RECENT CASES

United States Supreme Court reverses decision upholding jury award of $200,000 in damages to Reverend Jerry Falwell for emotional distress allegedly caused by parody advertisement in Hustler Magazine

The United States Supreme Court, in an 8-0 ruling, has found that the Reverend Jerry Falwell was not entitled to recover $200,000 awarded him by a Federal District Court jury for intentional infliction of emotional distress allegedly caused by the publication of a parody advertisement in Hustler Magazine.

Chief Justice Rehnquist noted that the November 1983 issue of Hustler featured, on its inside front cover, a "parody" of an advertisement for Campari Liquor. The ad, entitled "Jerry Falwell talks about his first time," included Falwell's name and picture and an "interview" in which Falwell purportedly stated that his "first time" was, as described by Justice Rehnquist, during "a drunken incestuous rendezvous with his mother in an outhouse." The magazine printed a disclaimer in small print at the bottom of the page stating "ad parody - not to be taken seriously," and the table of contents listed the ad as "Fiction; Ad and Personality Parody."

Falwell sued Hustler and its publisher Larry Flynt seeking damages for libel, invasion of privacy and intentional infliction of emotional distress. Hustler obtained a directed verdict on the invasion of privacy cause of action. The jury rejected Falwell's libel claim, but awarded him $100,000 in compensatory damages and $100,000 in punitive damages on the claim for intentional infliction of emotional distress.

A Federal Court of Appeals affirmed the judgment, and denied Flynt's petition for a rehearing en bank (ELR 9:1:15; 6:9:20).

Justice Rehnquist first stated that the standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), would serve to provide the "breathing space" required for speech concerning public figures by allowing such individuals to recover for libel or defamation "only when they can prove both (emphasis by the court) that the statement was false and that the statement was made with the requisite level of culpability."

Falwell had argued that a state's interest in preventing the emotional distress suffered by a person who is the subject of an offensive publication did not require a determination of whether the "outrageous" statement was a fact or an opinion, or whether it was true or false.

Justice Rehnquist rejected this view, stating that "in the area of public debate about public figures," the First

Amendment prohibits considering a speaker's intent to inflict emotional distress. It was observed that "from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate." The Hustler parody might not be closely related to the political cartoons of Thomas Nast and others. But the outrageousness" of the piece did not provide a standard which would avoid the possibility of having a jury impermissibly impose liability on the basis of the jurors' tastes or views, or on the basis of their dislike of a particular expression.

The Hustler parody advertisement was not governed by any exception to First Amendment principles, such as those for obscene speech or "fighting words," stated Justice Rehnquist. It therefore was held that public figures and public officials may not recover for the tort of intentional infliction of emotional distress against publishers of material such as the parody at issue unless they show that the publication contains a false statement of fact which was made with "actual malice," i.e. with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The jury's conclusion that Hustler engaged in outrageous conduct could not be the basis for an award of damages in this case, and the judgment of the Court of Appeals was reversed.

Justice White, in a concurring opinion, stated that the decision in New York Times v. Sullivan had "little to do" with this case since the jury found that the parody advertisement contained no assertion of fact. But Justice White agreed that the First Amendment required the reversal of the Court of Appeals judgment because penalizing the publication of the parody violated the First Amendment.

Hustler Magazine v. Falwell, Case No.86-1278 (U.S.Sup.Ct., Feb. 24, 1988) [ELR 9:10:3]

Federal District Court in California refuses to enjoin publication of "The Blue Bicycle" during pendency of action alleging that the novel infringed "Gone With The Wind"

A Federal District Court in California has refused to grant preliminary injunctive relief to Trust Company Bank, the trustee acting on behalf of the owners of the renewal copyright in Margaret Mitchell's novel "Gone With The Wind," in a copyright infringement action against The Putnam Publishing Group and other publishing parties.

Trust Company Bank claimed that the novel "The Blue Bicycle," written by Regine DeForges and first published in France in 1981, was a "remake" of Gone With The Wind. The trustee claimed that The Blue Bicycle transposed the characters and events of the Mitchell novel from Georgia during the Civil War to France during World War 11. DeForges' work was published in a hardcover English language version by Lyle Stuart, Inc. in May or June of 1986. Berkley Publishing Corp., a wholly-owned subsidiary of The Putnam Publishing Group, acquired the soft-cover rights to the work, and scheduled a December 1987 publication date.

Judge Alicemarie H. Stotler determined that Trust Company Bank and Macmillan, Inc., the exclusive licensee of the worldwide English language publication rights in Gone With The Wind, did not establish a strong likelihood that they would prevail on the merits of their claim, or that the continued distribution of The Blue Bicycle would cause them irreparable harm. In Findings of Fact and Conclusions of Law, Judge Stotler first noted that a remake or adaptation of an earlier work does not necessarily infringe that work, and that a court still must review the alleged similarities between the works.

The trustee was likely to prevail on the "extrinsic" test aspect of substantial similarity, stated Judge Stotler, i.e., a trier of fact would be likely to find that the general ideas of Gone With The Wind and The Blue Bicycle were substantially similar.

However, with respect to the substantial similarity of underlying protectible expression, (the "intrinsic" or "audience" test) Judge Stotler declared that Trust Company Bank did not establish a strong likelihood that it would prevail. The books were set in different eras and locations. And, although there were "similarities and parallels" between the major characters in the works and in the interrelationships between the characters, significant differences also were present, leading the court to conclude that the "total concept and feel" of the two works was not substantially similar, and that the ultimate trier of fact would not likely find substantial similarity of protectible expression.

Even if a likelihood of infringement had been shown, the court concluded that any presumption of irreparable harm was rebutted by The Blue Bicycle parties. Trust Company Bank and Macmillan allowed a "lengthy delay" prior to seeking injunctive relief after they first learned of the DeForges work in November 1984. Furthermore, stated Judge Stotler, the only potential harm from the continued distribution of The Blue Bicycle might be that readers would purchase the work instead of Gone With The Wind; monetary damages would adequately compensate for any such harm.

It also was found that the balance of hardships in the case tilted "heavily" in favor of The Blue Bicycle parties, particularly Berkley in view of the company's $200,000 investment in the novel, projected sales of over $300,000, and potential loss of book store shelf space and goodwill among wholesalers and retailers. Judge Stotler, in refusing to enjoin, during the pendency of the action, all promotion, distribution and sale of The Blue Bicycle, or to issue a writ of seizure as to all copies of the work, concluded that enjoining the publication of The Blue Bicycle would not serve the public interest, and that the delay by Macmillan and the trust company in bringing a lawsuit barred preliminary injunctive relief.

Trust Company Bank v. The Putnam Publishing Group, Inc., Case No. CV87 07393 (C.D.Ca., Jan. 4, 1988) [ELR 9:10:3]

Idea of featuring black family in television series was not sufficiently novel to support NBC employees claims against network with respect to "The Cosby Show"

In October 1987, the Entertainment Law Reporter (9:5:3) published a commentary by Alan J. Hartnick about a lawsuit in which Hwesu S. Murray claimed that the National Broadcasting Company, Brandon Tartikoff, President of NBC Entertainment, The Carsey-Werner Co., and Marcia Carsey and Thomas Werner based the television series "The Cosby Show" on an idea that Murray submitted to NBC.

Federal District Court Judge Miriam Goldman Cedarbaum's decision granting the NBC parties' motion for summary judgment now has been published. (Murray stipulated to the dismissal of his claims against the Carsey-Werner parties.)

Briefly, in 1980, Murray, an NBC employee, submitted several proposals for television programs to NBC executives. One of the proposals, entitled "Father's Day," involved a program about a black middle-class family; Murray suggested that Bill Cosby play the part of the father, and that Diahann Carroll play the part of Cosby's wife. NBC rejected all of Murray's proposals.

In 1984, NBC began broadcasting "The Cosby Show," a weekly comedy series featuring an upper-middle class black family in which Bill Cosby plays the part of the father.

Murray's action against NBC raised claims of race discrimination, false designation of origin under the Lanham Act, misappropriation and conversion, breach of implied contract, unjust enrichment and fraud.

Judge Cedarbaum, assuming for purposes of the motion for summary judgment that NBC used Murray's idea, determined that portraying a black family was not a sufficiently novel idea to support a claim for its unlawful use. Murray's proposal combined the standard family situation comedy with the casting of black actors in nonstereotypical roles, a casting practice already met by the networks "to a limited extent," according to the court. And a finding of novelty also was precluded because The Cosby Show was closely related to television programs with which Bill Cosby had been associated in the past. In 1965, Cosby himself expressed an interest in developing a television series about a middle-class black family, noted Judge Cedarbaum, who also observed that "in virtually every project in which Cosby has been involved, he has applied the ideas of black family and nonstereotypical black characters."

The court's finding that Murray's idea lacked novelty meant that the idea did not constitute property; recovery therefore was unavailable for the alleged unlawful use of the idea, and NBC was entitled to summary judgment, concluded the court.

Murray v. National Broadcasting Company, Inc., 671 F.Supp. 236 (S.D.N.Y. 1987) [ELR 9:10:4]

Johnny Carson and NBC obtain dismissal of action filed by dentist in connection with entertainer's statements during "The Tonight Show" about the dental profession

The wide-open issue of the balance between Johnny Carson's free speech rights versus dentist Michael Mendelson's interest in his good name recently arose in a New York trial court.

In a "Tonight Show" program broadcast in early 1986, Carson commented on a news report indicating that dentists were losing business due to technical improvements and the use of fluoride. Carson stated: "I haven't been so happy about a group disbanding since the Gestapo."

Mendelson wrote a letter expressing his dismay over the comparison between dentists and the Gestapo, and demanded a "smirk free public apology."

During the April 18, 1986 Tonight Show program, Carson read Mendelson's letter, and, in response to the concerns raised therein, announced that he did not mean to compare dentists as individuals to the Gestapo, but rather to convey the apprehension often associated with the dental appointment. Carson then delivered a rather caustic monologue about certain aspects of the profession of dentistry; the entertainer's closing remark was "So, lighten up, Michael Mendelson, D.D.S."

Mendelson, refusing to be brushed off, sued Carson, Carson Tonight, Inc. and the National Broadcasting

Company for libel, intentional infliction of emotional distress, and for violating sections 50151 of the New York Civil Rights Law. The dentist alleged that the entertainer's statements and the context of the sequence, including the fact that a sign reading "Michael Mendelson, D.D.S." was displayed behind Carson during the routine, served to constitute a personal attack.

Judge McCooe stated that in viewing the videotape as a whole, it could not be said as a matter of law that the dentist sequence was not "of and concerning" Mendelson. However, the complained-of statements (apparently the entire dentist sequence) were not reasonably susceptible of a defamatory meaning, declared the court. First, to the extent that the dentist sequence reflected Carson's belief that Mendelson might be taking the statements about dentistry too seriously, the entertainer was expressing an opinion that was not actionable.

The court, however, pointed out that "humor and comedy ... are not synonymous with opinion ... and as such they are not subject to the blanket First Amendment protections granted opinions. . ." In evaluating the key factor of whether Carson's remarks gave rise to an impression that they were true, Judge McCooe observed that the dentist sequence was a humor segment which was part of "a larger comedic entertainment that for the past twenty five years has nightly included commentary, containing irony, satire, exaggeration, rhetoric hyperbole on contemporary events and day to day concerns." Carson instructed the audience not to take the remarks seriously, and his "outlandish observations and exaggerations" were not viewed by the court as reflecting anything more than a "fanciful, if somewhat unflattering" view of the work of dentists.

As in Frank v. National Broadcasting Co., Inc. (ELR 8:8:8), involving the Saturday Night Live "Fast Frank" skit on accountants, and in Polygram Records v. Superior Court (ELR 8:4:14), involving Robin Williams' tales of wine snobbery, the context in the instant case was "broadly comedic." Carson's remarks were "devoid of serious meaning or intent," and it was impossible, stated Judge McCooe, for the remarks to be reasonably construed otherwise.

The court therefore dismissed the cause of action for defamation, and found that a separate claim for intentional infliction of emotional distress was not available to Mendelson for "if the words spoken are protected speech then the rights under the First Amendment cannot be subverted by allowing an action for intentional infliction of emotional distress." The cause of action under New York's Civil Rights Law also was dismissed because Mendelson's name was not used for advertising or trade purposes.

Mendelson v. Carson, New York Law Journal, p. 13, col. 1 (N.Y.Cnty., Feb. 4, 1988) [ELR 9:10:5]

Robert Craft obtains preliminary injunction to prevent publication of biography of Igor Stravinsky

Robert Craft, the longtime associate of the late composer Igor Stravinsky, has obtained a preliminary injunction barring Macmillan, Inc. from distributing John Kobler's as yet unpublished work "Firebird, A Biography of Igor Stravinsky."

Craft was the author or co-author of about fifteen books on Stravinsky, including several "conversation" books containing Craft's interviews with the composer, and an annotated three-volume set of Stravinsky's correspondence. Stravinsky willed to Craft his own copyright in the books in which the composer possessed a copyright interest. Craft's lawsuit alleging that Kobler's use of material from various Craft-Stravinsky works constituted copyright infringement, was brought, according to Federal District Court Judge Pierre Leval, primarily to protect the Stravinsky copyright interest which Craft inherited; to a lesser extent, the lawsuit also involved Craft-written material.

After conducting a word-for-word and contextual comparison of 167 instances of alleged infringement, Judge Leval first noted that Kobler's use of historical information derived from the Craft-Stravinsky literature did not constitute infringement, nor did the taking of unprotected ideas or quotes of third persons. With respect to the remaining passages, the court found infringement by quotation or paraphrase in 89 instances where Craft's ownership of the copyright was conceded. Craft also was entitled to claim possession of a copyright interest in certain translations of letters written in Russian by

Stravinsky and others, stated Judge Leval, either because Craft engaged in original authorship in reworking earlier translations from Russian done by others or because the translators hired by Craft were performing "work for hire."

Judge Leval then rejected Kobler's claim that his taking of material from the Craft-Stravinsky literature was fair use. Although in certain instances, Kobler properly quoted a reasonable amount of copyrighted material to support an instructive purpose, the court declared that "few of Kobler's quotations of Stravinsky advance such persuasive claims of a fair use purpose. More common are takings of Stravinsky's radiant, startingly expressive phrases to make a richer, better portrait of Stravinsky, and to make better reading than a drab paraphrase reduced to bare facts" Thus, while the biographer of an author may quote limited excerpts of published, copyrighted work "to illustrate the descriptive skill, wit, power, vividness, and originality of the author's writing," it was found that Kobler's takings were too numerous and had too little instructional justification to support a conclusion of fair use. The appropriations, by a conservative count, amounted to about three percent of the volume of Kobler's book, and "the importance of these passages to the book far exceeds that percentage," observed the court, commenting that "Kobler might agree that they are the liveliest and most entertaining part of the biography."

The remaining fair use factors - the nature of the copyrighted work and the effect of the alleged infringer's use upon the potential market for or value of the copyrighted work - also were found to favor Craft. And the books might be in potential competition, stated the court, for although several of Craft's book were out of print, there existed the possibility of reissues upon increased public interest in Stravinsky.

In all, concluded Judge Leval, "Firebird's" appropriations of copyrighted material were "too extensive and important, and their justification too slight to support an overall claim of fair use," and Craft was entitled to a preliminary injunction.

Craft v. Kobler, 667 F.Supp. 120 (S.D.N.Y. 1987) [ELR 9:10:5]

Archbishop Paul Marcinkus may proceed with action under New York Civil Rights Law arising from the use of his name in the novel "In the Name of the Father," but New York trial court refuses to recall copies or restrain sales of the book

"In the Name of the Father," a fictional account of a plan by three Vatican officials to assassinate the late

Soviet leader Yuri V. Andropov in order to prevent further attempts on the Pope's life, used the name Archbishop Paul Marcinkus for one of the three officials. Archbishop Marcinkus actually is an American-born church authority who has headed the Vatican Bank, and who reportedly has been questioned by Italian officials about the 1982 collapse of the Milan-based Banco Ambrosiano.

The Archbishop, claiming a violation of his rights under sections 50 and 51 of New York's Civil Rights Law, sought to restrain New American Library Publishing, Inc. and Doubleday & Co. from using his name, office, and background for any purpose in connection with the novel written by A.J. Quinnel (a pseudonym), and to recall all copies of the book.

A New York trial court, although denying the publishers' motion to dismiss the Archbishop's complaint, has refused to grant the requested preliminary injunctive relief.

Judge Ethel Danzig noted that although the novel contained a disclaimer stating that the actions and motivations of the characters named after real people were "entirely fictitious and should not be considered real or factual"; the author concededly included the names and identities of such individuals in order to provide "a sense of historical accuracy." The court declined to find, as a matter of law, that readers of the book would have no basis for believing that the work was "anything but fiction," and that there was no connection between the character in the book and Archbishop Marcinkus.

The court also refused to find that the use of the Archbishop's name in the book, on its cover, and in advertising did not violate sections 50/51. Even if the underlying use of the Archbishop's name did not violate the statute, the prominent placement of the name in advertising and in the book's inside dust jacket served to raise questions concerning the commercial appropriation of the Archbishop's name.

In denying injunctive relief, Judge Danzig noted that the Archbishop had not yet established a violation of the Civil Rights Law and had not shown a clear right to the relief sought, or a balancing of the equities in his favor.

Archbishop Paul Marcinkus v. NAL Publishing, Inc., N.Y. Law Journal, p. 14, col.4 (N.Y.Cnty., Dec. 10, 1987) [ELR 9:10:6]

Publishers are granted summary judgment in libel action involving the nonfiction book "The Vatican Connection"

In "The Vatican Connection," author Richard Hammer described a plot whereby a Vatican bank purchased counterfeit securities from organized crime. The 1982 nonfiction book referred to a Louis Milo as the owner of a printing plant on Avenue A; Milo purportedly participated in duplicating the securities certificates. Subsequently, the book noted that "a man named Louis Milo had been found murdered in the trunk of his car... Milo was the New York printer who had turned out the counterfeit bonds for the Vatican ... But Milo had been murdered because of money he owed and because of his links to a pornography ring."

Frank Milo, the owner of a printing business located at East Twelfth Street and Avenue A in Manhattan, filed a $10 million libel action against Hammer, publishers CBS and Holt, Rinehart & Winston, and retired police officer Joseph J. Coffey Jr. of the New York City Police

Department, whose recollections provided the basis for the book.

New York State Supreme Court Judge David H. Edwards first noted that an individual named Louis Milo had operated Milo Graphics on East Sixteenth Street in Manhattan; this Louis Milo, who was indicted for counterfeiting and was found murdered in 1979, probably was the Milo to whom the book referred, stated Judge Edwards.

The court found that "The Vatican Connection" arguably was within the sphere of legitimate public concern. Furthermore, CBS relied upon the integrity of a reputable author who had worked for Time and previously wrote six non-fiction books; the publisher had no substantial reason to question the accuracy of the information provided. CBS and Holt, Rinehart & Winston's motion for summary judgment was granted accordingly. It was also found that, as a matter of law, the book was not of and concerning Frank Milo. And there was no evidence that either Hammer or retired Detective Coffey acted in a grossly irresponsible manner, concluded the court.

Milo v. CBS, Inc., New York Law Journal, p. 12, col. 4 (N.Y.Cnty., Sept. 25, 1987) [ELR 9:10:6]

Libel action brought by sports agent in connection with football team coach's statement referring to "sleazebag agent" is dismissed upon finding that statement was expression of opinion protected by First Amendment

When Darrel "Mouse" Davis, the coach of the Denver Gold professional football team, called J. Harrison Henderson 111, a "sleazebag agent" who "slimed up from the bayou. . . " Henderson, an agent for professional football players, sued Davis and two newspaper companies whose papers published Davis' remarks, for libel and slander, disparagement, and intentional interference with contractual relations.

Federal District Court Judge Carrigan noted that "while it can be agreed generally that the terms 'sleazebag' and 'slime' do not rank as descriptive words one would prefer to have in letters of recommendation, their meanings in the context of Davis' comments is so imprecise that they cannot be considered as asserting facts." The mere absence of complimentary affect does not make a statement defamatory and, according to Judge Carrigan, nor does the mere description of one's means of locomotion as "sliming" rise to the legal status of slander. The court also found that Davis' statement was so incapable of factual proof or disproof that it could not be defamatory; that the statement was published in sports columns generally devoted to the comments of opinions of public figures concerning a current event in sports; and that the broader context of the statement was a recruiting dispute "in the rough and rowdy world of professional football."

In all, Davis' statement was found to be an expression of opinion protected by the First Amendment, and the claim for defamation was dismissed accordingly, as were Henderson's remaining claims.

Henderson v. Times Mirror Company, 669 F.Supp. 356 (D.Colo. 1987) [ELR 9:10:7]

Publishers of Sydney Barrows' autobiography obtain dismissal of libel claim

Sydney Barrows' purportedly autobiographical account of her experiences as a "madam" of a call girl enterprise included a description of Barrows' prior employment as an accessories buyer in a small company referred to, in the book as The Cutting Edge. According to Barrows, her superior, a general merchandise manager named "Carmela," required her to order a line of substandard merchandise from a certain vendor; Barrows stated that she concluded that the supervisor was receiving a "kick back."

Barrows apparently actually worked for a time in a company called Young Innovators, Inc. An individual named Londers, the general merchandise manager of Young Innovators, sued Barrows, Arbor House Publishing Company, and Ballantine Books, Inc. for libel.

In granting the publishers' motion to dismiss the complaint for failure to state a cause of action, New York trial court Judge Santaella noted that Londers did not challenge the publishers' allegations that Londers was not a "tall, thin redhead" as the character in the book was described, and that the company named The Cutting Edge was a fictional entity. The "of and concerning" aspect of the libel claim thus was "remote," stated the court.

Furthermore, the complaint alleged no facts from which libel per se could be reasonably concluded. Londers' failure to show special damages therefore required the dismissal of the complaint.

Londers v. Barrows, New York Law Journal, p.7, col. 3 (N.Y.Cnty., Feb. 19, 1988) [ELR 9:10:7]

Author of "Murrow" was entitled to terminate publication contract upon publisher's failure to pay royalties

Ann Sperber, the author of the book "Murrow," was entitled to summary judgment with respect to both her royalty claim against Lawrence Freundlich Publishers and her cause of action seeking to terminate a 1983 publishing contract with Freundlich, a New York trial court has ruled.

The publisher, citing book returns by customers, argued that the royalties due Sperber amounted only to about $97,500, rather than $109,000 claimed by the author. And Freundlich contended that termination was unavailable as a remedy because the publisher had substantially performed its obligations.

Judge McCooe noted that the amount of royalties in question was at least two-thirds of the total royalties earned by Sperber from the publication and sublicensing of "Murrow" Freundlich fundamentally breached its royalty obligation, stated the court, in directing an assessment of the damages due Sperber, for the "mere publication of the book is no defense when the mutual financial benefit of publisher and author which was the purpose of the agreement ... was frustrated."

Furthermore, Freundlich's failure to set aside funds for the payment of Sperber's royalties during late 1986 when the company received large revenues from the sales of "Murrow" constituted willful conduct. The publication contract between the parties was validly terminated by Sperber, effective May 4, 1987, concluded Judge McCooe, and Freundlich was required to render an accounting of all proceeds from the book received after that date.

Sperber v. Lawrence Freundlich Publishers, 14 Med.L.Rptr. 1798 (N.Y.Cnty. 1987) [ELR 9:10:7]

Author was entitled to proceed with breach of contract action against Random House pursuant to book packager's assignment of rights under publishing contract

A New York trial court has denied Random House's motion for summary judgment in a breach of contract action brought by author Milton Machlin. In 1980, Machlin entered into a contract with Book Creations, Inc., a book packager, whereby Machlin agreed to write books for the packager. Book Creations was to retain the copyrights in the works created by Machlin during the seven year term of the contract, and was entitled to negotiate all contracts on behalf of the author.

In 1981, Book Creations entered into a contract with Random House for the publication of two of Machlin's novels "Worldshakers" and "Strangers in the Land." Random House agreed to treat each of the works written under the contract as a lead book in the month of its publication.

Machlin claimed that Random House did not promote his novels, and that his books "were doomed to commercial failure." The author settled his claims against Book Creations in 1985. As part of the settlement, Book Creations assigned to Machlin all of the packager's rights and claims against Random House arising out of the Book CreationsRandom House contract.

The court agreed with Random House that Machlin did not have standing to sue as a third party beneficiary of the Book Creations-Random House contract. However, a provision in the publishing contract proscribing an assignment absent written consent by the parties did not "explicitly render an assignment without written consent a nullity." Therefore, the assignment to Machlin of Book Creations' rights and claims under its contract with Random House was valid. And a triable issue of fact was present concerning Random House's claim that Book Creations had waived its right to sue for breach of contract in exchange for certain increased promotional efforts in connection with the publication of "Strangers in the Land."

Machlin v. Random House, Inc., New York Law Journal, p.12, col.2 (N.Y.Cnty., Nov. 17, 1987) [ELR 9:10:8]

Johnny Unitas was not liable for fraud based on appearances in radio spots for bankrupt investment company because the former athlete made no representations, false or otherwise, upon which investors in company relied

In late 1979, former Baltimore Colts quarterback Johnny Unitas agreed to act as a spokesman for First Fidelity Financial Services, Inc., a Florida mortgage/investment broker. In certain radio spots, Unitas introduced his "friends at First Fidelity"; a company representative then provided information about the broker's services. First Fidelity also distributed newspaper advertisements and brochures containing information about the company-this material featured Unitas' picture and purported signature, but Unitas apparently did not see or approve the printed material.

First Fidelity soon filed for bankruptcy; some of the company's disappointed investors sued Unitas and the agency that developed the radio spots, alleging, in part, common law fraud.

A Federal District Court granted the Unitas parties' motion for summary judgment, stating that the parties did not make any false representations regarding First

Fidelity's investment offerings upon which the investors relied.

A Federal Court of Appeals has upheld the District Court's decision. Judge Edmondson pointed out that Unitas did not endorse a product, but merely introduced First Fidelity and suggested that the audience call for more information. According to District Court records, there was no "representation," false or otherwise, to support the investors' fraud claims.

Kramer v. Unitas, 831 F.2d 994 (11th Cir. 1987) [ELR 9:10:8]

Five Platters, Inc. was not entitled to prevent Paul Robi, one of the original members of The Platters musical group, from using the group name, rules Federal Court of Appeals, but Tony William, another original group member, was precluded by prior litigation from pursuing claims against the corporation

A Federal Court of Appeals has upheld performer Paul Robi's right to use the name "The Platters" in connection with musical entertainment services, but has reversed a Federal District Court decision granting summary judgment to performer Tony Williams in his action against Five Platters, Inc.

As described by Judge David R. Thompson, the five-member singing group known as The Platters performed together on television and in concert from 1954 to 1960, and achieved twelve gold records. In 1956, "The Five

Platters, Inc" was incorporated. The original members of the group, including Paul Robi and Tony Williams, entered employment contracts with the corporation. The various Platters also assigned to the corporation their rights in the group name in exchange for shares of stock. In the 1960s, all of the original Platters sold their shares of stock to the group's manager and musical director, Buck Ram.

In the early 1970s, the corporation sought to prevent Robi, who had left the original group and was performing with other artists, from presenting his group as "The Platters" In 1974, a California trial court granted judgment in favor of Robi on the ground that the corporation "was a sham used by Mr. Ram to obtain ownership of the name 'Platters;' that Ram benefitted from an unequal bargaining position between the parties and was guilty of laches and unclean hands; and that the corporation's issuance of stock to the original Platters was 'illegal and void' because the stock was issued in violation of California's corporate securities law."

Before the California trial court entered its judgment, Tony Williams petitioned the Trademark Trial and Appeal Board to cancel the corporation's registration of the service mark, "The Platters" Williams' petition was rejected when he failed to respond to the corporation's motion for summary judgment; a subsequent motion to vacate the Board's decision was denied and the denial was upheld by the Court of Customs and Patent Appeals.

In 1982, a New York trial court ruled on behalf of the corporation in an action against Williams. The court determined that Williams breached the 1967 contract pursuant to which he had sold all of his stock in the corporation for a payment of about $15,000. Under the contract, Williams agreed to refrain from using the name The Platters. The court permanently enjoined Williams from using the group name except to refer to the singer's previous status as one of its members.

When Robi and Williams, in separate actions, sued Five Platters, Inc. in a Federal District Court in California, the court, on the basis of the preclusive effect of the 1974 California trial court judgment, granted Robi's application for a preliminary injunction to prevent the corporation from interfering with his use of the name The Platters, and dismissed the corporation's complaint against Robi for alleged trademark infringement and unfair competition.

Judge Thompson found that the 1974 California Superior Court judgment was on the merits, final, and involved the same claim as the claim before the court. The corporation argued that the California trial court decision involved an interpretation of the contract between Robi and the corporation by which Robi allegedly transferred all of his rights in the name The Platters, but that the claim before the District Court concerned the corporation's trademark rights.

Judge Thompson declared that in the instant action the corporation was asserting the same right as it asserted in the 1974 case - the claim to the exclusive use of the name The Platters as against Robi - and that the District Court correctly found that the 1974 judgment precluded the corporation's action.

With respect to Williams' action seeking declaratory relief, Judge Thompson looked to New York law to determine the res judicata effect of the New York judgment against Williams. The court found that the dispute between Williams and the corporation over the name The Platters was a single cause of action for purposes of claim preclusion under New York law, and that the New York judgment therefore was claim preclusive against Williams. However, the District Court had found that its decision in the Robi case (issued about seven months before its decision in Williams' action) as well as the 1974 trial court judgment, generated "issue preclusion" against the corporation on the question of the corporation's right to use the name The Platters.

Notwithstanding the issue preclusive effect of the California rulings, Judge Thompson found that because the New York judgment was later in time than the 1974 trial court ruling and because the New York judgment was claim preclusive against Williams, the District Court was required to abide by the claim preclusive effect of the New York judgment. It was noted that the District Court could not have considered the preclusive effect of the New York judgment against Williams when it decided the Robi cases for Robi was not a party to the New York litigation between the corporation and Williams. Furthermore, the corporation succeeded in the New York case, and the case was the last in time in which both Williams and the corporation were parties.

Judge Thompson stated that there was "no rational reason" to permit Williams to avoid the claim preclusive effect of the New York judgment by trying "to draw issue preclusion from a subsequent case in which he was not involved," and held that the District Court erred in allowing Williams to rely upon the Robi rulings in the face of the claim preclusive effect of the New York judgment against Williams.

The court therefore affirmed the District Court's order granting a preliminary injunction in favor of Robi and dismissing the corporation's complaint against him, but reversed the ruling granting summary judgment in favor of Williams and remanded the matter to the District Court with instructions to enter summary judgment in favor of Five Platters, Inc.

It should be noted that in a separate proceeding in July 1987, a New York trial court had refused to grant Five Platters, Inc.'s motion seeking to have Williams held in civil contempt for allegedly refusing to obey the 1982 judgment of the court.

While declining to vacate the 1982 judgment, Judge Schackman observed that the corporation did not act expeditiously in seeking relief against Williams' use of the name "The Platters" in the club appearance at issue. Furthermore, in view of "the unique and tortured history of this action and the related actions, and of the existence of subsequent inconsistent Court determinations on the underlying issue of [the corporation's] right to use the subject trademark or tradename," it did not appear to Judge Schackman that Williams' alleged use of the group name was a willful violation of the 1982 judgment. Judge Schackman concluded that given the California federal and state court findings and all of the facts and circumstances before the court, it was "inappropriate" to enforce the corporation's purported claim of ownership of the subject trademark/tradename.

Robi v. Five Platters, Inc., Case Nos.85-6061; 85-6062; 87-5514 (9th Cir., Jan. 27, 1988); The Five Platters, Inc. v. Williams, New York Law Journal, p. 6, col.3 (N.Y.Cnty., July 6, 1987) [ELR 9:10:8]

Manager of "The Drifters" obtains injunction barring former member of the singing group from performing under the group's name

Larry Marshak, the manager of a musical group known as "The Drifters," and the owner of a registered service mark in the group name, was entitled to restrain Rick Sheppard from performing under the name "Rick Sheppard and The Drifters,"a Federal District Court in New York has ruled.

The Drifters singing group first appeared in 1953. Between 1953 and 1976, at least twenty different individuals appeared as members of the group. In 1958, the group's manager, George Treadwell, hired Dock Green, Elsbeary Hobbs, and Charles Thomas to join The Drifters. It was during the early 1960s, when Green, Hobbs, and Thomas were in the group, that several of the most popular Drifters songs were recorded, including "There Goes My Baby," "Save the Last Dance for Me," "Some Kind of Wonderful," "Up on the Roof," "On Broadway," and "Under the Boardwalk."

In 1969, Green, Hobbs, and Thomas reunited to perform in revival shows as "The Drifters." Larry Marshak soon became the manager of the group, and by the mid-1970s, according to a producer of musical revival shows, when those in the music industry referred to The Drifters, it was Marshak's group that was being designated, rather than a group also known as The Drifters which was managed, after George Treadwell's death in 1967, by his widow.

Rick Sheppard performed as a member of The Drifters group managed by the Treadwells from 1966 to 1970. In 1974, after Faye Treadwell had relocated her group in Europe, Sheppard resumed performing in the United States, sometimes billing himself as "Rick Sheppard of The Drifters" or "Rick Sheppard and The Drifters."

In 1981, a Federal District Court (see ELR 3:1:1; 7:4:9) in an action between Marshak and by-now former group member Dock Green, upheld Marshak's rights in the service mark at issue pursuant to a 1976 assignment by Green, Hobbs, and Thomas of all their right, title and interest in and to a service mark application for the entertainment group called The Drifters.

In the instant proceeding brought by Marshak against Sheppard for violating section 1125(a) of the Lanham Act and for engaging in service mark dilution in violation of New York law, Senior Federal District Court Judge Milton Pollack first noted that Marshak's ownership of a trademark for "an entertainment group called 'The Drifters'" was prima facie evidence of the manager's exclusive right to use the registered mark in commerce. Indeed, Marshak had obtained incontestability status for his mark, and also was entitled to the stare decisis effect of the 1981 ruling on his behalf.

Sheppard sought the cancellation of Marshak's service mark on the ground that it was obtained via a knowing and material fraud upon the Patent and Trademark Office. Sheppard alleged that Hobbs, Thomas and Green knew that Mrs. Treadwell was managing another group using the name "The Drifters," and that several other former group members also were performing in groups using the name.

The court pointed out that Mrs. Treadwell's group was performing, for the most part, outside the United States, and that the evidence did not establish willful material misrepresentations in Marshak's assignors' application concerning exclusive use.

Sheppard next argued that Thomas, Hobbs and Green obtained no assignable rights in the group name because the name was not personal to the group members, and because each assignor had signed an employment contract with Treadwell's Drifters in which they waived all such rights. However, even assuming the validity of the employment contracts, Sheppard was not the beneficiary of such contracts, and these arguments thus were found irrelevant.

Judge Pollack then determined that The Drifters mark was entitled to maximum trademark protection, and had not become, as argued by Sheppard, a name describing a certain type of singing group. And the court found, in conducting the "time-tested analysis for likelihood of confusion"; that Marshak had presented substantial evidence of actual confusion between the two performing groups using the name The Drifters; that Sheppard's use of the mark in 1986 was not innocent (he had been sued by Marshak in 1975 and 1978); and that, as was found in Marshak v. Green, the two performing groups were in direct competition.

Sheppard's counterclaims were rejected because the performer did not establish fraud, willfulness or misrepresentation sufficient to warrant the cancellation of the service mark; and because, given the validity of Marshak's trademark, Marshak's actions in suing alleged infringers and otherwise enforcing his trademark did not constitute unfair competition.

Judge Pollack granted Marshak's request for a decree enjoining Sheppard from continuing to perform under the name "The Drifters" or any variant therof, and awarded stipulated damages to Marshak in the amount of $6,465. The court, while awarding Marshak statutory costs, declined to exercise its discretion to award attorneys' fees.

Marshak v. Sheppard, 666 F.Supp. 590 (S.D.N.Y. 1987) [ELR 9:10:10]

Action seeking to prevent prosecution of producer of sexually explicit films under California's pandering and prostitution laws is ordered reinstated by Federal Court of Appeals pending outcome of proceeding before California Supreme Court

The question of whether California's pandering and prostitution statutes may be applied against producers of sexually explicit films should be determined initially by the California Supreme Court, a Federal Court of Appeals has ruled.

Norma Jean Almodovar, a former Los Angeles civilian traffic control officer later convicted of prostitution, and film maker R. N. Bullard sought to prevent the enforcement of the statutes, claiming the violation of their state and federal constitutional rights. Almodovar and Bullard alleged that they were likely to be prosecuted for producing a film explicitly depicting "safe sex" practices.

A Federal District Court abstained from issuing a decision citing a pending case before the California Supreme Court, and dismissed the action.

The Court of Appeals found that the District Court properly abstained, but that it should not have dismissed the action. It was noted that the instant case did not present much danger of First Amendment chill; that the issue raised could be adjudicated in a single state court proceeding; that other parties already were presenting the issue to the California Supreme Court (see People v. Freeman, ELR 8:10:16); and that the statutes in the case were 'susceptible to limiting construction." However, the District Court should have retained jurisdiction pending the state court proceedings in order to allow Almodovar to raise any unsettled federal questions; the matter was remanded accordingly.

Almodovar v. Reiner, 832 F.2d 1138 (9th Cir. 1987) [ELR 9:10:10]

Producers indicted for violating Federal Child Protection Act may present evidence to establish their good faith, reasonable mistake of fact as to Traci Lords' age when they hired the then 16 year old actress to appear in a sexually explicit

Section 2251 (a) of the Federal Child Protection Act makes it unlawful to employ persons under the age of 18 to engage in sexually explicit conduct for the purpose of filming or photography. Producers Ronald Kantor and Rupert MacNee were indicted under the section for employing Traci Lords to star in the sexually explicit film "Those Young Girls;" Lords was 16 years old when she appeared in the film.

Kantor and MacNee argued that the First Amendment required the government to prove that the producers knew the actual age of the underage performer. Federal District Court Judge J. Spencer Letts disagreed, stating that it was sufficient for the government to prove that the producers knew that the "nature and character" of the materials produced were sexually explicit.

However, the statute's proscription of "simulated" sexual conduct, particularly with respect to 16 and 17 years olds, was questioned by the court. Judge Letts pointed out that " major motion pictures intended for mass distribution may call for the simulation of sexual intercourse, by characters portraying older teenagers, in roles which are otherwise not generally considered pornographic... A blanket prohibition which requires that no one under the age of 18 be permitted to perform even the most innocuous physical acts, in simulation, goes well beyond Congress' legitimate interest of protecting children."

The court concluded that the definition of "sexually explicit conduct" in Section 2251 (a) was not suitably limited and described "in that the potential encroachment upon the first amendment [was] not properly directed to the legitimate objectives of protection of children from the abuses of child pornography." Nevertheless, the court, albeit "reluctantly," determined, on the basis of the collective view of the United States Supreme Court as expressed in all of the various opinions in New York v. Ferber, 458 U.S. 747 (ELR 4:14:5), that Section 2251 (a) could not be struck down facially, at least until the statute's alleged overbreadth was challenged by a party affected by it. Thus, Judge Letts declined to dismiss the indictment on the basis that Section 2251(a) violated the First Amendment.

Judge Letts next considered the producers' claim that they acted on the basis of a good faith, reasonable mistake of fact concerning Lords' age. In deciding to allow Kantor and MacNee to raise the mistake of fact defense, the court cautioned that such a defense was not available if the producers simply stated that Lords told them that she was 18 and that they believed her. Rather, it would be necessary to prove that the mistake of fact was reasonable and not due to carelessness or negligence.

The court emphasized that the mistake of fact defense was not included in the language of the statute and approached "the kind of judicial legislation which courts should avoid." However, after a considered analysis, Judge Letts found it "dispositive" that due process of law "at least requires that if a person is to be jailed for a lengthy term for an act taken on the basis of a factual error, the error cannot be one into which the person has been intentionally and convincingly tricked."

The government's motion to exclude evidence regarding the producers' lack of knowledge of the minority status of Lords therefore was denied.

United States of America v. Kantor, Case No.CR 87-164 JSL (C.D.Ca., Nov. 6, 1987) [ELR 9:10:11]

United States Supreme Court asks Supreme Court of Virginia for clarification of state statute restricting display of sexually explicit material

A 1985 amendment to a Virginia obscenity statute made it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" visual or written material that "depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles." The original statute barred the sale to juveniles of the subject material.

Two bookstore owners from Alexandria, Virginia, the American Booksellers Association, and other trade associations challenged the amendment, claiming that restricting the display, as opposed to the sale, of the subject material would infringe the First Amendment rights of adults. The booksellers argued that they would be required to adopt "economically devastating" measures to comply with the amended statute, such as maintaining an "adults only" section of the store, placing the subject works behind a counter, declining to carry the materials in question, or barring juveniles from the store.

The booksellers sued the Arlington County Chief of Police under 42 U.S.C. section 1983. A Federal District

Court found, in part, that the statute's definition of "harmful to juveniles" would cover between five and twenty-five percent of a typical bookseller's inventory, agreed with the booksellers' theory as to compliance alternatives (rather than with the state's suggestion that stores could place distinctive tags on the restricted materials, or place them behind "blinder racks"), and held that the amendment placed significant burdens on adult First Amendment rights by restricting adult access to nonobscene works. The court concluded that the amended statute was overbroad and permanently enjoined its enforcement.

A Federal Court of Appeals affirmed the District Court opinion, and the state appealed.

United States Supreme Court Justice William J. Brennan first found that the bookselling parties possessed standing to sue by alleging an actual and well-founded fear that the statute would be enforced against them; the alleged danger of the statute largely was that of self-censorship, "a harm that can be realized even without an actual prosecution."

However, the court postponed its decision on the constitutional issues raised pending an interpretation by the Virginia Supreme Court of the following two (paraphrased) questions: 1. Does the phrase "harmful to juveniles" as used in the Virginia statute, properly construed, encompass any of the books introduced as evidence by the booksellers in the District Court proceeding, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?; 2. What meaning is to be given to the provision of the statute making it unlawful to "knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Can a bookseller comply with the provision by not permitting juveniles to examine materials covered by the statute, and by prohibiting such conduct when observed, but otherwise taking no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

Justice Stevens, concurring in part and dissenting in part would have modified the first certified question to ask the Virginia Supreme Court which, if any, of the booksellers' exhibits was covered by the statute, in order to clearly understand the reach of the statute and evaluate its validity.

Pending the determination of the certified questions, the District Court order barring the enforcement of the amended statute will remain in effect.

Virginia v. American Booksellers Association, Inc., Case No. 86-1034 (U.S.Sup.Ct., Jan.25, 1988) [ELR 9:10:11]

New York City Cabaret Law's three musician limitation for unlicensed cabarets is ruled unconstitutional

Issuing an invitation to "come and hear the music play," a New York trial court judge has declared unconstitutional the portion of the incidental music exception of the New York City Cabaret Law setting a three musician limitation for unlicensed establishments.

The Cabaret Law, a part of the city's Administrative Code, defines a cabaret as "an eating or drinking place where music or dancing or entertainment are provided." A cabaret must have a difficult-to-obtain license unless it falls within the "incidental music exception." The exception applies to " eating or drinking places providing musical entertainment without dancing, either by mechanical device, or by not more than three persons playing piano, organ, accordian, guitar or any string instrument."

In July 1986, the city amended the exception to eliminate any distinction as to the type of musical instruments permitted, but retained the limitations as to the number of musicians and instruments allowed.

Warren Chiasson and two other musicians argued that the limitation unconstitutionally restricted their expression of musical ideas, in that the content of music "cannot be separated from the number of musicians and instruments needed to create a work of art. . ." Judge David B. Saxe agreed, finding that the incidental music exception restricted the musicians' freedom of expression and therefore was unconstitutional. The city did not show that its contentbased regulations were narrowly drawn to advance a compelling state interest; the asserted traffic and congestion concerns were not sufficient to justify the restriction at issue, stated Judge Saxe, particularly since the city presented no evidence to demonstrate that the number of musicians might bear any relationship to car or pedestrian traffic. Summary judgment was granted in favor of the musicians.

According to news reports, the city plans to appeal the decision; an appeal apparently stays Judge Saxes ruling and leaves the three musician limitation in effect pending further proceedings.

Chiasson v. New York City Department of Consumer Affairs, New York Law Journal, p. 7, col. 1 (N.Y.Cnty., Feb.2, 1988) [ELR 9:10:12]

Copyright infringement action involving two works by writer John Fogerty raised material question of fact as to substantial similarity, as did question of recovery of profits from record sales outside United States, finds Federal District Court, but several other issues were subject to summary judgment

A Federal District Court in California has refused to grant summary judgment to Fantasy, Inc. in a copyright infringement action against John Fogerty and Warner Bros. Records. Fantasy, the owner of the copyright in the song "Run Through the Jungle," written by Fogerty in 1970, claimed that Fogerty's 1984 work "The Old Man Down the Road" infringed "Jungle."

In an earlier proceeding, Federal District Court Judge Conti had refused to find that Fogerty's status as a beneficial owner of the Jungle copyright precluded an infringement action by Fantasy against Warner Bros., Fogerty's licensee (ELR 9:3:13).

In the instant action, Judge Conti first found that Fantasy's ownership of the Jungle copyright, and Fogerty's access to Jungle prior to composing Old Man were without substantial controversy. However, the court determined that "reasonable minds could differ as to the absence or existence of substantial similarity between Jungle and Old Man," and denied Fantasy's motion for summary judgment accordingly. Furthermore, disputed issues of material fact were present concerning Fogerty and Warner Bros.' fair use defense. But a First Amendment defense seeking protection of Fogerty's "songwriting style," was rejected by the court on the ground that the "idea/expression" analysis of the substantial similarity test would accommodate the First Amendment concerns of the parties.

Judge Conti next denied Fantasy's motion for summary judgment with respect to the Fogerty parties' liability for the extraterritorial exploitation of Old Man, finding the evidence unclear as to whether the extraterritorial profits of the song derived from an act of infringement occurring in the United States. Fogerty had argued that any allegedly illegal authorization to use the work occurred during the granting of mechanical use licenses, not during the execution of Warner Bros. or WEA International agreements licensing the right "to reproduce and sell records embodying John Fogerty musical performances."

Also denied was Fogerty's claim seeking, on the basis of a provision in his writer's contract with Fantasy's predecessors, to receive a percentage of Fantasy's recovery in the action-Fogerty was entitled to claim such a percentage only with respect to those recoveries not based on acts of infringement by the writer or his agents, stated Judge Conti. And it was found that Fantasy's deposit of Fogerty's royalties into an irrevocable escrow account did not amount to a material breach of the writer's contract with Fantasy's predecessors; Fantasy therefore was entitled to summary judgment on Fogerty's first counterclaim seeking, inter alia, the rescission of the contract, and the right to regain his ownership of Jungle.

Warner Bros.' motion for reconsideration of the court's decision finding that Fantasy was the legal owner of the Jungle copyright was denied. The transfer of the Jungle copyright challenged by Warner Bros. occurred by operation of law, and a written instrument was not a prerequisite to such a transfer, concluded the court.

Fantasy, Inc. v. Fogerty, 664 F.Supp.1345 (N.D.Ca. 1987) [ELR 9:10:12]

Decision granting summary judgment to Hallmark Cards and Mattel, Inc. in copyright and trademark infringement action involving "Rainbow Brite" character is upheld

A Federal Court of Appeals has upheld the dismissal of Debra K. Hartman's claim that Hallmark Cards and Mattel, Inc. used Hartman's copyrighted graphics and script entitled "The Adventures of Rainbow Island" as the basis for their "Rainbow Brite" character and products.

The District Court had concluded that there was no substantial similarity between the Rainbow Island and Rainbow Brite works, finding that Hartman's work consisted almost entirely of noncopyrightable general themes or ideas. And the court correctly determined, stated Federal Court of Appeal Judge Fagg, that the two works were not substantially similar in expression, therefore warranting the entry of summary judgment against Hartman on her copyright infringement claim.

It also was found that Hartman did not establish that Rainbow Island acquired the secondary meaning necessary for a trademark infringement claim, or that there existed a likelihood of consumer confusion. Furthermore, summary judgment for Hallmark and Mattel on Hartman's state law misappropriation claim was upheld, as was the dismissal without prejudice of Hartman's remaining pendent claim of unfair competition.

The District Court's denial of Hallmark's motion for attorneys' fees also was affirmed; the court found that Hartman had not acted in bad faith; that her complaint was colorable and not baseless; and that Hallmark did not demonstrate that the case was exceptional under the Lanham Act.

Hartman v. Hallmark Cards, Inc., 833 F.2d 117 (8th Cir. 1987) [ELR 9:10:13]

"Wuzzles" were not substantially similar to "Whats," rules Federal District Court in rejecting copyright infringement claim against toymaker

Federal District Court Judge Gerard Goettel recently posed the following questions: "Just what's a 'What,'"; "What's the similarity between a 'What' and a 'Wuzzle'"; and "'Wuzzle' we do about it?"

Judge Coettel's response was to grant a motion for summary judgment on behalf of Hasbro Bradley, Inc. and Walt Disney World of Florida in a copyright infringement action brought against the companies by Joanne Selmon and Renee Strong.

Selmon and Strong created eight fanciful characters they called "Whats;" the characters had the names and features of two different animals combined into one. The Whats characters, and various stories featuring the creatures, were registered with the Copyright Office in September 1984.

In January 1985, Hasbro and Disney registered the Wuzzles, which also were derived from combinations of different animals, for copyright protection.

Judge Goettel first noted that Hasbro began working on the Wuzzle project in the fall of 1983 and that by September 1984, when Selmon's unsolicited Whats proposals to Hasbro and to Disney were returned to her by the companies, the preparatory work for the Wuzzles had been completed. In any event, stated the court, it was unnecessary to reach the question of access because of the lack of substantial similarity between works.

In granting summary judgment to the Wuzzle parties, Judge Goettel found that there was no substantial similarity in the particular expressions by the parties of the idea of combining two animal forms, and that the Wuzzles did not capture the "total concept and feet" of the Whats. It was observed that no Wuzzle was comprised of the same two animals comprising any particular What; that the specific content of the storylines for the creatures was not substantially similar; and that there were no artistic similarities between the works.

With respect to Selmon's unjust enrichment claim, Judge Goettel, exercising pendent jurisdiction, found that not "one scintilla of evidence" was presented to distinguish the claim from the allegations raised in the copyright infringement cause of action, and that summary judgment therefore also was available to Hasbro and Disney as to this claim.

The court concluded by finding that the action "wuzn't" sufficiently frivolous or vexatious to warrant imposing attorney's fees or sanctions.

Selmon v. Hasbro Bradley, Inc., 669 F.Supp. 1267 (S.D.N.Y. 1987) [ELR 9:10:13]

Federal Court of Appeals upholds ruling granting summary judgment to manufacturer Of "Prehistoric Pets" Stuffed toy dinosaurs in action brought by creator of "Ding-A-Saur" dolls

R. Dakin & Co. has prevailed in a copyright infringement claim involving stuffed toy dinosaurs. A Federal Court of Appeals agreed with a District Court ruling granting summary judgment to Dakin in an action brought by Shelley and John Aliotti. Shelley Aliotti, who created a line of stuffed toy dinosaurs known as "Ding-A-Saurs," claimed that Dakin's "Prehistoric Pets" infringed her copyrighted creations. The District Court concluded that there was no substantial similarity between the works at issue.

On appeal, Judge Goodwin pointed out that "no copyright protection may be afforded to the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls." Thus, the "intrinsic test" of substantial similarity was not met merely because the Ding-A-Saurs and the Prehistoric Pets featured similar postures and body designs or because both lines of toys were "gentle and cuddly." The eye style and stitching on Aliotti's dolls constituted protectible expression, noted the court, but Dakin's animals did not incorporate this design element.

In all, because children, the intended consumer market for the dolls, would not reasonably infer that Dakin's dolls captured the "total concept and feel" of Shelley Aliotti's designs, there existed no substantial similarity of protectible expression, and summary judgment therefore was appropriate.

Also upheld was the District Court's decision to grant summary judgment to Dakin with respect to Aliotti's claim that Dakin breached an implied-in-fact contract by using Aliotti's designs without compensating her, and that Dakin committed a breach of confidence by disclosing her designs without permission. In this case, Aliotti presented her designs to Dakin when Dakin was considering the purchase of a company called Favorite Things; Aliotti then was working on a contract basis for Favorite Things. Judge Goodwin stated that Aliotti apparently did not disclose her ideas to Dakin with the expectation of receiving compensation, but rather to induce Dakin to enter a business relationship.

And Aliotti's claim for breach of confidence was properly denied because Dakin did not receive confidential information concerning at least three of the Ding-A-Saurs already on the market, and there was no testimony that the company knew that the information was disclosed in confidence or that the parties agreed that any confidence would be maintained.

Aliotti v. R.Dakin & Co., 831 F.2d 898 (9th Cir. 1987) [ELR 9:10:14]

Banana Republic prevails in trade dress and copyright infringement action brought by creator of synthetic animal display pieces

Edmund Rachel, known as Peter Rachel, and doing business as Wildlife Interiors, produced and sold synthetic animal heads as display pieces for stores. In 1983, Rachel sold a reproduction of a zebra head to Banana Republic, a chain of stores selling safari clothing and accessories and subsequently sold a number of other animal display pieces to Banana Republic; none of the works contained a copyright notice.

In early 1984, Banana Republic, a wholly-owned subsidiary of The Gap, began buying animal displays from a consultant to Fisher Development, an interior design company.

When Rachel sued Banana Republic, Fisher Development and The Gap, a Federal District Court in California held that the artist did not have a valid copyright claim due to the uncured omission of notice on the works. Alternatively, the court held that the Banana Republic did not infringe Rachel's copyright, and granted partial summary judgment with respect to the copyright infringement claim.

The District Court refused to grant summary judgment to the Banana Republicans as to Rachel's pendent state claim for unfair competition, breach of contract and breach of the covenant of good faith and fair dealing, and a trial was held on these claims and on a trade dress infringement cause of action. At the close of Rachel's evidence, the court directed a verdict in favor of Banana Republic and Fisher Development on the trade dress infringement claim. And the jury returned a verdict on the pendent claims in favor of the Banana Republicans.

A Federal Court of Appeals has affirmed the District Court decision, agreeing that the trade dress of Rachel's works was functional and therefore not entitled to protection under the Lanham Act. Rachel claimed that various features of his animal creations, such as the eyes, ears and noses, were not real and thus were not functional. But Judge O'Scannlain observed that the features cited by Rachel all were "absolutely essential" to the goal of creating realistic reproductions of animals.

Judge O'Scannlain next found it unnecessary to decide whether Rachel held a valid copyright, for even assuming its validity, the District Court correctly found that there was not copyright infringement. As a matter of law, Rachel's works and the works of the Banana Republicans were not substantially similar, stated the court. The District Court's side-by-side comparison of the works resulted in a finding that there was not similarity in expression. And to the extent that the works may have been similar in ideas and general concepts, the similarities were noninfringing. Furthermore, similarity in expression may be noninfringing when the nature of the creation makes such similarity necessary, a situation which has been described as "indispensable expression." Such expressions may be protected only against virtually identical copying, and the works at issue were not identical.

The District Court had imposed sanctions against Rachel's counsel because the artist did not produce admissible evidence sufficient to raise any genuine issue of fact as to why The Gap should have been held liable for the acts of Banana Republic. However, the circumstances of the case did not warrant the imposition of sanctions, concluded Judge O'Scannlain, who also declined to award costs or fees against Rachel.

Rachel v. Banana Republic, Inc., 831 F.2d 1503 (9th Cir. 1987) [ELR 9:10:14]

Home Box Office was entitled to preliminary injunction barring Showtime/The Movie Channel from using HBO trademark in promotional slogans because Showtime did not establish that disclaimers would substantially reduce likelihood of consumer confusion

Home Box Office has obtained a preliminary injunction barring Showtime/The Movie Channel, Inc. from using certain slogans in an advertising and promotional campaign for Showtime's cable television services. A Federal District Court had enjoined Showtime from using the challenged slogans unless the company presented an accompanying disclaimer. A Federal Court of Appeals affirmed the issuance of the preliminary injunction order, but vacated the portions of the order exempting certain promotional material introduced by Showtime at the earlier hearing, and allowing the use of disclaimers along with certain other contested slogans.

HBO argued that Showtime's use of slogans such as "Showtime & HBO. It's Not Either/Or Anymore," violated section 1125(a) of the Lanham Act and infringed HBO's service mark. According to HBO, the slogan confusingly suggested that HBO and Showtime merged or participated in a cooperative promotion campaign.

Judge J. Edward Lumbar agreed with the District Court's finding that Showtime's use of the slogans would create a likelihood of confusion, but stated that the record was not sufficient to support a finding that the proposed disclaimers would be effective in substantially reducing consumer confusion. In the absence of such evidence, Showtime could not use HBO's trademark in its slogans, concluded the court.

Home Box Office v. Showtime/The Movie Channel, 832 F.2d 1311 (2d Cir. 1987) [ELR 9:10:15]

Federal Court of Appeals upholds issuance of preliminary injunction barring use of the trademark "Opium" in advertising slogans for low-priced "smell-alike" fragrance

Charles of the Ritz Group Ltd., the manufacturer of a fragrance known as "Opium" was entitled to a preliminary injunction barring Quality King Distributors from using certain advertising slogans in connection with the company's distribution of Deborah International Beauty's fragrance "Omni," a low-priced, "smell-alike" version of Opium.

A Federal District Court granted the preliminary injunction upon finding a likelihood of confusion in the use of the trademark Opium in Omni's slogans. Federal Court of Appeals Judge Irving R. Kaufman has upheld the District Court decision.

Judge Kaufman noted that one of the disputed slogans appeared on a tab projecting out from the top of each package of Omni. The third version of the slogan read: "If You Like Opium, a fragrance by Yves Saint Laurent, You'll Love Omni, a fragrance by Deborah Int'l Beauty Yves Saint Laurent and Opium are not related in any manner to Deborah Int'l Beauty and Omni." The District Court had concluded that the disclaiming slogan was inadequate to eliminate consumer confusion between the fragrances for several reasons, including the fact that it did not indicate that Opium and Omni were competing products.

Judge Kaufman found that there existed a likelihood of confusion as to the source of Omni; stated that Deborah International did not show that the disclaimer would reduce consumer confusion; and affirmed the issuance of a preliminary injunction.

In a concurring opinion, Judge Altimari agreed with the District Court's decision to enjoin the use of the trademark "Opium," but expressed concern that the majority opinion seemed to require empirical evidence of the effectiveness of a proposed disclaimer in alleviating consumer confusion. In Judge Altimari's view, requiring empirical evidence might overemphasize the importance of such evidence and unnecessarily restrict the discretion of federal district courts in trademark infringement cases. In this case, the District Court did not abuse its discretion, stated Judge Altimari.

Charles of the Ritz Group Ltd. v. Quality King Distributors, Inc. 832 F.2d 1317 (2d Cir. 1987) [ELR 9:10:15]

United Artists was not entitled to include in the basis for its films the estimated future participation and residual payments due to the films' creative and union personnel, rules Federal District Court in denying claim for tax refund

In a decision rendered in November 1986, but only recently published, a Federal District Court in California has ruled that United Artists was not entitled to include in its basis for its films in the years 1971 through 1974, for purposes of computing depreciation expense deductions, the estimated future participation and residual payments to be made to the films' performers, creators and various unions out of the proceeds from ticket sales to the general public.

Under the Internal Revenue Code, the cost of producing a film must be depreciated and deducted over the useful life of that film. United Artists, a wholly-owned subsidiary of Transamerica Corporation, used the income forecast method of depreciation for all films released after October 1, 197l. In determining the basis of each film for depreciation purposes, United Artists included the amounts of participations and residuals which would be paid if the projected lifetime revenue of the film was achieved.

The Internal Revenue Service disallowed the inclusion in the basis for each film of the amount of participations and residuals that had not yet become due and payable in a particular tax year, contending that such amounts were estimates rather than actual costs. United Artists apparently forecast the lifetime revenue of its films and the company's ultimate liability for participation/residual payments with reasonable accuracy. For example, in 1972, United Artists took about $12.1 million in aggregate deductions when actual revenues through mid-1985 indicated that $11.3 million would have been the proper amount to deduct.

However, United Artists' approach resulted in higher depreciation deductions in the initial years of a film's life. Thus, for the film "Thunderbolt and Lightfoot," United Artists deducted about $3.6 million in depreciation for the film in 1974, the year of release-the government formula would have permitted a deduction of only about $2.4 million.

Federal District Court Judge Thelton E. Henderson first determined that section 461(a) of the Internal Revenue Code, rather than section 1012, as argued by the government, applied in this case. Section 1012 precludes the inclusion of contingent liabilities in basis. Section 461(a) states that deductions "shall be taken for the taxable year which is the proper taxable year under the method of accounting used in calculating taxable income." An accrual basis taxpayer, such as United

Artists, thus would be entitled to determine its depreciable basis in accordance with accrual accounting rules.

Under section 461(a), stated the court, the timing of United Artists' deductions was governed by an "all events" test, i.e., an expense would be deductible for the taxable year in which all the events had occurred which determined the fact of the liability and the amount thereof could be determined with reasonable accuracy. But the future participation payments included in United Artists' basis in the year in question were not sufficiently definite to satisfy the "all events" test, held the court.

United Artists contended that its obligations to make the participation and residual payments were "fixed and certain" at the time the films were completed since the creative personnel had fully performed their contractual obligations at that time. The government claimed that United Artists' liability for participation payments depended upon the commercial success of the films with the viewing public.

Judge Henderson agreed that the participation liabilities were too contingent to accrue at the time of the completion of a film, pointing out that United Artists was not obligated by contract to pay the artists a fixed sum, and that if a film "did not strike a responsive chord, if UA proved ineffectual in promoting it, or if any other unforeseen event prohibited its economic success, UA was not obligated to make participation payments." The fact that the company was able to make an informed estimate of its aggregate film revenues did not change the contingent nature of its liability for the participation payments, for "as long as a significant possibility existed that UA would not have to make these payments, the 'fact of the liability' remained uncertain.

United Artists' contractual obligation to make good faith efforts to promote and distribute each of its films was not equivalent to an obligation to generate a specific level of public attendance at its films. Absent a provision that the participation would be paid even if no profit were shown, the obligation was too contingent for inclusion in basis, and the government was entitled to summary judgment.

Transamerica Corporation v. United States, 670 F.Supp. 1454 (N.D.Ca. 1986) [ELR 9:10:15]

Briefly Noted:

Copyright Infringement/Jurisdiction.

A Federal District Court in Florida has refused to dismiss a copyright infringement action brought by P&D International against Halsey Publishing Company and the Cunard Line in connection with the allegedly unauthorized copying of substantial portions of a P&D film about the island of St. Thomas.

Judge Edward B. Davis found that the case "arose under" United States copyright law - the controversy over the ownership of the copyright in the St. Thomas film was merely a threshold inquiry, and not the essence of P&D's claim. And, citing Peter Starr Production Co. v. Twin Continental Films, Inc (ELR 8:2:20) Judge Davis noted that P&D alleged that an infringing act occurred in the United States; the court therefore possessed subject matter jurisdiction over P&D's claims. Judge Davis declined to conditionally dismiss the case on grounds of forum non conveniens, stating that with respect to the factors bearing upon access to sources of proof, convenience "dictates that this action remain where it is." The remaining private and public interest factors, including the fact that the majority of the significant contacts in the case were in Florida, also warranted the retention of the case.

And although reluctant to consider Cunard's affirmative defense that the St. Thomas film actually was a work for hire, Judge Davis found that material issues of fact were raised as to this question and that summary judgment thus was not available.

P&D International v. Hals Publishing Company, 672 F.Supp. 1429 (S.D.Fla. 1987) [ELR 9:10:16]

NEW LEGISLATION AND REGULATIONS

California amends Labor Code provision relating to employment of recording artists

Section 2855 of the California Labor Code, relating to personal service contracts and known as the "seven year rule" has been amended.

As before the passage of the amendment, the statute provides that a contract to render personal services may not be enforced against an employee beyond seven years from the commencement of service under the contract. Furthermore, "any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it."

The amendment provides that, notwithstanding the above subdivision, "Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed ... may not invoke the provisions of subdivision (a) without first giving written notice to the employer... specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a)."

Section (2) of the subdivision states that "any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law."

And, under subdivision (3), if "a party to such a contract is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice ... the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice."

The amendment disclaims any intent by the legislature to have the provisions of the act support any inference about the meaning of Section 2855 of the Labor Code prior to the operative date of the act, or with respect to any industry other than the phonorecord industry.

The act was approved by the Governor on September 11, 1987, and filed with the California Secretary of State on September 14, 1987.

An act to amend Section 2855 of the Labor Code, relating to employment [ELR 9:10:17]

IN THE NEWS

Joan Rivers may proceed with defamation claim against Gentlemen's Quarterly and author of allegedly false article, but Los Angeles trial court dismisses comedian's claim for emotional distress

A Los Angeles trial court judge has ruled that Joan Rivers may proceed with a defamation claim against the publisher of Gentlemen's Quarterly and against Ben Stein, the author of an article entitled "Off the Cuff-Big Hearts, Little Pizzas". However, Superior Court Judge Dzintra Janavs dismissed Rivers' claim for emotional distress allegedly arising from the publication of the Stein article in the December 1987 issue of Gentlemen's Quarterly. Rivers' action contended that the article, purportedly describing the comedian's relationship with her late husband and her conduct after his death, was false. [Mar. 1988] [ELR 9:10:18]

Los Angeles trial court dismisses defamation claim brought against KABC-TV in connection with report on medical malpractice and jury rejects doctor's causes of action for invasion of privacy and emotional distress

A Los Angeles trial court has dismissed a defamation claim brought by Dr. Robert Grant against KABC-TV arising from a 1982 series entitled "Malpractice Coverup." Dr. Grant claimed that the series falsely portrayed him as an incompetent and uncaring doctor who committed malpractice. Los Angeles Superior Court Judge Edward Ross concluded that the allegedly defamatory statements were protected expressions of opinion.

Judge Ross allowed a jury to determine Dr. Grant's cause of action for invasion of privacy and emotional distress. The jury announced a verdict in favor of the television station. [Mar. 1988] [ELR 9:10:18]

ABC obtains dismissal of libel action brought by former Los Angeles County Superior Court judge arising from report rating criminal court judges

A libel action brought by former Los Angeles County Superior Court Judge David J. Aisenson against television station KABC has been dismissed by an Orange County court.

Aisenson claimed that a 1983 report by Wayne Satz, based on a poll of prosecutors and defense attorneys, implied that Aisenson was "the most incompetent judge in Los Angeles County-dishonest, a 'bad person,' sneaky and immoral." The court found that Satz's remarks were not defamatory, and noted that the station had labelled some of Satz's comments as opinions and had offered broadcast time to Aisenson to respond to the report. [Mar. 1988] [ELR 9:10:18]

Former KABC-TV reporter Wayne Satz must present wrongful termination claim against station to arbitrator, rules Federal District Court

Former KABC-TV reporter Wayne Satz's $5 million wrongful termination action against the station must be heard by an arbitrator, a Federal District Court has ruled.

Judge Alicemarie Stotler ruled that the dispute concerning Satz's 1987 departure from KABC was governed by the terms of the collective bargaining agreement between the station and the American Federation of Television & Radio Artists. Satz, alleging that he was "forced out" by KABC after he broadcast a critical report on the station's May 1987 sweeps series on Nielsen families, had argued that his claims should be heard by a trial court. [Mar. 1988] [ELR 9:10:18]

United Artists Theater Circuit incurs fines totalling $1.75 million in two product split proceedings

In late 1987, the United Artists Theater Circuit was fined $1.75 million in two product split cases in which the company, a subsidiary of United Artists Communications, pleaded guilty to contempt charges based on criminal informations filed by the United States Department of Justice.

A Federal District Court in Milwaukee fined the exhibitor $1 million for continuing to engage in product splits subsequent to the court's ruling that such conduct violated the antitrust laws (ELR 5:3:8; 7:1:11).

And the exhibitor was fined $750,000 by a Federal District Court in Texas where a grand jury in Dallas is conducting an investigation of product splits. [Mar. 1988] [ELR 9:10:18]

Federal District Court jury decides that ABC documentary about the McCarthy era did not libel author Victor Lasky

A Federal District Court jury has decided that an ABC News documentary about the McCarthy era did not libel author Victor Lasky. Lasky claimed that the 1983 program, "The American Inquisition," defamed him by purportedly stating that Lasky caused educator Luella Mundel to lose her job by calling Mundel a Communist. ABC had argued that the documentary did not accuse Lasky of any improper conduct, but the broadcaster was denied summary judgment in two court decisions (see ELR 8:7:19; 7: 10: 11). The jury apparently concluded that although the documentary defamed Lasky, the author failed to prove that the program was false. [Mar. 1988] [ELR 9:10:19]

"Twilight Zone:" The Finale?

California's Division of Occupational Safety and Health, pursuant to an out-of-court settlement, has withdrawn about $61,000 of the fine assessed against director John Landis, two film studios and other parties in connection with the death of actor Vic Morrow and two children on the set of the film "Twilight Zone." The fines for alleged violations of state safety regulations were reduced primarily because Landis and four other individuals who worked on the film were acquitted of involuntary manslaughter charges (ELR 9:1:20) arising from the tragic death of the actors. A fine of $1,350 for the alleged violation of regulations will be paid; the payment does not constitute an admission of wrongdoing or liability.

Landis and unit production manager Dan Allingham have objected to a recent reprimand issued by the Directors Guild of America; the Directors Guild has refused to confirm the reprimand or to comment on Landis' response. [Mar. 1988] [ELR 9:10:19]

WASHINGTON MONITOR

United States Department of Justice approves Warner Communications' proposed acquisition of half-interest in Gulf & Western's theater holdings

The United States Department of Justice has announced that it will not object to the proposed $150 million acquisition by Warner Communications Inc. of a half-interest in Gulf & Western's motion picture theater holdings.

Gulf & Western, the parent company of Paramount Pictures, owns about 470 domestic screens. The Justice Department concluded that the acquisition did not warrant action under the antitrust laws. Warner and Gulf & Western remain subject to the theater licensing requirements of the 1948 Paramount consent decrees.

The acquisition, upon closing, must be approved by Federal District Court Judge Edward Palmieri. [Mar. 1988] [ELR 9:10:20]

United States Supreme Court lets stand California Supreme Court ruling rejecting author William Peter Blatty's action against the New York Times

The United States Supreme Court has let stand a California Supreme Court ruling (ELR 8:9:4) dismissing author William Peter Blatty's action against the New York Times in connection with the newspaper's failure to include Blatty's 1983 novel "Legion" on its weekly best seller list. Blatty had argued, unsuccessfully, that the omission of "Legion" from the best seller list constituted intentional interference with prospective economic advantage and decreased the novel's economic value. [Mar. 1988] [ELR 9:10:20]

Copyright Royalty Tribunal adopts rules governing rates of royalty payments by public broadcasting entities for the use of musical and graphic works

The Copyright Royalty Tribunal has announced the adoption of rules governing the terms and rates of copyright royalty payments with respect to the use by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic and sculptural works. The terms and rates will apply for the period 1988-1992.

It should be noted that the detailed schedules set forth by the Tribunal do not cover compositions which are the subject of voluntary license agreements, such as those reached by the Public Broadcasting Service and National Public Radio with ASCAP, BMI and SESAC.

With respect to royalty payments for the use of graphic works, the regulations specify, in part, the payment of a display fee for the use of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted and therefore also subject to the payment of a display fee under the terms of a Tribunal schedule.

Copyright Royalty Tribunal, 1987 Adjustment of Public Broadcasting Royalty, Rates and Terms, Federal Register, Vol. 52, No. 249 (Dec. 29, 1987) [ELR 9:10:20]

Copyright Office revises regulations for recording copies of documents

The Copyright Office has revised its requirements for recording copies of documents. In order to be recorded, an original document must bear the actual signature of the person who executed it. Alternatively, under the revised Section 201.4(c)(1), a legible photocopy or other legible facsimile reproduction of the signed document may be recorded if it is accompanied by a sworn certification or an official certification that the reproduction is a true copy of the signed document. The sworn certification must be signed by at least one of the parties to the document (regardless of whether the person actually signed the original document) or by an authorized representative of that person.

The Copyright Office rejected a suggestion that documents should be recorded on the basis of copies attested to merely by a successor in interest.

In a technical amendment, the words "full-size" before facsimile reproductions were deleted, with the amended phrase reading: "a legible photocopy or other legible facsimile reproduction of the signed document." The Copyright Office stated that it was sufficient for a reproduction of a document to be capable of being read for purposes of examining and cataloging and being reproduced in legible microform copies; the Office was not concerned with whether a particular reproduction was the same size as the document reproduced.

Library of Congress, Copyright Office: Recordation of Transfers and Other Documents, Federal Register, Vol.53, No.2 (Jan. 5, 1988) [ELR 9:10:20]

DEPARTMENTS

In the Law Reviews:

Communications and the Law, Volume 10, Number 1, has been published by Meckler Corporation, 11 Ferry Lane West, Westport, CT 06880 with the following articles:

Direct Broadcast Satellite: A Proposal for a Global/Regional System by Bryan Adamson and James C. Hsiung, 10 Communications and the Law 3 (1988)

Was Warren Burger Antipress? by James M. Bernstein, 10 Communications and the Law 19 (1988)

Home Satellite TV Viewers: Pirates or Just Aiming in the Right Direction? by Sheila B. Mangel, 10 Communications and the Law 31 (1988)

The Commercial Speech Doctrine: Posadas Revisionism by Denise M.Trauth and John L. Huffman, 10 Communications and the Law 43(1988)

Trademark Litigation: A New Look at the Use of Social Science Evidence by Jack P. Lipton, 29 Arizona Law Review 639 (1987)

Cardozo Arts & Entertainment Law Journal, 55 Fifth Ave., Room 121, New York, NY 10003, has published its Volume 6 with the following articles:

Cable Television's New Legal Universe: Early Judicial Response to the Cable Act by Michael 1. Meyerson, 6 Cardozo Arts & Entertainment Law Journal 1 (1987)

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Some Unhurried Reflections on Copyright by Charles McC. Mathias, Jr., 6 Cardozo Arts & Entertainment Law Journal101 (1987)

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Products Liability in the Sports Industry by Douglas G. Houser, John P. Ashworth and Ronald J. Clark, 23 Tort & Insurance Law Journal 44 (1987) (750 N. Lake Shore Drive, Chicago, IL 60611)

Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law by Arlen W. Langvardt, 49 University of Pittsburgh Law Review 91 (1987)

The Regulation of Sports Agents: An Analytical Primer by Lionel S. Sobel, 39 Baylor Law Review 701 (1987)

Judicial Indifference to Pornography's Harm: American Booksellers v. Hudnut by Penelope Seator, 17 Golden Gate University Law Review 297 (1987)

Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument by John A. Scanlan, 62 Indiana Law Review 863 (1986-87)

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Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility, 62 Indiana Law Review 1151 (1986-87)

"No Pass, No Play ": Equal Protection Analysis Under the Federal and State Constitutions, 63 Indiana Law Review 161 (1987-88)

Defining Obscenity: The Criterion of Value by R. George Wright, 22 New England Law Review 315 (1987)

Justice Brennan and Freedom of Expression Doctrine in the Burger Court by Edward V. Heck, 24 San Diego Law Review 1153 (1987)

The Sometimes Relevant First Amendment by Donald E. Lively, 60 Temple Law Quarterly 881 (1987)

Regulation of Financial Planners, 16 University of Baltimore Law Review 287 (1987)

[ELR 9:10:22]