscape artist Albert Bierstadt.

In the spring of 1985, some art historians began to question the attribution of the work. The Union League reiterated to Firestone & Parson the view that the painting was a Bierstadt. However, in the February 1986 issue of "Antiques" magazine, an artist historian expressed the "firm opinion" that a Confederate artist, John Ross Key, produced the "Bombardment of Fort

Sumter" painting. The attribution of the painting to Key has been accepted by art experts.

Firestone & Parson, alleging that the painting, as the work of Key, would be worth only about $50,000, sued the Union League seeking rescission and damages.

A Federal District Court in Pennsylvania, in an opinion issued in April 1987, but only recently published, has granted the Union League's motion for summary judgment on the ground that the action was barred by the statute of limitations.

Chief Judge Fullam first rejected any claim of fraud since the painting had long been attributed to, and was generally recognized as the work of, Bierstadt; since both parties believed, at the time of the sale, that it was a Bierstadt; and since the alleged mistake in attribution did not become known until February 1986.

In an action for breach of contract, a four year limitations period would apply (either under the Uniform

Commercial Code, or under state law) with the claim accruing at the time of delivery.

Firestone & Parson's argument that their claims did not accrue until they discovered the error in attribution, or reasonably should have discovered it, was rejected by the court because Pennsylvania courts have not extended the "discovery rule" exception to commercial transactions. And the fact that the art historian's article did not appear until February 1986 did not mean that the art dealers could not reasonably have learned of the alleged error in attribution long before that date.

The statute of limitations was not equitably tolled by the Union League's alleged continued assertions that the painting was a genuine Bierstadt, concluded Chief Judge Fullam, who then commented that his ruling should not be interpreted as suggesting that the art dealer's claim, if not time-barred, would otherwise have been valid. For, if at the time of sale, "both parties correctly believed at that time that the painting was generally believed to be a Bierstadt, and in fact it was then generally regarded as a Bierstadt, it seems unlikely that [Firestone & Parson] could show that there was a mutual mistake of fact."

Firestone & Parson, Inc. v. Union League of Philadelphia, 672 F.Supp. 819 (E.D.Pa. 1987) [ELR 9:9:14]

Publisher is granted summary judgment in libel action brought by individual wrongly identified as the brother of alleged participant in toxic waste disposal scandals

In the book entitled "Poisoning for Profit: The Mafia and Toxic Waste in America," the authors (not named by the court) referred to one Richard Miele as a principal participant in allegedly illegal activities involving toxic-waste disposal. In describing a proposed waste disposal project, the authors mentioned a Georgia dump operator's expectation that "he could strike another deal with Richard Miele's brother, Dennis, the operator of Applied Technology of Toms River, New Jersey." And it was stated that Dennis Miele "reportedly disposed of the toxic waste for about 40 companies..."

Except for the fact that Dennis Miele was not the brother of Richard Miele, the other statements about Dennis Miele were literally true. However, Dennis Miele alleged that the "entire thrust" of the book was to "expose" corruption and mob involvement in the toxic waste disposal industry, and that the false statement concerning his relationship with the "notorious" Richard Miele was defamatory.

A Federal District Court in Pennsylvania, using New Jersey law, has found that even assuming the defamatory nature of the publication, Miele did not establish actual malice; the authors believed that Dennis Miele was the brother of Richard Miele, made some effort to verify the accuracy of the information, and, in all, did not act with knowledge of the falsity of the challenged statement or with reckless disregard. The court therefore granted the publisher's motion for summary judgment.

Miele v. William Morrow& Company, Inc., 829 F.2d 31, aff'g, 670 F.Supp. 136 (E.D.Pa. 1987) [ELR 9:9:14]

Federal Court of Appeals upholds judgment entered on jury verdict awarding damages to former radio station disc jockey in action alleging that his termination violated the Age Discrimination in Employment Act

A Federal Court of Appeals in Illinois has affirmed a District Court decision (ELR 9:6:16) denying radio station WCLR's motion for judgment notwithstanding a jury verdict in favor of Leo J. Rengers, a former WCLR disc jockey. Rengers had claimed that the termination of his employment violated the Age Discrimination in Employment Act and that the violation was willful; the jury awarded Rengers damages of about $97,000.

The District Court had concluded that the result of the radio station's post-1975 hiring practices was that, by the end of 1981, it did not employ a single staff announcer over the age of 40, and that "the jury was entitled to conclude that this disparity was neither merely 'coincidental'. . . nor simply a byproduct of the natural age progression of the labor market."

On appeal, Judge Cummings agreed with the District Court's holding that there was sufficient evidence to uphold the jury's conclusion that the radio station's conduct in discharging Rengers violated the statute. Rengers presented substantial evidence that he performed his job well, so that a reasonable jury might conclude that WCLR's "proferred justifications [for the termination] were a pretense for concealing its actual discriminatory designs." In all, the totality of the evidence provided a reasonable basis for the jury verdict, concluded Judge Cummings, including the finding of willfulness on the part of the radio station; WCLR's motion for a judgment notwithstanding the verdict thus was properly denied.

Rengers v. WCLR Radio Station, A Division of Bonneville International Corporation, 825 F.2d 160 (7th Cir. 1987) [ELR 9:9:15]

School officials did not violate First Amendment in requiring deletion of two pages from high school-sponsored student newspaper, rules United States Supreme Court

The United States Supreme Court has upheld the right of school officials to exercise editorial control over student speech in school-sponsored expressive activities, "so long as their actions are reasonably related to legitimate pedagogical concerns."

Several former Hazelwood East High School students who were staff members of the school newspaper, Spectrum, argued that the school principal's deletion of two pages scheduled to appear in the May 13, 1983 issue of Spectrum violated the students' First Amendment rights.

The deleted pages contained an article describing three Hazelwood East students' experiences with pregnancy; the article did not contain graphic accounts of sexual activity, although the students commented on their sexual histories and their use or nonuse of birth control. Another deleted article concerned the impact of divorce on students at the school.

Principal Robert Reynolds was concerned that the pregnant students, for whom false names were given, might be indentifiable from the text of the report, and that the reference to sexual activity and birth control were inappropriate for some of the younger students at the school. Reynolds also questioned the inclusion in the divorce report of certain critical comments by a student (whose name had not yet been deleted from the final version of the article); the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication.

According to United States Supreme Court Justice Byron R. White, Reynolds believed that making the necessary changes in the stories might so delay printing that the newspaper would not appear before the end of the school year. The principal therefore directed the newspaper advisor to withhold from publication the two pages containing, along with other material, the two challenged articles.

When the newspaper staff members sued various school officials, a Federal District Court in Missouri denied the students' request for an injunction, holding that no First Amendment violation had occurred. The court found that the principal's decision to delete the newspaper pages was based on substantial and reasonable concerns.

A Federal Court of Appeals reversed the District Court's decision, holding that the Spectrum was a public forum, rather than only "a part of the school adopted curriculum." School officials thus could not censor the newspaper except "when necessary to avoid material and substantial interference with school work or discipline ... or the rights of others." In this case, the Court of Appeals found that there was no evidence that classwork would have been materially disrupted or that there would have been substantial disorder in the school upon the publication of the two stories.

In reversing the decision of the Court of Appeals, Justice White first noted that according to school policy, the production of Spectrum was considered part of the educational curriculum and a "regular classroom activity." The journalism teacher selected the editors of the newspaper, scheduled publication dates, and edited stories, as well as advising students on the development of their stories. Each issue of Spectrum, after being approved by the journalism teacher, was reviewed by Reynolds prior to publication. Justice White described as "equivocal at best," the evidence relied upon by the Court of Appeals to support its finding that school officials clearly intended Spectrum to be a public forum; the newspaper was a "supervised learning experience for journalism students," and school officials therefore were entitled to regulate the contents of Spectrum in any reasonable manner.

Justice White then stated that educators are entitled to exercise greater control over student expression occurring via school-sponsored publications, theatrical production and other expressive activities than in a situation where a student is engaged in personal expression that happens to occur on the school premises. In activities which are part of the school curriculum, educators may seek "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." The standard set forth in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 508

(1969) for determining when a school may punish student expression was not involved in this case, declared Justice White, who held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

The court concluded that Reynolds acted reasonably, given the particular circumstances of the case in requiring the deletion of two pages from Spectrum, and that no violation of First Amendment occurred.

Justice Brennan, with whom Justice Marshall and Justice Blackmun joined in dissent, stated the view that by deleting two pages of Spectrum, Reynolds violated the First Amendment's "prohibition against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose." Justice Brennan would have applied the Tinker standard in this case, rather than announcing a distinction between personal and schoolsponsored speech. The three "excuses" offered by the court for the distinction were, according to Justice Brennan, the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to disassociate itself from student expressions. But the dissent pointed out that Tinker addressed the first concern; that the second was illegitimate; and that the third was achievable by less oppressive means, such as by requiring student activities to publish a disclaimer or by issuing responses stating the official position on a particular issue.

Justice Brennan concluded by emphatically objecting to the "brutal manner" of Reynolds' censorship-six entire articles were deleted without an inquiry into whether deletions or additions still could be made or publication delayed-and by stating that the majority's opinion "denudes high school students of much of the First Amendment protection that Tinker itself prescribed."

Hazelwood School District v. Kuhlmeier, Case No.86-836 (U.S.Sup.Ct., Jan. 13, 1988) [ELR 9:9:15]

School officials may censor expression from official school publications on the basis of a reasonable determination of potential tort liability, rules California appellate court

In a decision issued about two weeks after the United States Supreme Court's ruling in Hazelwood School District v. Kuhlmeier (see ELR 9:9:15), a California appellate court has found that the Garden Grove Unified School District was entitled to censor material which school officials reasonably believed to contain an actionable defamation from a high school newspaper.

When David Leeb, the editor of the Rancho Alamitos High School newspaper, "La Voz del Vaquero," submitted the proposed April 1, 1984 "spoof" edition of the newspaper to school principal James DeLong, the principal objected to an article headlined "Nude Photo Girls of Rancho The article stated that the July issue of Playboy maga zine would include nude photos of women students, and described a purported sign-up procedure for interested parties. The article was accompanied by a photograph of five fully clothed female students standing in line, with their school books and "applications."

DeLong spoke with the five students and concluded that they did not give a "totally informed consent" to the use of the photograph, and also spoke with the father of one of the girls. According to DeLong, the father claimed that the picture invaded his daughter's privacy and damaged her reputation, and suggested potential legal action if the picture were published. DeLong also believed that the article and photograph would damage the reputation of the students and of school, and that a disclaimer pointing out that the stories and announcements in the issue were "fabrications of the mind" was so inconspicuous that many readers might believe the article was true.

On April 2, DeLong prohibited the distribution of the newspaper. Leeb's appeal to school district officials was unsuccessful, and he subsequently brought an action claiming that section 48907 of the state's Education Code and the school district's enabling regulation-both of which provided for prior restraints with respect to official student publications in certain limited situations-violated the free press provision of the California

Constitution. A trial court denied Leeb's request for a temporary restraining order and a preliminary injunction, and granted the school district's motion for summary judgment.

On appeal, Acting Presiding Judge Thomas F. Crosby, Jr. first noted that Kuhlmeier was not specifically applicable in California, for section 48907 of the state's Education Code and state case law grant editorial control of official student publications to the student editors, with very limited exceptions. Judge Crosby emphasized that "the [broad] power to censor expression in school sponsored publications for pedagogical purposes recognized in Kuhlmeier is not available to this state's educators."

For Judge Crosby, the primary intended function in publishing the school newspaper was the education and development of the journalistic talents of the staff members. However, the court declared itself bound to follow the majority decision in Bailey v. Loggins, 32 Cal.3d

907 (1982), and, accordingly, classified the newspaper as a "limited forum" for expression, at least in terms of prior restraints, under the California Constitution.

In a limited forum, observed the court, the government may restrict access to the forum "consistent with the purposes for which it was created." And although neither the First Amendment nor the California Constitution permit the prior restraint of the private publication of libelous material, Judge Crosby found that both precedent and practical considerations supported that right of a school administration to censor actionable defamatory material from official student publications. The practical considerations cited by the court included: the inability of student editors to pay damages to defamed parties, resulting in a lack of incentive to suppress defamatory material; the possibility that school districts subject to defamation actions might reduce opportunities for student expression; and the educational purpose of preparing student journalists to encounter, in the newspaper business, "a blue pencil poised for defamation prevention."

Judge Crosby, although again recognizing the Kuhlmeier position that student newspapers are "pedagogical tools," not public (or limited public) forums, stated that the court was constrained from reaching this position by the Bailey majority's interpretation of the California Constitution, by the language of Education Code section 48907, and by the fact that the school district did not argue that it had a right to a defamation exception broader than a right to censor to avoid potential tort liability. Thus, "a school district in this state may censor expression from official school publications which it reasonably believes to contain an actionable defamation but not as a matter of taste or pedagogy," declared the court.

It was pointed out that schools still possess such post-publication responses such as grading to teach journalistic ethics when a viable libel action might not be maintained. And while recognizing the difficult task of evaluating allegedly defamatory material by a potential tort liability standard, the court stated that such a standard placed the parties in the same situation with respect to allegedly defamatory material as private litigants in a court of law. Thus, a decision to impose a prior restraint must be based on "a good faith and objectively rational determination of the probable effect of the challenged speech, i.e., that it contains a false statement ... likely to harm the reputation of another or hold that person up to shame, ridicule, or humiliation. It is not enough that a lawsuit is threatened ... Prior restraint, although not other disciplinary action, necessarily must yield unless it also appears that an offended [party] would have a clear chance of prevailing in a tort action against the school district."

Furthermore, defamatory material that is not actionable because it is privileged or deals with a public figure without malice may not be censored. And Judge Crosby stated that the challenged enabling regulation should be amended to reflect the limitations on prior restraint, including the requirement that any decision to delete an item thought to be defamatory should as far as possible, be limited to the offending material itself. Procedural guidelines attendant to prior restraint, such as a speedy system of review, also must be set forth.

The court pointed out that it was not required to determine whether the school officials could have maintained a good faith belief that the April 1st edition contained material that might have led to a successful tort action against the school district; the issue was not presented on appeal. In upholding the constitutionality of

Education Code section 48907, Judge Crosby again cautioned that the enabling regulation must be revised, but found that no further action was required-the question of whether the April 1st edition should be published was moot-and therefore affirmed the trial court judgment.

Leeb v. DeLong, Case No. G002587 (Ca.Ct.App., Jan. 29, 1988) [ELR 9:9:16]

Cancellation of screening of Jean-Luc Godard's film "Hail Mary" by University of Nebraska art gallery director violated First Amendment rights of students

The cancellation of a showing of Jean-Luc Godard's film "Hail Mary" at a state-operated theater located within an art gallery on the University of Nebraska campus violated the constitutional rights of the school's students, a Federal District Court has ruled.

The director of the school's art gallery stated that he cancelled the screening because of the controversy surrounding the film; the likelihood of a demonstration by those opposing the film; and the political climate. However, Judge Urbom concluded that the cancellation resulted from the gallery director's concern over possible budget cuts, particularly in view of a state legislator's critical comments concerning the scheduled screening, And even if potential controversy was the only cause for canceling the screening, the cancellation was not justified, stated the court, because "action taken by an arm of the state merely to avoid controversy from the expression of ideas is an insufficient basis for interfering with the right to receive information."

Judge Urbom categorized the theater as the type of public forum subject to reasonable limitations on expression. But the court had determined that the showing of "Hail Mary" was cancelled, unconstitutionally, "because of an unnerving campaign to suppress its content because it was at odds with a public official's religious views." The university's students were denied their First Amendment right to receive the controversial ideas expressed in the film because its content was "officially" characterized as offensive, and its expression suppressed after the film had been selected and advertised for showing.

The court declined to award damages against the gallery director in either his official or in his individual capacity, and dismissed the complaint against the Board of Regents of the University of Nebraska on the basis of the Eleventh Amendment, pointing out, in addition, that there was no evidence that the Board was implicated in the decision to cancel the film. The gallery director and his associates were enjoined from preventing the presentation of the film, and the students were awarded attorneys fees and costs.

Brown v. Board of Regents of the University of Nebraska, 669 F.Supp. 297 (D.Neb. 1986) [ELR 9:9:17]

Art gallery owner is denied summary judgment in artist's action claiming breach of a contract to share gallery premises, but artist's damages are limited by Federal District Court

A Federal District Court in New York has refused to grant summary judgment to Luke Cheung, the owner of a Manhattan art gallery, in a breach of contract action brought by artist Maria Karetsos with whom Cheung had agreed to share space in the gallery premises. Judge Goettel pointed out that the parties had agreed to divide the gallery space equally; thus, there was not merely "an agreement to agree" as to the division of space, as argued by Cheung.

However, Karetsos' damages were limited by the court to the recovery of expenditures made in renovating the gallery and restitution damages, if any. Karetsos did not show that she had become a joint tenant under the lease or that she otherwise was entitled to damages in the amount of onehalf of the market value of the lease; neither the lease nor the contract between Cheung and Karetsos mentioned a joint tenancy being established or contemplated by the parties, observed Judge Goettel.

Karetsos' claim that she was a third party beneficiary of the lease between Cheung and the landlord also was rejected because of the failure to demonstrate that, assuming third party beneficiary status, she was entitled to one-half of the market value of the lease. And damages for lost profits due to Karetsos' failure to sell works of art intended for the gallery were not available because there was no evidence to determine the value of the art works, whether they would have been sold if in the gallery, and whether Karetsos suffered any loss by retaining the works, since, according to Judge Goettel, presumably "the unsold works could be sold today for their full present value, and no profits have been lost."

Karetsos v. Cheung, 670 F.Supp. 111 (S.D.N.Y. 1987) [ELR 9:9:18]

School board's decision declaring high school athlete ineligible to participate on school wrestling team is upheld

A Federal District Court in Iowa in a decision rendered in February 1987, but only recently published, has upheld a school board's decision finding Tom Brands, defending state wrestling champion, ineligible to compete on the school wrestling team.

The school board upheld a high school principal's determination of Brands' ineligibility, based on the principal's investigation of rumors concerning the athlete's alleged participation, along with three other youths, in "multiple acts of sexual intercourse with a sixteen-year-old female student. . . "

Chief Judge Donald E. O'Brien first emphasized that the court was not making a judgment as to the nature of any evidence purportedly supporting the charges against Brands. The court had issued a temporary restraining order which permitted the athlete to compete and advance in a sectional tournament, for it had been determined that the court at that time could not fairly consider all of the evidence admitted in time to fully resolve the matter prior to the weigh-ins for the tournament. But Judge

O'Brien refused to enter the second restraining order or preliminary injunction, finding that Brands was not likely to succeed on the merits of his claim that his constitutional rights were violated, even if his allegations of irreparable harm, a favorable balance of interests and the public interest were accepted as true.

The court noted that a majority of courts have found that in the context of interscholastic or intercollegiate athletics, athletes have no legitimate entitlement to participate. And assuming that the court were to recognize a protected interest in participation, Judge O'Brien stated that Brands' procedural due process rights were respected, and that the school board's action affirming the principal's decision was not arbitrary or capricious, but rather involved legitimate school board concerns and a sanction which limited Brands' ability to represent the school without limiting his basic rights as a student.

Brands v. Sheldon Community School, 671 F.Supp. 627 (N.D.Iowa 1987) [ELR 9:9:18]

California Interscholastic Federation eight semester eligibility rule for high school athletes is upheld

The California Interscholastic Federation's eight semester limitation on athletic eligibility was correctly applied to Demetrius Jones, a Calabasas High School athlete, a California appellate court has ruled.

During the 1985-1986 school year, Jones, due to academic difficulties, elected to repeat the eleventh grade. The school then attempted to apply the eight semester limitation in order to preclude Jones from participating in varsity athletic and football programs in 1986-87, his senior year. Jones argued that the rule was overbroad as applied to him because his delayed graduation was due to academic reasons, and was not the result of "redshirting." It also was argued that the rule was facially invalid because it provided for a possible waiver of the eight semester limitation when a student is required to return to grade eight from grade nine, without including such a provision for similarly situated students in the upper grades.

A Los Angeles trial court enjoined the Federation from enforcing the eight semester rule against Jones, finding that the rule applied only to Federation schools and that Jones had not been a student in such a school during the first year of his eligibility.

On appeal, Presiding Judge Klein first noted that the case was not moot although Jones had obtained the relief he sought and completed his senior year prior to the time the matter was heard by the appellate court. Jones' appeal presented questions of continuing public interest "`capable of repetition, yet evading review,'" stated the court.

Judge Klein then determined that the eight semester rule served the rational basis of "discouraging unnecessary delays in graduation for athletic reasons," and that holding Jones subject to the rule would serve both to create interscholastic athletic opportunity for younger students at the school, and to further "competitive equity" among Federation member schools. The trial court erred in its interpretation of the applicability of the rule, concluded Judge Klein, for "under its plain meaning and in accordance with its purpose. . ." the rule applied to semesters spent by a student at non-Federation schools, and thus to Jones.

California Interscholastic Federation v. Jones, Case No.B024235 (Ca.Ct.App., Jan. 11, 1988) [ELR 9:9:18]

Briefly Noted:

Release Agreement.

An exculpatory agreement signed by the mother of minor gymnast Tara A. Simmons barred Simmons' mother from claiming damages from the Parkette National Gymnastic Training Center in connection with injuries suffered by her daughter, a Federal District Court has ruled. However, although Tara Simmons also signed the release which purportedly prospectively exculpated the gymnastics center from liability for injuries she might incur, the court stated that it did not believe that Pennsylvania courts would bind the minor to the agreement, and denied the center's motion for summary judgment.

Simmons v. Parkette National Gymnastic Training Center, 670 F.Supp. 140 (E.D.Pa. 1987) [ELR 9:9:19]

Copyright Infringement/Jury Trial.

In a decision issued in January 1987, but only recently published, a Federal District Court in New Jersey has refused to strike a jury demand by The Princeton Review and its sole officer and shareholder, John Katzman, in an action brought by Educational Testing Services seeking statutory damages for copyright infringement. Judge Barry rejected the testing service's argument that section 504(c)(2) of the Copyright Act of 1976 showed that Congress intended statutory damages to be awarded by the judge, and concluded, after conducting under a Seventh Amendment analysis for determining whether an issue is legal or equitable, that statutory damages under the Copyright Act are legal in nature, and that Katzman therefore was entitled to demand a jury.

Educational Testing Services v. Katzman, 670 F.Supp. 1237 (D.N.J. 1987) [ELR 9:9:19]

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Copyright Infringement/Musical Compositions.

A Federal District Court in California has found that James C. Moses, the owner and operator of a Duarte night club known as "The Cabaret" infringed several copyrighted musical compositions, including "Looking for Love," "Take Me Home Country Road," and "I Just Called to Say I Love You." The court granted summary judgment to the owners of $2,130, as well as attorney's fees and costs.

Southern Nights Music Co. v. Moses, 669 F.Supp. 305 (C.D.Ca. 1987) [ELR 9:9:19]

Copyright Infringement/Music.

A Federal Court of Appeals in Texas has vacated a District Court decision granting summary judgment to the owners of several copyrighted musical compositions in a copyright infringement action against the owners of the Waco Wrangler Club in Waco, Texas. In remanding the matter, the court found that a material issue of fact precluded summary judgment. The club owners claimed that the club was closed at 12 midnight on the night when two investigators acting on behalf of the copyright owners stated that they were present in the club from 8:30 P.M. on October 19 until 1:35 A.M. on October 20. Although the investigators testified that the allegedly infringing performances of the songs in question took place between 10: 00 and 11:00 P.M., the court stated that the club owners presented evidence sufficient to lead a reasonable person to doubt the credibility of the investigators' testimony, and that summary judgment therefore should not have been granted.

Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77 (5th Cir. 1987) [ELR 9:9:19]

Media/Access to Athletic Conference Correspondence.

When the Dallas Times Herald asked the Southwest Athletic Conference to inspect all conference correspondence which concerned allegations that some member universities had violated the rules of the National Collegiate Athletic Association regulating the recruitment of student athletes, the conference commissioner refused the newspaper's request. The newspaper's publisher proceeded to sue the conference seeking a declaration that Texas' Open Records Act required the conference to divulge the subject correspondence. Southern Methodist University, a member of the conference, intervened in the action; the university opposed the newspaper's attempt to obtain the correspondence, and also presented a counterclaim for a declaratory judgment seeking a determination that the conference was not a " governmental body" to which the Open Records Act applied.

After various procedural events, the newspaper declareda nonsuit of its action against the conference and moved for the dismissal of Southern Methodist's counterclaim, arguing that the counterclaim no longer presented a justiciable controversy.

A trial court decision dismissing the counterclaim has been upheld by a Texas appellate court. The court declined to find that the counterclaim presented a controversy that was sufficiently noncontingent so as to be a "justiciable" case within the jurisdiction of the trial court.

Southern Methodist University v. Times Herald Printing Company, 729 S.W.2d 129 (Tex.App. 1987) [ELR 9:9:19]

IN THE NEWS

Lionel Richie fails to obtain dismissal of songwriter's copyright infringement claim; United States Supreme Court lets stand Federal Court of Appeals decision ordering jury trial on issue of substantial similarity between songwriter's work and Richie's song "Stuck on You"

The United States Supreme Court has refused to dismiss a copyright infringement action brought by songwriter Gene Thompson against performer Lionel Richie. The Supreme Court let stand a Federal Court of Appeals decision (ELR 9:5:9) which held that Thompson was entitled to a jury trial to determine whether Richie's 1983 song "Stuck on You" was substantially similar to Thompson's copyrighted work "Somebody's Got to Love Her."

A Federal District Court had granted Richie summary judgment, finding that no reasonable juror could find that the two songs at issue were substantially similar; the Court of Appeals reversed the dismissal of Thompson's lawsuit. [Feb. 1988] [ELR 9:9:20]

"Platoon"/"Hoosiers": The Settlement

Vestron, Inc., Hemdale Film Corp., and Home Box Office have settled a lengthy dispute (see ELR; 9:5:19) over the home video rights to the films "Platoon" and "Hoosiers."

The parties agreed that HBO Video would release "Platoon" in late January 1988; HBO also will resume its interrupted distribution of "Hoosiers."

Vestron, in return for settling its federal action against Hemdale and Home Box Office, has been paid $15.7 million and has been granted home video rights to the Hemdale film "Best Seller." In addition, beginning

September 1, 1988, Vestron will regain, for a ten year term, the distribution rights, on a royalty-free basis, to the videos of "Platoon" and "Hoosiers." [Feb. 1988] [ELR 9:9:20]

Arbitrator restores free agency status of seven major league baseball players

Seven baseball players who were free agents during the winter of 1985-1986 have regained their free agent status pursuant to a ruling issued by arbitrator Tom Roberts. In September 1987, Roberts ruled that the major league baseball club owners had violated the collective bargaining agreement with the Major League Players Association by conspiring to restrict free agent movement after the 1985 season (ELR 9:5:19).

The players, including Kirk Gibson, Tom Brookens, Donnie Moore, Butch Wynegar, Carlton Fisk, Joe Niekro and Juan Beniquez, have until March 1st to sign with any team; if not signed by March 1st, each player can return to his current team under the terms of his existing contract, or he can remain a free agent, thereby voiding the contract. Any team signing one of the seven players would not have to compensate the former team with a player or draft pick. And the granting of free agency does not mean that the seven players will not be entitled to share in any monetary payments ordered by the arbitrator.

The Players Association has announced that it will continue to seek financial compensation for all 62 players who were free agents during the winter of 1985-1986. [Feb. 1988] [ELR 9:9:20]

WASHINGTON MONITOR

Federal Communications Commission reinstates policies favoring ownership of broadcast properties by women and minorities; Commission declines to select standard AM stereo broadcast system

The Federal Communications Commission, in response to a Congressional directive contained in the recent appropriations bill, has reinstated its policies favoring women and minorities in comparative renewal proceedings and in distress sales of broadcast properties. The FCC had suspended its preferential policies in December 1986, pending the consideration of proposals to revise or repeal them.

The Commission also has declined to select a standard AM stereo broadcasting system, or to require manufacturers to produce radios that can pick up multiple types of AM stereo signals, thereby leaving to market forces the future development of AM stereo broadcasting. [Feb. 1988] [ELR 9:9:21]

House of Representatives defeats attempt to codify fairness doctrine

The House of Representatives has voted to delete from a recent appropriations bill a provision codifying the Federal Communications Commission's fairness doctrine. In the summer of 1987, President Reagan vetoed a bill that would have legalized the doctrine (ELR 9:3:21), stating that "In any other medium besides broadcasting, such federal policing of the editorial judgment of journalists would be unthinkable." [Feb. 1988] [ELR 9:9:21]

Congress forbids Federal Communications Commission newspaper-television station cross-ownership ban

The Federal Communications Commission may not alter its ban on broadcast-newspaper cross-ownership by a single entity, according to legislation recently passed by Congress, and may not extend any temporary waivers granted to owners of media properties. The affirmation of the crossownership ban appeared as a last-minute change in a spending provision allocating funds to the Commission.

As a result of the legislation, publisher Rupert Murdoch may have to divest himself either of his newspapers or his television stations in New York and Boston. Murdoch had obtained a two year waiver of cross-ownership rules in order to operate the New York Post and WNEW-TV; the waiver will expire in March 1988.

And Murdoch's waiver with respect to operating the Boston Herald and WFXT-TV will expire in June 1988.

In mid-January, 1988, the FCC denied Murdoch's petition seeking to extend the waivers previously granted him pending a Commission ruling on a petition (filed by the Freedom of Expression Foundation) seeking to repeal the cross-ownership rules. [Feb. 1988] [ELR 9:9:21]

DEPARTMENTS

In the Law Reviews:

New York's Treatment of Attorney Advertising: Greater First Amendment Freedoms, But at What Cost?, 51 Albany Law Review 51 (1986)

Falwell v. Flynt: Lampooning or Liability: The Realization of a Three-Pronged Tort Approach for Establishing Media Liability Defamation by Christopher C. Patterson, 21 Akron Law Review 113 (1987)

Tying the Victim's Hands: Curbing Citizen Group Abuse of the Broadcast Licensing Process by Jared L. Burden, 39 Federal Communications Law Journal 259 (1987)(UCLA School of Law, 405 Hilgard, Los Angeles, CA 90024)

The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976, 62 New York University Law Review 373 (1987)

Foundations and Limits of Freedom of the Press by Judith Lichtenberg, 16 Philosophy and Public Affairs 329

(1987) (published by Philosophy and Public Affairs, 3175 Princeton Pike, Lawrenceville, NJ 08648)

Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising by Steve Younger, 34 UCLA Law Review 1139 (1987)

Feminism, Pornography, and the First Amendment: An Obscenity-Based Analysis of Proposed Antipornography Laws by Edward A. Carr, 34 UCLA Law Review 1265 (1987)

Matchpoint: Agents, Antitrust, and Tennis by Jon S. Hainline, 64 University of Detroit Law Review 481 (1987)

Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes by Steven

D. Stark, 42 University of Miami Law Review 229 (1987)

Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up in Smoke by Jef 1. Richards, 19 Pacific Law Journal 1 (1987)

Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption by David E. Shipley, 29 Arizona Law Review 475 (1987)

One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement, 53 Brooklyn Law Review 379 (1987)

The Bankruptcy Code, the Copyright Act, and Transactions in Computer Software by Thomas M. S. Hemnes and Susan Barbieri Montgomery, 7 Computer/Law Journal 327 (1987) (published by Computer Law Journal, 1112 Ocean Dr. 101, Manhattan Beach, CA 90266)

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law by Don Lewis, 20 Indiana Law Review 767 (1987)

The Artist Alone: Work-Related, Human, and Social Service Needs-Selected Findings by Joan Jeffri, Joseph Hosie, and Robert Greenblatt, 17 Journal of Arts Management & Law 4 (1987) (published by Journal of Arts Management & Law, 4000 Albemarle St. N.W., Washington, D.C. 20016)

Work for Hire: A Judicial Quagmire and a Legislative Solution by Charles D. Ossola, 17 Journal of Arts Management & Law 23 (1987) (for address, see above)

Colorization: The Arguments For by Roger L. Mayer, Rob Word, and Buddy Young, 17 Journal of Arts Management & Law 64 (1987) (for address, see above)

Colorization: The Arguments Against by Woody Allen, Milos Forman, Sydney Pollack, Ginger Rogers, and Elliot Silverstein, 17 Journal of Arts Management & Law 79 (1987) (for address, see above)

The Piracy of Subscription TV-A Marketplace Solution to the Unauthorized Interception of MDS Transmissions by Steven DeBaun, 34 UCLA Law Review 445 (1986)

The Magic Kingdom of Will-Bumping: "Where Estates Law and Copyright Law Collide-Part 2 by Francis M. Nevins, Jr., 9 European Intellectual Property Review 330 (1987) (ESC Publishing Limited, Mill Street, Oxford OX2 OJU)
[ELR 9:9:23]