

**LEGAL AFFAIRS**

**Studios vs. Writers: A Bend in Analysis**

**by David Nimmer**

Two motion picture industry clients recently and independently posed to me questions involving essentially the same fact pattern: in the case of a pre-1978 movie that was based on an unpublished work, and in which only the movie's copyright had been renewed, could the studio freely produce and distribute a remake of the original motion picture? In analyzing this question, I focused on the unarticulated consequences of the recent *Abend* case in the Ninth Circuit, and I concluded that the court's nominally anti-studio ruling contains a silver lining for motion picture proprietors. This article sets

forth first the legal background leading up to Ninth Circuit's *Abend* case, and then the application of that case to the above scenario.

### 1. *Rohauer v. Killiam Shows*

To understand *Abend*, it is first necessary to appreciate the Second Circuit's opinion in *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949 (1977). In *Rohauer* an author granted motion picture rights in her novel to the defendants' predecessor, who produced a motion picture based thereon, the highly-successful silent version of "Son of the Sheik," starring Rudolph Valentino. In granting motion picture rights, the author purported to grant such rights for the renewal as well as the original term of copyright.

Defendants' predecessor obtained a copyright in the motion picture as a derivative work, and 28 years later

renewed the movie's copyright. In the meantime, however, the author died before the original term of copyright in her novel had expired, so that thereafter the renewal rights in the novel were claimed by the author's daughter, as the only member of the successor renewal class. See 2 Nimmer on Copyright Sec. 9.04[A].

Because the daughter was not bound by her mother's prior grant of exclusive renewal rights to the defendants' predecessor, see 2 Nimmer on Copyright Sec. 9.06[C], the daughter granted exclusive motion picture and television rights in the novel for the renewal period to the plaintiffs. When the defendants thereafter continued to publicly perform their motion picture, the plaintiffs sued for infringement of their copyright in the novel.

The Second Circuit held for the defendants by reason of the grant of motion picture rights from the author of the novel to the defendants' predecessor. This result was reached despite the court's acknowledgment that,

because the author did not live until the renewal vested, it was the author's daughter who was entitled to claim the renewal. The court further acknowledged that the daughter was not bound by her mother's purported exclusive grant of renewal rights to the defendants. The daughter, therefore, had the power to make the grant which she in fact made to the plaintiffs.

Moreover, the court conceded that because the author did not survive to renewal vesting, the original grant from the author would not authorize the defendants, after commencement of the renewal period, to produce a new motion picture based upon the novel. The Second Circuit nevertheless held that the defendants could continue to exploit during the renewal period any motion picture, based upon the novel, which had been produced during the original term of copyright.

Rohauer provoked a firestorm of criticism, spearheaded by the lengthy critique in 1 Nimmer on

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Copyright Sec. 3.07[A]. The gist of the problem was that Judge Friendly's opinion managed simultaneously to hold the author's grant of renewal rights valid and invalid -- invalid insofar as it purported to grant exclusive rights during the renewal period and invalid insofar as it purported to authorize new productions made after commencement of the renewal period, but valid insofar as it authorized the continued exploitation during the renewal period of any film first produced during the original term of the novel's copyright. Skepticism about the viability of that resolution extended beyond scholarly commentary to judicial opinions as well. For instance, in *Russell v. Price*, 612 F.2d 1123, 1128 n.16 (9th Cir. 1979), cert. denied, 446 U.S. 952 (1980), the Ninth Circuit describes the distinction made in *Rohauer* as "unconvincing," given that the 1909 Act "made no distinction between a copyright owner's right to authorize copying or exhibition of the work as it appears in an existing derivative

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work and the right to authorize creation of a new derivative work."

## II. Abend v. MCA

Abend v. MCA, Inc., 863 F.2d 1465 (9th Cir. 1988), presented the Ninth Circuit with essentially the same facts as those in Rohauer. The plaintiff in Abend had acquired renewal rights to several short stories written by Cornell Woolrich, who did not survive until renewal vesting. Among the Woolrich stories thus acquired was "It Had to be Murder" which served as basis for the 1954 film "Rear Window." The plaintiff filed suit for copyright infringement "based on defendants' re-release of the 'Rear Window' film in theatres, on TV, and on videocassette" during the renewal term of the the underlying short Story.

Abend largely agrees with the criticism of Rohauer set forth in 1 Nimmer on Copyright Sec. 3.07[A], which will not be repeated here. Suffice it to note that in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), the Supreme Court long ago observed that "assignees of renewal rights take the risk that the rights acquired may never vest in their assignors." The Ninth Circuit concluded that the Supreme Court's *Miller Music* opinion "provides ineluctable authority for Abend's position." 863 F.2d at 1475. On that basis, the court held the defendants' activity to be infringing.

A dissenting opinion in *Abend* objected that the quirk of fate that Woolrich had died prior to renewal vesting should not be dispositive of the rights of the parties. 863 F.2d at 1487 (Thompson, J., dissenting) "It just doesn't make sense," Judge Thompson opined.

Nonetheless, the majority was quite right in holding that the Supreme Court's *Miller Music* opinion gives

decisive significance to that "quirk of fate" in determining copyright ownership. In fact, contrary to the perspective of the Abend dissent, Congress intended in general under the 1909 Act to limit grants to the initial term of copyright, and to allow a reversion to the author or author's estate for the renewal term. See 2 Nimmer on Copyright Sec. 9.02. That intent was largely undercut, however, by the Supreme Court's decision in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), which created a giant loophole in the doctrine of reversion of renewal rights. See 2 Nimmer on Copyright Sec. 9.06[B][1]. It is the *Fred Fisher* opinion that makes copyright ownership depend on a "quirk of fate" -- not *Abend*. *Abend*, by contrast, follows the established doctrine of *Miller Music*, and reaffirms Congressional intent with respect to the renewal doctrine by declining to carve out yet another exception to reversion of renewal rights.



Abend stopped short of granting the plaintiff full relief, however. Instead, the Abend court examined the equities of the case and concluded that its special circumstances warranted the fashioning of special relief. "Defendants invested substantial money, effort, and talent in creating the 'Rear Window' film. Clearly the tremendous success of that venture initially and upon re-release is attributable in significant measure to, inter alia, the outstanding performances of its stars -- Grace Kelly and James Stewart -- and the brilliant directing of Alfred Hitchcock. The district court must recognize this contribution in determining Abend's remedy." 863 F.2d at 1478. Accordingly, the Ninth Circuit barred the issuance of an injunction. *Id.* at 1479, citing 3 *Nimmer* on Copyright Sec. 14.06[B]. Instead, the court remanded for computation of damages in an apportioned amount (i.e., less than 100% of the defendants' profits). 863

F.2d at 1480. See 3 Nimmer on Copyright Sec. 14.03[C].

### III. The Legacy of Abend

#### A. Benefits to Writers

Underlying properties created after 1978 (or which were protected by common law copyright until 1978) do not fall within the renewal framework, and therefore will never be subject to the Rohauer/Abend conflict. See 2 Nimmer on Copyright Sec. 9.01[C] *infra*. On the other hand, the split between the Second and Ninth Circuits means that underlying properties which achieved statutory copyright before 1978 are now treated differently depending on which circuit's law governs. This raises a question about what the result will be to studios and other owners of derivative works based on underlying

properties that achieved statutory copyright before 1978. That question is important with respect to many pre-1978 motion pictures, for which there seems to be an ever-increasing cable television and videotape market.

The question also is important with respect to more recent movies as well. For example, even currently, it is possible for a movie to be made based on a story published in 1977, the renewal term for which will last from 2005 through 2052. One can imagine a movie being made in 1995 pursuant to a license from the author of a 1977 short story, who dies in 1999. Thereafter, upon re-release of the movie in 2050, the Rohauer/Abend conflict comes into play again.

Unless resolved by the Supreme Court, this circuit conflict will therefore have practical significance for many decades to come. On the one hand, Rohauer, which has effectively reigned nationwide in the motion picture

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context since the dawn of the 1976 Act, has been essentially rendered moot by *Abend*. For virtually all renewal claimants who wish to allege infringement may, like Sheldon *Abend*, simply file suit in the Central District of California, where the Hollywood studios are located and thus amenable to venue and personal jurisdiction, and in which the court must follow *Abend* as governing Ninth Circuit law. (A situation is nonetheless conceivable in which the distributor of a re-release is amenable to suit only in New York, or in which a *forum non conveniens* motion transfers the action to a jurisdiction controlled by Second Circuit law.) Only if a studio can gain advance knowledge of a prospective conflict (sufficient to warrant declaratory relief) could it defeat *Abend*'s applicability by choosing a Second Circuit forum, in which *Rohauer* continues to apply. And even declaratory relief suits may be unavailing in New York, Connecticut or Vermont by reason of lack of personal jurisdiction over

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the individual who is renewal claimant or other procedural flaws.

On the other hand, at the same time that it dethroned Rohauer, the Ninth Circuit protected the financial interests of the motion picture industry by limiting the relief available in these circumstances. The court thereby avoided the studios' "dire prediction" that producers would be led to "withdraw films from distribution to avoid infringing the copyright in the underlying work," with the result that "[t]he public will then be denied access to countless classic films." 863 F.2d at 1477 n.15. In this way, Abend combines fidelity to the principles underlying the renewal doctrine with sensitivity to the equities of the situation. Judge Pregerson's opinion in Abend therefore promises to correct the statutory shortcomings in Judge Friendly's Rohauer opinion without causing tremendous dislocations in the practices of the marketplace, at least with respect to pre-1978 movies.

With respect to current productions, however, *Abend* could have a negative impact on owners of rights in pre-1978 works. Thus, a film producer might decline to synchronize a pre-1978 song that is in its initial copyright term, and choose instead a post-1978 song, for fear that use of the former song might create litigation when the song enters its renewal term.

Universal, the losing party in *Abend*, as well as many other motion picture studios have expressed dismay over the *Abend* ruling. A petition for certiorari to the United States Supreme Court in *Abend* is pending; efforts at corrective legislation may likewise be anticipated, if the judicial route fails.

## B. Benefits to Studios?

We return finally to the question posed at the start of this article. Both Rohauer and *Abend* dealt with

situations in which the underlying works had been renewed separately from the derivative works, i.e., the motion pictures. For that reason, it was clear to both courts that the owners of the underlying works could, for example, prevent the studios, during the renewal term, from producing remakes of the movies based on those underlying works.

By contrast, consider the common situation in which a motion picture was released before 1978 based on an unpublished work, and in which renewal was effectuated only for the movie, not for the underlying work. In such a situation, publication of the movie constituted publication of the previously unpublished underlying work as well. See 1 Nimmer on Copyright Sec. 4.12[A]. Twenty-eight years later, renewal was required to continue protection for both the movie and the underlying work. See *id.* Sec. 3.07[C].

(A separate question is posed as to proper copyright notice. Publication of the motion picture constituted a divestive publication of the underlying work; applying the doctrine of indivisibility, a copyright notice on the film solely in the name of the studio would be tantamount to unnoticed publication of the underlying work that was still owned by its author, and the result would be that the author's rights in the underlying work would terminate upon publication of the motion picture. See 3 Nimmer on Copyright Sec. 10.01[A]. Nonetheless, given the judicial retreat from the doctrine of indivisibility as evidenced by *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970), most courts would attempt to avoid that harsh result. See *id.* Sec. 10.01[B]. As a consequence, the underlying work would not have been injected into the public domain upon initial publication of the motion picture, and the question of its



continued copyright protection would remain live 28 years thereafter upon renewal of the movie.)

When a copyright is owned jointly by several individuals, renewal by any one of them in his or her name alone suffices to renew the interests of all. See 2 Nimmer on Copyright Sec. 9.05[E]. In addition, under certain circumstances beneficial owners can file renewal claims on behalf of legal owners. See *id.* Sec. 9.05[D].

With that background in mind, based on the logic of Rohauer, an author's heirs could contend that the renewal of the movie constituted a renewal of the portions of the underlying work embodied in the movie. (Authors themselves could make the same argument in cases where they survive renewal vesting, and in which the their initial assignments did not unambiguously include renewal rights. See 2 Nimmer on Copyright Sec. 9.06.) Under this view, when the studio renewed all elements that it owned, those elements included the underlying

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work, because the studio owned a limited right therein, namely the right to exploit the underlying work in the motion picture. As fellow owners of rights in the underlying work along with the studio, the heirs could thus claim that the studio's renewal inured to their benefit as well.

The logic of *Abend* produces a different result. Under *Abend*, the studio's renewal of the copyright to its motion picture has no application to the underlying work, because the renewal applies only to elements owned by the studio, namely the cinematographic elements and additions to the story that were not present in the underlying work. The studio cannot secure renewal of any elements from the original work even those embodied in the motion picture because *Abend* rules that the studio owns no such elements during the renewal term. Accordingly, the heirs cannot claim that the studio's renewal inures in any manner to their benefit. For even if

the renewal of the motion picture is construed as an application to renew the underlying work as well (as was assumed above), an application to renew in the name of a party who has no rights in the work is a nullity. See 2 Nimmer on Copyright Sec. 9.05[D]. Therefore, a renewal application in the name of the studio, in cases in which the studio has no interest in the underlying work (as Abend dictates) cannot serve to renew the underlying work.

Following these scenarios to their logical conclusions, the upshot is that Abend is more favorable to the studios than Rohauer in situations where studios wish to produce remakes and sequels based on unpublished works. For under Rohauer, the studio has renewed the underlying work, in which the heirs can now claim rights and thereby prevent the studio from producing a remake or sequel. But under Abend, the heirs have lost all rights in the underlying work through failure to renew, leaving

the studio free not only to continue to exploit the original motion picture, but to produce remakes, sequels, and all other derivative works as well.

Moreover, only the studio may continue to exploit the original motion picture throughout the movie's copyright term, as the studio owns the cinematographic elements therein exclusively. Of course, all parties are nominally free to use the public domain underlying work for a remake or sequel. But if, as a practical matter, a commercially viable remake or sequel must incorporate elements from the first motion picture as well as from the underlying work, then the studio's rights are effectively exclusive as to remakes and sequels as well.

To conclude with a concrete example, imagine a 1930 release of a motion picture entitled "Windows" based on an unpublished short story written in 1925 entitled "Murder," and imagine that only the copyright to the movie was renewed. As a variant, imagine that

"Windows" were released in February 1930 following publication of "Murder" in January 1930, and that only the copyright to the movie was renewed in March 1957. In both instances, the 1957 renewal is timely to renew the underlying work. See 2 Nimmer on Copyright Sec. 9.05[B]. But the question remains whether the motion picture renewal applies, substantively, to the underlying literary work. A logical extension of Rohauer would answer that question "yes," meaning the studio would have perpetuated its grantor's copyright to its potential detriment. Such is the consequence of Rohauer's gerrymandering of the significance of renewal. A logical extension of Abend, by contrast, would answer that question "no," meaning the studio is free to do whatever it wishes with the underlying work. Again, this consequence flows automatically from Abend's scrupulous adherence to the significance of renewal.

In light of this disparity -- and on the (perhaps questionable) assumption that the life of the law will be logic in future applications of the Rohauer/Abend doctrine -- perhaps the studios will be less vigorous in their assault upon Abend.

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## RECENT CASES

**Author Janet Malcolm's misquotation of psychoanalyst Jeffrey Masson in The New Yorker magazine article is ruled not libelous, but dissent would have submitted issue of actual malice or recklessness of author and publishers to a jury**

Psychoanalyst Jeffrey M. Masson's termination as the Projects Director of the Sigmund Freud Archives was the subject of a two-part article by Janet Malcolm. The article was published in The New Yorker Magazine in December 1983, and was reprinted by Alfred A. Knopf, Inc., in a book entitled In the Freud Archives. According to the article, which largely was based on Malcolm's tape-recorded interviews with Masson, the psychoanalyst claimed that his contract with the Archives was terminated because of Masson's position that Freud

abandoned the "seduction theory" of mental illness in order to further his career.

Masson sued Malcolm and the publishers for libel, contending that the article placed him in a false light in violation of section 45 of the California Civil Code. The complaint alleged that Malcolm falsified words attributed to Masson within quotation marks and edited his statements so as to portray him as "unscholarly, irresponsible, vain, and lacking in personal honesty and moral integrity."

A Federal District Court granted motions by Malcolm and the publishers for summary judgment (ELR 10:12:20) on the ground that Masson failed to establish actual malice. A three-judge panel of the Federal Court of Appeals, over a strong dissent by Judge Alex Kozinski, has upheld the District Court's decision.

Masson argued that a jury could have found actual malice by clear and convincing evidence based on



Malcolm's purported deliberate fabrication of quotations. Masson showed that several quotations attributed to him did not appear in the tape recordings of his conversations with Malcolm, that Malcolm had altered quotations, and that he notified the staff at The New Yorker that the quotations were altered prior to publication.

Federal Court of Appeals Judge Arthur L. Alarcon stated that for purpose of the appeal, the court would assume the quotations were deliberately altered. Judge Alarcon described the current law concerning the defamatory nature of statements "ostensibly ascribed to another person by the use of quotation marks" as follows: A factfinder may infer actual malice from a fabricated quotation when the language attributed to a party is wholly the product of the author's imagination. An author may, under certain circumstances, fictionalize quotations "to some extent," and malice will not be inferred from evidence showing that the quoted language

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does not contain the exact words used by the party provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure, or do not "alter the substantive content" of unambiguous remarks actually made by the public figure.

The court proceeded to review the challenged quotations. Among the items questioned by Masson was the purported quotation that Masson changed his middle name from Lloyd to Moussaieff because "it sounded better." On the tape recording, Masson stated that he changed his middle name, in part, because he "just liked it." The difference between these phrases did not alter the substantive content of Masson's statement and the District Court did not err in granting summary judgment against Masson with respect to this discrepancy.

More significantly, a quotation in which Masson purportedly described himself as an "intellectual gigolo" was not in the tape-recordings, but did appear in

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Malcolm's interview notes, observed the court. However, assuming that Masson did not refer to himself in this manner, the description was found to be a rational interpretation of his comments on the tape-recording. Not only was the "intellectual gigolo" quotation not defamatory, stated Judge Alarcon, but the District Court did not err in determining that Masson did not prove by clear and convincing evidence that Malcolm acted with malice in attributing these words to Masson. A fair reading of the quotation, in the court's view, was that Malcolm was setting forth Masson's account of the opinion of him held by two colleagues. And given the "general tenor" of the article and "the many provocative, bombastic statements" made by Masson and quoted by Malcolm, any additional harm caused by the "intellectual gigolo" quotation was found nominal or nonexistent.

After reviewing the remaining quotations, Judge Alarcon agreed with the District Court that each of the

allegedly defamatory statements was either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations. Masson's contentions regarding allegedly misleading editing were rejected.

Judge Alarcon concluded by rejecting Malcolm's motion for attorneys fees and costs, stating the Masson made a plausible, good faith argument that actual malice could be inferred from the fictionalized quotations, particularly since at the time when the complaint was filed, it was unclear whether actual malice might be inferred solely from proof that an author by using quotation marks, ascribed to a party words that he/she did not speak.

In his lengthy dissent, Judge Alex Kozinski began by setting forth his understanding of the meaning of quotations, declaring that "when a writer uses quotation marks in reporting what someone else has said, she is representing that those are the speaker's own words or

something very close to them." It appeared to Judge Kozinski that for the majority, quotations were much more "amorphous," i.e., that they were an "extrapolation" of a speaker's words. Thus, a "quotation" may differ in wording and content from the speaker's actual utterance "so long as the writer can argue with a straight face that it is a (emphasis by Judge Kozinski) rational interpretation of what the speaker said. If the speaker is thereby made to sound stupid or arrogant, evil or insincere, the majority denies him a remedy." But for Judge Kozinski, the right to deliberately alter quotations is not "a concomitant of a free press."

Also assuming for purposes of the motion for summary judgment that Malcolm altered Masson's statements as he claimed, Judge Kozinski pointed out that under California law, attributing to Masson a statement he did not make could constitute libel. Judge Kozinski would have allowed Masson the opportunity to present to a jury his

claim that Malcolm acted with actual malice in changing his words or misquoting him.

Returning to the significance of quotations, Judge Kozinski expressed the understanding that by using quotation marks, a writer "warrants that she has interposed no editorial comment, has resolved no ambiguities, has added or detracted nothing of substance...quotations purport to come directly from the speaker - free of editorial comment by the writer" and can have "a devastating rhetorical impact..."

Judge Kozinski cited critical reviewer comments concerning Masson, based on the purported quotations contained in Malcolm's work, and stressed the difference between an author's assessment of an individual and a purported self-evaluation. The use of quotation marks "to deceive the reader about the author's editorial role" is prohibited by libel law and not protected by the First Amendment, in Judge Kozinski's opinion. The dozen or

so discrepancies challenged by Masson showed him unfavorably, and for the dissent it appeared that the majority was saying that if an individual makes statements that could reasonably be construed as boastful or arrogant, a reporter may attribute to the individual any other statement reflecting that same trait." However, Masson's statements were materially different both in tone and content, stated the Judge Kozinski, from what Malcolm reported the psychoanalyst to have said.

The use of the phrase "intellectual gigolo" was described by Judge Kozinski as "particularly damning because of its graphic imagery and the emotional impact it is likely to have on the reader." But in reaching its conclusion, the majority accepted "the most benign interpretation of gigolo," noted Judge Kozinski; the term, fairly read, suggested to the dissent "someone who forsakes intellectual integrity in exchange for pecuniary or other gain," and a jury might so conclude. The innocuous

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interpretation adopted by the majority apparently was contrary to the meaning which was intended by Malcolm herself.

In discussing other comments mistakenly attributed to Masson, Judge Kozinski suggested that "if authors are given license to invent quotations on the basis of what they perceive to be a speaker's character, there are no words whatsoever that they cannot put into a subject's mouth."

Another type of "abuse" perceived by the dissent was Malcolm's deletion of thirty-three words out of a forty word sentence by Masson, a deletion "utterly changing Masson's meaning so as to make him say the antithesis of what he actually said." Judge Kozinski cautioned that "the selective editing of quotations so as to radically alter their meaning is anathema among respectable journalists." And Malcolm's alleged fabrications cumulatively made Masson appear "more arrogant, less



sensitive, shallower, more self-aggrandizing, and less in touch with reality than he appears from his own statements," declared the dissent. Malcolm may have been entitled to arrive at such inferences on the basis of her interview, but she was not entitled, in the dissent's view, to manufacture support for her conclusion, and, in so doing, Malcolm "crossed the line between poetic license and license. The latter the first amendment does not protect."

Judge Kozinski found no support for the majority's conclusion in the cases cited by Judge Alarcon, and took the opportunity to point out that in this case, there was a "mountain" of factual evidence tending to show malice, as follows: Malcolm's assurances that all quotes would be verbatim; the existence of tape recordings for many of the conversations; Masson's notification to the magazine's fact-checkers that he was being misquoted; the fact that at least one of the quotations was changed,

"apparently in Malcolm's handwriting, to make it more bombastic but less accurate." Such evidence might support a jury determination that the alterations in Masson's quotations were deliberate, not merely careless, accidental or negligent.

Given the lack of cases precisely on point, Judge Kozinski reviewed the policies of the First Amendment as interpreted by the Supreme Court in *New York Times v. Sullivan* and subsequent cases. The press, faced with reporting a "veritable avalanche of facts," may be held liable only for deliberate falsehoods or where reporters act recklessly. And the First Amendment protects a writer's selection of words so long as a reasonable view of an event is presented.

Fabricating or altering quotations does not serve the policy of protecting the press from errors of fact, declared the dissent, and "what someone says is a fact no less than what someone does." *New York Times v.*

Sullivan's actual malice standard protects the reporter who negligently misquotes a subject, but this protection does not extend to reckless or deliberate conduct.

Judge Kozinski acknowledged that although the accepted fundamental rule is that quotation marks indicate a verbatim report, it is not always possible, as a practical matter, for a reporter to be literally accurate. After describing the circumstances in which changes acceptably may be made in quotations, such as correcting errors in grammar and word usage, Judge Kozinski cited the position of authorities that it is a firmly-rooted journalistic convention that the central meaning, the spirit, of a speaker's words must be truly conveyed.

The dissent then described a mid-1984 journalistic debate concerning journalist Alistair Reid's admission that he used composite characters and invented dialogue in purportedly nonfiction newspaper pieces. William Shawn, then editor-in-chief of *The New Yorker*, initially

defended Reid but subsequently condemned the journalist and affirmed his magazine's devotion to fact and literal accuracy. As quoted by Judge Kozinski, Shawn's memorandum to his staff stated: "We do not permit composites. We do not rearrange events. We do not create conversations. (emphasis added by the dissent). Reid's conduct "pales by comparison" to Malcolm's alleged activities, stated the dissent, for Reid's quotations were not attributed to specific, identifiable people - he used the fictional characters to better convey his own ideas, and did not put words into the mouths of "real, flesh and blood individuals with reputations to be tarnished." In all, Judge Kozinski found it difficult to conclude that the right to distort quotes of real individuals was important to the proper functioning of the press in a free society, and declined to grant journalists "a privilege to engage in practices they themselves frown upon,

practices one of our own defendants has flatly disowned as journalistic heresy."

Judge Kozinski set forth a five part inquiry to resolve questions such as those before the court. In response to the first issue - does the quoted material purport to be a verbatim rendition of what Masson said - the dissent noted that Malcolm used no cautionary language to notify readers that she was relating a "hypothetical conversation" or that they should doubt that Masson said precisely what Malcolm quoted him as saying.

The next query was whether the quotes were accurate, and in this case, what Masson was quoted as saying was alleged to differ from what he actually said.

Judge Kozinski next asked whether the inaccuracies were material. Malcolm's alterations completely rephrased Masson's statements or, in some instances, "invent[ed] them out of whole cloth" - the changes were not merely cosmetic or immaterial.

Stating that even the majority seemed to concede that California law recognizes a cause of action for libel on the basis of misquotations that have the same damaging effect as defamatory statements, Judge Kozinski, in response to the question of whether the alterations were defamatory, stated that at least some of the misquotations, if proved at trial, would support a jury verdict for Masson. The misquotations, together, portrayed Masson as "a vain, shallow, disingenuous, intellectually dishonest, cold, heartless, self-absorbed individual." A jury might reasonably conclude that the tapes presented a different picture.

The remaining question was whether the alterations were the result of malice. Judge Kozinski would have asked whether there was sufficient evidence presented for a rational jury to conclude that Malcolm and the publishers knew that Masson's actual statements differed from those attributed to him and whether they

acted with reckless disregard with respect to the statements. For Judge Kozinski, there was very strong circumstantial evidence that Malcolm acted with malice, deliberately or recklessly altering Masson's statements. In addition to facts mentioned above, the dissent observed that Malcolm was not working under a tight deadline, and had a chance to review galley proofs. Furthermore, Malcolm assured Masson that all of his quotations were on tape and would be reported verbatim.

It appeared that The New Yorker did not engage in deliberate fabrication, except as the magazine might have knowingly approved Malcolm's alterations, but there was considerable evidence of the publication's recklessness. Again, Masson brought the inaccuracy of the quotations to the attention of the magazine's fact-checking department. And Masson's attorney wrote to the magazine after the first part of the article appeared to put the publication on notice of the alleged misstatements;

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apparently there was no attempt to verify the balance of the article or to make any corrections. The New Yorker has induced "a reasonable expectation of accuracy in the minds of sources and readers," and a jury might consider the magazine's reputation as relevant in determining the recklessness of its conduct.

Knopf did not have the right to ignore "clear indications" that the material it was about to publish might be libelous, stated Judge Kozinski. The company knew of Masson's allegations and could have asked Malcolm to document the disputed quotes. If the company on the basis of such an examination had concluded, even wrongly, that the quotes were accurate, Judge Kozinski might have held it harmless. But the failure to investigate the matter at all might well amount to recklessness. A jury therefore might conclude that Knopf's "cavalier" treatment of Masson's complaint amounted to a reckless disregard of the truth.



Judge Kozinski concluded by declaring that "Truth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. To have that assertion made by The New Yorker, widely acknowledged as the flagship publication when it comes to truth and accuracy, debases the journalistic profession as a whole. Whatever it might have taken to refute Masson's allegations on the merits is not, in my view, worth the unsettling implications left by defeating him on these grounds. Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more."

Masson v. The New Yorker Magazine, Inc., Case Nos. 87-2665; 87-2700 (9th Cir., Aug. 4, 1989) [ELR 11:4:7]

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## **United States Supreme Court upholds award of compensatory and punitive damages in libel action by defeated judicial candidate**

In Masson (above), the court referred to the recent United States Supreme Court decision in Harte-Hanks Communications, Inc. v. Connaughton.

Harte-Hanks involved a libel claim brought by Daniel Connaughton against the publisher of the Journal News, a local newspaper in Ohio. Connaughton was the unsuccessful candidate for the office of Municipal Judge of Hamilton, Ohio in an election conducted on November 8, 1983. The Journal News supported the incumbent candidate, James Dolan. About a month before the election, as described by United States Supreme Court Justice Stevens, Dolan's Director of Court Services resigned and was arrested on bribery charges. On November 1, 1983, the newspaper published a story

quoting Alice Thompson, a witness in the grand jury investigation of the charges; Thompson stated that Connaughton had used "dirty tricks" and had offered jobs and a vacation to her family "in appreciation" for their help in the investigation.

Connaughton, invoking diversity jurisdiction, sued for damages. Harte-Hanks, after discovery, filed a motion for summary judgment, claiming that even if Thompson's statements were false, the First Amendment protected the accurate and disinterested reporting of charges against a public figure. The District Court denied the motion on the ground that the evidence raised an issue of fact as to the objectivity of the newspaper's reporting.

A jury then found by a preponderance of the evidence that the November 1st article was defamatory and that it was false. Also finding by clear and convincing proof that the story was published with actual malice, the jury

awarded Connaughton \$5,000 in compensatory damages and \$195,000 in punitive damages.

A Federal Court of Appeals affirmed the District Court's denial of a motion for judgment notwithstanding the verdict.

In upholding the Court of Appeals' decision, Justice Stevens found that when the court's opinion was read as a whole, it was apparent that references to the newspaper's departure from accepted professional standards and to the publisher's motive in reporting the allegations were "merely supportive" of the court's ultimate conclusion that the record demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of actual malice as found by the jury.

Justice Stevens proceeded to consider whether the Court of Appeals gave undue weight to the jury's findings, rather than conducting the independent review

required by *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984; ELR 6:3:12). After recounting some of the important conflicts in the evidence, Justice Stevens remarked that there was " unquestionably ample evidence in the record to support a finding that Thompson's principal charges were false, either because she misinterpreted remarks by Connaughton and his wife, or because Thompson was deliberately lying." The fact that the jury found that Connaughton was telling the truth did not alone constitute clear and convincing evidence that the newspaper acted with a knowledge of falsity or with a high degree of awareness of probable falsity. However, in this case, additional information supported the inference that the Journal News acted with actual malice in printing Thompson's false and defamatory statements.

According to Justice Stevens, the Journal News chose not to interview Alice Thompson's sister, Patsy

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Stephens; Stephens granted Connaughton the initial interview on which the bribery charges were based. It was "utterly bewildering" to the court that the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of the events." The newspaper did not listen to the tapes of an interview conducted with Stephens in Connaughton's home. Interviews were held with six witnesses, including Connaughton, and each of them denied Thompson's charges and corroborated Connaughton's version of the events.

Justice Stevens, although affirming the importance of "vigorous reportage of political campaigns," stated that the press does not have absolute immunity in its coverage of public figures or elections. And, although basing his ruling on what he characterized as a "less speculative" approach to the evidence than that taken by the

Court of Appeals, Justice Stevens .found that the newspaper acted with actual malice. In particular, Thompson's most serious charge - that Connaughton intended to confront the incumbent judge with the tapes to scare him into resigning and otherwise not to disclose the existence of the tapes - "was not only highly improbable, but inconsistent with the fact that Connaughton had actually arranged a lie detector test for Stephens and then delivered the tapes to the police." Furthermore, it was likely that the newspaper's failure to interview Stephens was "a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges." Although the failure to investigate will not alone support a finding of actual malice, " the purposeful avoidance of the truth is in a different category," and the judgment of the Court of Appeals was affirmed accordingly.

Justice Blackmun's concurring opinion noted that Harte-Hanks had abandoned the defense of truth, despite the fact that there might have been some support for that defense, and the court therefore was required to presume that the jury correctly found that the article was false. The newspaper also did not rely on a "neutral reportage" defense, thus depriving the court of the opportunity to consider this theory. Were the court to adopt the neutral reportage theory, stated Justice Blackmun, the facts of this case arguably might fit within it."

Justice Blackmun also observed that the newspaper accurately described Thompson's statements as allegations, and printed Connaughton's partial denial of their truth - the differences in presentation, for Justice Blackmun, were relevant to the question of whether the publisher acted in reckless disregard of the truth. Cautioning that the majority's opinion cannot fairly be read to hold that the content of the article is irrelevant to the actual



malice inquiry, and stating that he was convinced that the majority had considered the article's content and form, Justice Blackmun concurred in the court's opinion.

Justice Scalia's concurring opinion focused on the issue of the standard of review to be used in determining the existence of actual malice, stating that the court's opinion resolved the issue in a "peculiar manner." The court found it sufficient to accept not all of the favorable facts that the jury could reasonably (emphasis by Justice Scalia) have found, but rather only the adequately supported favorable facts that the jury did find, and exercised its independent judgment just on the basis of those factual determinations and the uncontroverted evidence in concluding that malice was clearly and convincingly proved. Justice Scalia questioned why the court chose not to consult all the reasonably supported findings that the jury could have made, and would have adopted the Sixth Circuit's analysis in which the court would make

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its independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it reasonably could have made.

Justice White, with whom Chief Justice Rehnquist joined in concurring, and Justice Kennedy, in a separate concurrence, also expressed their views as to the applicable standard of review.

Harte-Hanks Communications, Inc. v. Connaughton,  
Case No. 88-10 (U.S.Sup.Ct., June 22, 1989) [ELR  
11:4:10]

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**United States Supreme Court refuses to impose liability on Florida newspaper for publishing name of rape victim; in separate case, Federal Court of Appeals holds that documentary program did not invade rape victim's privacy**

The October 29, 1983 issue of the Florida Star, a weekly newspaper in Jacksonville, Florida, included a one-paragraph account, derived from a police report, of the rape and robbery of a woman; the report, contrary to the newspaper's internal policy of not publishing the names of sexual offense victims, included the victim's full name.

B.J.F. sued the Duval County, Florida, Sheriff's Department and the newspaper, alleging the violation of a Florida statute making it unlawful to "print, publish, or broadcast ... in any instrument of mass communication" the name of the victim of a sexual offense. The Sheriff's

Department settled with B.J.F. for \$2,500. The trial court denied the Florida Star's motion to dismiss the case, ruled that the statute was constitutional, and granted B.J.F.'s motion for a directed verdict on the issue of negligence, finding the newspaper per se negligent based upon the violation of the statute. The jury, instructed by the judge that it could award B.J.F. punitive damages if it found that the newspaper had "acted with reckless indifference to the rights of others," awarded B.J.F. \$75,000 in compensatory damages and \$25,000 in punitive damages.

A Florida appellate court affirmed the entry of the directed verdict in a brief per curiam opinion.

In reversing the lower court ruling, Justice Marshall stated that imposing damages on the Florida Star for publishing B.J.F.'s name would violate the First Amendment. The newspaper lawfully obtained truthful information about a matter of public significance - the police

report revealed the identity of the victim and the news article describing the unfortunate assault was accurate.

Justice Marshall, while acknowledging the state's interest in punishing the dissemination of victim identities, stated that the circumstances of the instant case did not warrant the imposition of damages against the newspaper. The government was responsible for the "erroneous, if inadvertent" inclusion of B.J.F.'s full name in a report made available in a press room open to the public.

The court observed that the fact that the newspaper gained access to the victim's name through a government news release made it "especially likely that, if liability were to be imposed, self-censorship would result." If the newspaper had reproduced the news release prepared by the Sheriff's Department, imposing civil damages would "surely" violate the First Amendment. The addition of the "linguistic connecting tissue" necessary to convert

the police report into a news story did not change this result, in Justice Marshall's view.

Justice Marshall also questioned the "broad sweep" of the negligence per se standard in civil actions based on the statute, noting that no case-by-case findings were required as to whether the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive.

The "facial underinclusiveness" of the statute raised serious doubts for the court about whether significant state interests were being furthered. Justice Marshall therefore declined to find that Florida's selective ban on publication by the mass media, "without more careful and inclusive precautions against alternative forms of dissemination," accomplished its stated purpose.

The court concluded by cautioning that its holding was limited and that it did not find that truthful publication is automatically constitutionally protected, or "that there is

no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense." The court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order," and that no such interest was served by holding the Florida Star liable in the instant case.

Justice Scalia concurred in the court's judgment, but stated that it would have been sufficient to find that the statute did not protect an interest "of the highest order" - the statute appeared to Justice Scalia as "a prohibition that society is prepared to impose upon the press but not upon itself."

Justice White, with whom Chief Justice Rehnquist and Justice O'Connor joined in dissent, would have upheld

the jury award to compensate B.J.F. for the harm she suffered due to the Star's negligence. Justice White did not agree that the cases cited by Justice Marshall supported the result reached by the court. Furthermore, Florida did take measures to avoid the disclosure of the names of rape victims and it was "not too much to ask the press," in Justice White's view, to respect "simple standards of decency and refrain from publishing a victim's name, address, and/or phone number."

Justice White also observed that the jury had found that the newspaper acted with reckless indifference toward the rights of others - the court's concerns about damages based on a strict liability standard thus were "irrelevant."

Characterizing the court's "underinclusiveness" analysis as "underinclusive," Justice White stated that the court should have reviewed not only the statute at issue, but the whole of Florida privacy tort law in order to



determine the comprehensiveness of the state's "liability regime."

Justice White concluded by declaring that the court's opinion would obliterate the tort of the publication of private facts, for if the First Amendment "prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, [Justice White doubted] that there remain any 'private facts' which persons may assume will not be published in the newspapers, or broadcast on television." The right to privacy is not absolute, stated Justice White, but the court accorded too little weight to B.J.F.'s side of the equation, for there is no public interest in immunizing the press from liability in the rare cases where a state's efforts to protect a victim's privacy have failed.

In a case decided several months before the decision in *Florida Star*, a Federal Court of Appeals in Texas upheld a District Court decision granting summary judgment to

a television station in an invasion of privacy action brought by a rape victim.

Marla Ross was raped in 1983. In 1986, WCCO-TV prepared a documentary concerning a man who had been convicted of two rapes; the man was a suspect in Ross's case, but Ross did not identify him as her attacker. The documentary used Ross's actual first name and a picture of the house in which she lived at the time of the assault.

The District Court granted summary judgment to the broadcast parties on both state law and constitutional grounds, finding that the convict's interest and the public's interest in reversing false convictions outweighed Ross's privacy interest.

Federal Court of Appeals Judge Higginbotham rejected Ross's contention that the disclosure of the details of the rape were "private facts," stating that the documentary involved matters of legitimate public concern.

Ross also argued that even if the details of her rape were newsworthy, the documentary could have been produced without mentioning her name. But Ross's name, residence or "identity" were not private, embarrassing facts, stated the court. And there existed a "logical nexus" between the rape victim's name and a matter of legitimate public concern in this case because "communicating that this particular victim was a real person with roots in the community, and showing [the television station's] knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story." It was arguable that the station was correct in its judgment about the newsworthiness of the victim's identity and without diminishing Ross's legitimate distress, the District Court's grant of summary judgment was justified.

Judge Higginbotham also stressed the narrowness of the court's holding and the "peculiar facts" present in

the case. The decision did not leave rape victims without any protection against the public disclosure of their names, stated the court and also left open the state's power to protect rape victims' privacy by preserving the confidentiality of the state's records, and imposing liability for the wrongful taking of information, including damages resulting from the foreseeable publication of the information. The court declined to determine whether WCCO had immunity from liability arising from any constitutional protection for the publication of information contained in public records or for the publication of truthful materials lawfully obtained.

The Florida Star v. B.J.F., Case No. 87-329 (U.S.Sup.Ct., June 21, 1989); Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989) [ELR 11:4:12]

## **Political cartoon was expression of opinion and did not libel Ohio judicial candidate**

In a decision issued in July 1988, but only recently published, an Ohio appellate court has ruled that a trial court correctly dismissed a libel action brought by Ohio Supreme Court Judge James P. Celebrezze against Dayton Newspapers, Inc., the publisher of the Journal Herald newspaper.

In August 1984, during Judge Celebrezze's re-election campaign, the Journal Herald published a critical political cartoon by Milton Priggee. Judge Celebrezze subsequently sued Dayton Newspapers, alleging defamation, intentional infliction of emotional distress, and a "false light" theory of invasion of privacy.

The trial court held that Ohio does not recognize a claim for false light invasion of privacy, and dismissed

that claim. The court granted summary judgment in favor of the publisher on the remaining claims.

Ohio Court of Appeals Judge Grey agreed with the trial court that there was no showing that the cartoon was published with malice. The purpose of the cartoon, admittedly, was "to politically embarrass Celebrezze and to prevent him from being re-elected, but such a motive does not constitute legal malice." And either under a convincing clarity standard or the ordinary summary judgment standard, no genuine issue of fact as to actual malice was shown. The cartoon did not assert a false statement of fact, and no reasonable person could conclude, in the court's view, that Priggee's cartoon 'accused Celebrezze of a crime. The scene portrayed was "exaggeration, hyperbole ... rhetorical, perhaps allegorical, but not capable of being interpreted as being factual or defamatory." Given the finding that the cartoon was an expression of opinion, the trial court correctly

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granted summary judgment to the publisher since there was no genuine issue as to Celebrezze's libel claim, concluded Judge Grey.

Celebrezze v. Dayton Newspapers, Inc., 535 N.E.2d 755 (Ohio App. 1988) [ELR 11:4:13]

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**Satirical column quoting Raymond Chandler's fictional detective "Philip Marlowe" did not libel public official**

A Washington appellate court has affirmed a trial court decision granting summary judgment to the Seattle Post-Intelligencer in a defamation action brought by a former county official.

In the spring of 1983, Harley Hoppe, then King County Assessor, was involved in a controversy over his use of

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private detectives to monitor county employees. Hoppe subsequently was not re-elected.

During the controversy, the Post-Intelligencer published a satirical column written by Emmett Watson; in the column, Raymond Chandler's fictional detective "Philip Marlowe" was offered a fee to follow county employees for "da boss," the county assessor, "Hurley Herpes." Marlowe commented: "Don't tell me where he gets the money," I said. "I bet he hits the quinella every day..... Or maybe he just kind of ups a property assessment here and there and some of the money drips over into the Private Eye Benevolent Fund."

Judge Winsor stated that the trial court correctly found that the identification of Hoppe as "Hurley Herpes" could not be reasonably understood as describing an actual fact concerning Hoppe's medical condition, nor be objectively characterized as true or false. Furthermore, the audience to whom the column was directed knew



that Watson frequently used alliterative nicknames to refer to public figures.

The court then noted that Watson's column appeared during a political campaign, and in the context of a well publicized debate over Hoppe's use of public funds to hire detectives; that the column was distinguishable from more general news articles; and that the humorous tone and first-person narrative style further indicated that the column did not concern actual events. As a matter of law, concluded Judge Winsor, Watson's column did not imply the allegation of defamatory facts, or allege criminal conduct, and the trial court correctly dismissed Hoppe's defamation claim.

Hoppe's causes of action for outrage, intentional or negligent infliction of emotional distress, and false light invasion of privacy also were properly dismissed. The trial court determined that in cases involving a public official, none of the claims could be maintained without a

showing that the newspaper acted with actual malice. In order to determine malice when the allegedly defamatory expression in issue is satire, humor, or fiction, the standard to be applied is whether the author intended, or recklessly failed to anticipate, that readers would construe the publication as a statement of defamatory facts. Having found that Watson's column did not imply defamatory facts, and in the absence of any evidence that the newspaper parties intended the column to convey defamatory facts, or believed that the column did convey such facts, Hoppe failed to establish a prima facie case of malice and the dismissal of the claim for intentional infliction of emotional distress therefore was affirmed.

The lack of malice also served to warrant the dismissal of Hoppe's claims for the negligent infliction of emotional distress, and false light invasion of privacy. And

Hoppe did not make an evidentiary showing sufficient to maintain his claim of outrage.

Hoppe v. Hearst Corporation, 770 P.2d 203 (Wash.App. 1989) [ELR 11:4:14]

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**Author and publisher of "In the Spirit of Crazy Horse" prevail in libel action brought by former Governor of South Dakota**

The Supreme Court of South Dakota has granted summary judgment to Peter Matthiessen and Viking Press, the author and publisher of "In the Spirit of Crazy Horse" in a \$25 million libel action brought by William Janklow, the former attorney general and governor of South Dakota.

The book alleged that Janklow engaged in rape, drunk driving and other reckless conduct.

Judge Gene Paul Kean first stated that Janklow was required to prove that the allegedly libelous statements were made with actual malice. It was found, however, that Matthiessen and Viking provided sufficient evidence to corroborate their position that they did not publish the complained-of statements with reckless disregard or with a knowledge of their falsity. The statements may have been potentially libelous by state law standards, but the publisher and author were not required to be objective. Summary judgment therefore was appropriate, ruled the court.

Summary judgment also was appropriate in view of the finding by another Court of Appeals (ELR 8:3:13) that Newsweek magazine's publication of the same rape allegation recounted by Matthiessen was "a materially accurate report of an historical fact." Other challenged

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statements also were "accurate accounts of an historical statement" or were constitutionally protected opinion, concluded Judge Kean.

Janklow v. The Viking Press, Case No. 83-1385 (S.D., June 2, 1989) [ELR 11:4:15]

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### **"Mac Tonight" character does not infringe copyrighted man-in-the-moon mask**

When you get caught between the moon and McDonald's,\* the best that you can do may not be to file a copyright infringement action, as Norbert Pasillas discovered.

Pasillas, sometime in late 1982, created a latex man-in-the-moon mask, and registered a copyright in the mask in July 1987.

In 1986, McDonald's began its "Mac Tonight" promotion; the advertising campaign included television commercials featuring a person wearing a man-in-the-moon mask. The mask resembled Pasillas' copyrighted work in that both masks used crescent moon shapes, depicted human faces in the centers of the masks, were colored white or off-white, and were designed to be worn over a person's head.

Notwithstanding the common design elements, noted Federal District Court Judge Ferdinand F. Fernandez, the masks were "essentially dissimilar" in many respects, and the overall feeling expressed by the Mac Tonight mask was "totally different from that expressed by the Pasillas mask." Furthermore, stated Judge Fernandez, no reasonable person could confuse one mask with the other one.

In granting McDonald's motion for summary judgment, Judge Fernandez found that as a matter of law, there

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was no substantial similarity of expression between the masks. The court observed that human features are indispensable elements in portraying the idea of a man in the moon, and that Pasillas could not claim copyright protection for all man in the moon masks which incorporate human features. McDonald's request for attorney's fees was denied, as was a motion for Rule 11 sanctions.

(\*With apologies to Peter Allen, Burt Bacharach, Carol Bayer Sager and Christopher Cross.)

Pasillas v. McDonald's Corporation, Case No. CV 88-4065 (C.D.Ca., April 21, 1989) [ELR 11:4:15]

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**Toothpaste manufacturers did not infringe copyrighted script and synopsis for animated "Mr. Cavities" commercial**

Sometime prior to February 1975, Andrew L. Green 11 created and wrote a detailed shot-by-shot continuity script for a toothpaste commercial entitled "Mr. Cavities." Green submitted the script to Proctor & Gamble, Inc. and to Lever Brothers Company, but the toothpaste producers rejected his work.

Green claimed that television commercials aired by Proctor & Gamble, Lever Brothers, and Colgate-Palmolive Co. infringed the "Mr. Cavities" script. The commercials depicted either cartoon characters, such as the "Crest Cavity Fighting Team" and "Hurtful J. Cavity" or, as in the Colgate commercial, humans portraying "professional cavity makers."

A Federal District Court in New York has granted summary judgment to the toothpaste manufacturers on the ground that Green's scripts and the challenged commercials were not substantially similar. Accepting the validity of Green's copyright and assuming access by all



of the toothpaste manufacturers, the court observed that the only elements that Green's script had in common with the Proctor & Gamble and Lever Brothers animated commercials was "the idea of microscopic, humanoid organisms who attack human teeth with sharp instruments and are vanquished by toothpaste." But the idea of characterizing oral bacteria as humanoid "cavity makers" was "hardly protectible," stated Judge Keenan, and there were no common characteristics in the expression of the idea.

Green v. Proctor & Gamble, Inc., 709 F.Supp. 418  
(S.D.N.Y. 1989) [ELR 11:4:15]

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**Decision barring daughter of Hank Williams, Sr., from claiming interest in late singer's royalties is upheld by Federal Court of Appeals in New York, but Alabama Supreme Court finds that she may be entitled to share in songwriting income**

A Federal Court of Appeals in New York has affirmed a District Court decision (ELR 10:5:9) holding that Cathy Yvonne Stone was barred by the doctrine of laches from claiming any interest in the copyright renewal rights to works composed by the late Hank Williams, Sr.

Judge Cardamone stated that even granting Stone, who was Williams Sr.'s natural daughter, "the fullest stretch of sympathy, her own delay and procrastination" barred her lawsuit. After reviewing the background of the action, the court stated that Stone presented no plausible explanation for delaying the filing of the complaint until

September 1985, and noted that the delay resulted in the loss of evidence. Furthermore, various parties had entered agreements involving the rights to Williams Sr.'s songs, perhaps lulled into "a false sense of security that the renewal rights were as they appeared."

In July 1989, the Alabama Supreme Court ruled that Stone, now known as Cathy Deupree Adkinson, was entitled to share in the income earned since August 1985 from Williams Sr.'s songs; the court apparently concluded (in a decision not yet available to the ELR ) that Adkinson's interests were not properly represented in a 1967 hearing concerning Williams Sr.'s estate.

Stone v. Williams, 873 F.2d 620 (2d Cir. 1989) [ELR 11:4:16]

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## **New York court declines to enjoin "Lynyrd Skynyrd" 1988 tribute tour, but orders MCA Records to affix explanatory labels on albums**

In a case decided in June 1988, but only recently available to the Entertainment Law Reporter, a Federal District Court in New York considered Judith Van Zant Grondin's action seeking to enjoin several musicians from performing as a musical group under the name "Lynyrd Skynyrd," and to enjoin MCA Records from marketing a record album entitled "Lynyrd Skynyrd Live."

Ronnie Van Zant, along with Gary Rossington, formed the band Lynyrd Skynyrd in the early 1970s. Van Zant and three other individuals died in 1977 when the airplane in which the band was flying crashed. Grondin (Van Zant's widow) and two band members

subsequently agreed not to use the name Lynyrd Skynyrd again in order not to capitalize on the tragic accident.

However, in 1987, the survivors of the crash, along with Grondin, decided to conduct a tribute tour to Lynyrd Skynyrd. One of the relevant contracts granted the tour producer a license to use the name Lynyrd Skynyrd. But Grondin later claimed that she did not agree to allow the use of the name Lynyrd Skynyrd for the new band, and sought to prevent any further performances.

Federal District Court Judge Robert W. Sweet first stated that although Grondin may win permanent injunctive relief, the musicians were entitled to continue their tour due to Grondin's delay in seeking relief.

Judge Sweet next determined that the oral agreement not to use the Lynyrd Skynyrd name did exist, and that the parties' performance of the agreement for ten years

precluded the application of Florida's statute of frauds. Furthermore, the non-use agreement was memorialized in certain corporate documents.

But Grondin did not show a likelihood of success on the merits of her contract claim against MCA, ruled the court. MCA was not a party to the non-use agreement, and it was noted that the company, which was authorized by the tribute producer to use the "Live" title, relied on an entity with the apparent authority to approve both the title and the album jacket art work.

As described by Judge Sweet, Grondin's claim under section 43(a) of the Lanham Act was that the musicians, by holding themselves out to the public as Lynyrd Skynyrd, would deceive concertgoers into believing that they will view a performance by a group that achieved popularity in the 1970s, even though the group's lead singer no longer is alive. The court pointed out that the tragic crash was highly publicized, and that it was

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"improbable" that sophisticated fans of the original Lynyrd Skynyrd would believe that the 1987-1988 group included Ronnie Van Zant "by virtue of the use of the name Lynyrd Skynyrd."

The court therefore declined to enjoin the tour on Lanham Act grounds, stating that although there were "minor ways" in which the tour might deceive the unsophisticated concertgoer, the balance of hardships was in favor of the individual musicians.

Likelihood of confusion was greater with respect to the album, concluded Judge Sweet, because record buyers would not know whether MCA was releasing recordings of Van Zant's live performances recorded before his death. The words "Lynyrd Skynyrd Tribute Tour 1987," in comparison to the album jacket logo reading "Lynyrd Skynyrd Live," were "so small in comparison as to be nearly meaningless." The small lettering did not adequately explain that the MCA album did not contain

recordings of the original group "packaged in a 1987 context." And it was only after the plastic wrapper was removed from the album that a buyer might see the dedication to the victims of the crash " and then in type size barely visible without eye strain," emphasized Judge Sweet.

In all, Grondin presented sufficiently serious questions going to the merits to warrant further proceedings on the Lanham Act claim with respect to the "Live" album, and limited injunctive relief was available given that the sale of the album might decrease sales of previously released albums "unquantifiably." MCA, although not required to recall the albums, must affix to the album jacket a label " explicitly conveying that this is a recording of the new band recorded in 1987 and not the original Lynyrd Skynyrd" - the wording of the label must be mutually agreeable to the parties.



Grondin v. Rossington , 690 F.Supp. 200 (S.D.N.Y. 1988) [ELR 11:4:16]

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**Literary agent may be entitled to commission on authors' participation in Jane Fonda videotape project; claim not barred by statute of frauds, New York court rules**

Harvey Klinger, Inc., was not barred by the statute of frauds from seeking a 15% commission on the royalties earned by two authors (identified only as Radetsky and Garrick) from a Jane Fonda sports video series, a New York trial court has ruled. The authors collaborated with Fonda on the video "SportsAid," which was based on the book "Peak Condition." Klinger had arranged the publication of "Peak Condition" and another Radetsky/Garrick book entitled "Personal Trainer.

Judge Saxe found that Klinger presented sufficient documentary evidence to warrant granting a motion to dismiss the statute of frauds defense. The contracts for the sports medicine books each included a provision stating that "The Author hereby empowers the Publisher to pay his agent, Harvey Klinger, Inc ... all monies that become due under this agreement."

Furthermore, a six page letter-agreement signed by Jane Fonda and countersigned by the authors not only contained the basic terms of their agreement to develop a series of videotapes, but also provided that the \$20,000 advance would be paid to Harvey Klinger, Inc. on the authors' behalf. The unexecuted copies of the letter-agreement were sent to Klinger to be forwarded to Radetsky and Garrick for signature. Judge Saxe noted that the letter-agreement and an accompanying cover letter indicated that there was an agent-client

relationship between the parties and that Klinger "actively participated in the negotiation of the agreement."

Klinger was entitled to establish the amount of the commission by other, unsigned documents, concluded the court, in denying the authors' motion to dismiss the complaint.

Harvey Klinger, Inc. v. Radetsky, New York Law Journal, p. 28, col. 1 (N.Y.Cnty., July 17, 1989) [ELR 11:4:17]

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### **Disputes concerning sales of paintings by Max Beckmann and Brice Marden are resolved by Federal District Court in New York**

A Federal District Court in New York has issued rulings in two art-related disputes.

In *Keoseian v. von Kaulbach*, Judge Mukasey refused to disqualify the attorney for Hedda Schoonderbeek von Kaulbach, the older sister of the widow of German Expressionist painter Max Beckmann, in a proceeding involving one of Beckmann's paintings, "Portrait of Quappi." Richard S. Keoseian, claiming that von Kaulbach assigned the painting to him in August 1987, sought a declaratory judgment that the assignment was valid and enforceable, and that the executors of the estate of Mathilde Beckmann should deliver the painting to him rather than to von Kaulbach. Von Kaulbach claimed that her signature on the assignment was obtained through fraud, duress and misrepresentation as to the contents and meaning of the document.

Keoseian moved to disqualify von Kaulbach's counsel on the ground that they had represented Keoseian on a matter substantially related to the instant litigation. According to Keoseian, attorney Edward J. Ross and the

firm of Breed, Abbott & Morgan represented him (as the agent for von Kaulbach) as well as von Kaulbach in challenging the validity of Mathilde Beckmann's 1982 will.

Judge Mukasey stated that although Keoseian had a reasonable basis to believe that Ross was acting as his lawyer in the prior litigation, that litigation was not substantially related to the matter before the court. Thus, no conflict of interest existed because of Ross's work in the prior matter.

Keoseian claimed that Ross's testimony would be required by von Kaulbach in order to show her reduced mental and physical state at the time Keoseian allegedly induced her to sign the assignment, and that Keoseian planned to call Ross to show the extent of the services Keoseian rendered for von Kaulbach - the services purportedly provided the consideration for the assignment of the painting.

Judge Mukasey again declined to disqualify counsel, stating that Ross's testimony was not relevant to von Kaulbach's case and that the attorney was not a witness who ought to be called such that disqualification was mandatory.

The court concluded by observing that von Kaulbach was almost ninety years old and was living in Germany - the disqualification of an attorney who had assisted her for over two years and was familiar with the complex history of the litigation involving the Beckmann estate would be "a classic example of hardship." The case also was sufficiently advanced, stated Judge Mukasey, so that a change of attorneys would unfairly disadvantage von Kaulbach. In all, even if Ross were a necessary witness, von Kaulbach would be substantially harmed by having to find a replacement, and Keoseian's motion therefore was denied.

In *Hoffman v. Boone*, Judge Mukasey dismissed a complaint in which Paul and Camille Hoffmann sought specific performance of a purported oral contract to purchase a work by artist Brice Marden entitled "Grey #1." The Hoffmanns claimed that Mary Boone, the owner of a New York art gallery, agreed to sell them the work for \$120,000. Boone denied that the parties entered a sales contract.

The court, although agreeing with Boone that the statute of frauds barred the enforcement of the alleged oral contract, considered the Hoffmann's argument that the doctrine of promissory estoppel barred Boone from relying on the statute of frauds .

Judge Mukasey, following the decision of intermediate New York state courts, first determined that estoppel principles would apply to contracts under the Uniform Commercial Code. However, the Hoffmanns did not present evidence that they "expended significant

resources in reliance on the agreement," thereby suffering unconscionable injury. In the absence of a genuine issue of fact as to unconscionable injury, one of the required elements in a promissory estoppel claim, the court granted Boone's motion for summary judgment.

Keoseian v. Von Kaulbach, 707 F.Supp. 150 (S.D.N.Y. 1989); Hoffmann v. Boone, 708 F.Supp. 78 (S.D.N.Y. 1989) [ELR 11:4:17]

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### **United States government must return watercolors painted by Adolph Hitler and two photographic archives to German photographer's children**

A Federal District Court in Texas has ordered the United States government to return to an art investor and to the children of a German photographer four

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paintings and two photographic archives seized in Germany by the United States Army in May 1945.

The four watercolors in issue were painted by Adolph Hitler and were given to Heinrich Hoffman, Sr. in 1936. It was not until 1982 that Hoffman's children learned that the watercolors were located in the United States. The photographic archives were compiled by the Hoffman family, and the family was advised that the archives, relocated in the early 1950s to the United States, would be returned.

Judge Hughes found that statements made by representatives of the United States Army from 1945 until 1982 indicated that a bailment existed between the Army and the Hoffmans. No claim arose, stated the court, until the Hoffmans demanded and were refused redelivery. The lawsuit was filed within the statutory limitations period, and since the United States did not present evidence contesting the title of the Hoffmans or the nature of the

government's acquisition of their property, summary judgment was available to the Hoffman parties for title and possession of the paintings and archives. Judge Hughes questioned the government's reliances on "political denigrations of the artist and the archivist," instead of property law arguments, and commented that "equal justice under law protects people without exceptions for those people whose father's politics were wrong."

Price v. United States, 707 F.Supp. 1465 (S.D.Tex. 1989) [ELR 11:4:18]

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**Taxpayers denied depreciation deductions and investment tax credit in connection with purchase of "reproduction masters" of Picasso originals**

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James and Judy Rose were not entitled to depreciation deductions or investment tax credits on their purchase of "reproduction masters" of Picasso originals, a Federal Court of Appeals has ruled.

On December 26, 1979, the Roses entered into two contracts with a corporation called Jackie Fine Arts to purchase two Pablo Picasso "reproduction masters." A reproduction, master, as described by Judge Boyce F. Martin, Jr., is a photo screen negative used to produce an image, but does not include the original works of art created by the artist. The "master" referred to in the contract between the Roses and Jackie Fine Arts was a "four by five inch color transparency" taken from a slide photograph of the original art work, and costing about \$200 to produce.

The Roses, without obtaining any independent appraisals of the value of the Picasso packages before selecting images and without obtaining any valuation or

distribution information, paid a total of \$550,000 for the package, allocating \$545,000 to the master and \$5,000 to the copyright. An additional \$5,000 was used to produce a limited edition of 500 prints and 1,000 posters from the image.

According to Judge Martin, the reproductions and posters taken from the "master" image had no proven market or marketability; the fair market value of the Picasso packages acquired by the Roses in 1979 and 1980 was "negligible."

On a 1979 income tax return governing profit or loss from a business or profession, the Roses reported zero income, and depreciation expenses of about \$125,800 in art print activity under the business name Lecia Arts. A double declining balance method to compute depreciation was applied on a basis of \$1,100,000 for the two 1979 Picasso "reproduction masters," plus first year depreciation of \$4,000. The Roses, who reported 1979

taxable income exceeding \$460,000, also claimed an investment tax credit, of which \$110,000 was attributed to the Picasso works.

On a 1980 joint individual income tax return, the Roses reported taxable income exceeding \$550,000; with respect to art print activity, they claimed depreciation (for three Picasso packages) of about \$340,000, interest of about \$76,000 and expenses. The Roses claimed an investment tax credit of \$55,000 attributable to a third Picasso package they acquired.

The Commissioner of Internal Revenue disallowed all of the losses and investment tax credits claimed for 1979-1980 relating to the Picasso packages, stating that the losses were not incurred in an activity entered into for profit; that the art masters were not used or available for use during 1979; and that the Roses had not established a depreciable basis, the useful life of the art masters, or the propriety of the depreciation method used.

The Tax Court held that the acquisition of the Picasso packages was motivated primarily, if not exclusively, by tax considerations; that the Roses did not have an actual and honest profit objective in acquiring the art works; and that the transactions were devoid of economic substance and were merely a means to reduce tax liability.

In upholding the Tax Court decision, Judge Martin noted that the question of whether the Roses used the Picasso packages in a "trade or business" or held the works "for the production of income" was a question of fact. In determining whether the transaction had any "practicable economic effect other than the creation of income tax losses," the Tax Court correctly examined the Roses' profit motive and the economic substance of their activities. The evidence, particularly the Roses' admission that tax considerations were a major part in their decision to acquire the Picasso packages, supported the Tax Court's conclusions, stated Judge Martin.

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Furthermore, the Roses did not obtain information on the commercial viability of the package, were "indifferent" to the real value of the Picasso works, and were correctly held liable for additional interest.

Rose v. Commissioner of Internal Revenue, 868 F.2d 851 (6th Cir. 1989) [ELR 11:4:19]

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### **Artist's right to approve licenses for merchandising of fictional character "Babar" is upheld**

Clifford Ross, an artist who agreed to "develop" the fictional character Babar the Elephant in accordance with a "high standard" of "style, appearance and quality," obtained, in 1987, an option to acquire motion picture, television, merchandising and allied rights in Jean de Brunhoff's creation. Subsequently, Ross assigned to

Nelvana Limited, a Canadian animation studio and entertainment company, the option to acquire the Babar rights.

Ross claimed that Nelvana, contrary to the provisions of the assignment, entered licensing agreements with third parties without his approval and that he was not consulted in connection with the recently-released animated film based on the Babar property.

Federal District Court Judge Kenneth Conboy first found that Ross was not excluded from the production of the Babar film. However, the court agreed that Nelvana granted licenses to third parties without obtaining Ross's approval and that "numerous" proposed or fully executed licenses did not contain the requisite quality control provisions. Ross proved that his reputation would suffer irreparable harm if Nelvana continued to conduct licensing activities without meeting Ross's high standards of quality control, stated Judge Conboy in



granting Ross a preliminary injunction barring Nelvana, during the pendency of the action, from entering into any agreements concerning the marketing of Babar characters without obtaining Ross's approval, and from holding itself out as the sole licensor of merchandising rights in the literary character.

A Federal Court of Appeals, in an opinion not yet available to the Entertainment Law Reporter, has upheld the District Court's decision.

Clifford Ross Company, Ltd. v. Nelvana, Limited, 710 F.Supp. 517 (S.D.N.Y. 1989) [ELR 11:4:20]

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**United States Supreme Court holds that ban on indecent dial-a-porn telephone messages violates the First Amendment**

Section 223(b) of the Communications Act of 1934 bans indecent as well as obscene interstate commercial telephone messages. A Federal District Court in California upheld the prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute with respect to indecent messages. The United States Supreme Court has affirmed the District Court's decision.

Sable Communications, an affiliate of Carlin Communications, operated a service offering sexually-oriented prerecorded telephone messages through the Pacific Bell telephone network. The fees charged to callers were collected by Pacific Bell and divided between the telephone company and the message provider.

In 1988, Sable sought declaratory and injunctive relief against the enforcement by the Federal Communications Commission and the United States Department of Justice of the recently amended section 223(b). The 1988

amendments to the statute included a prohibition on indecent telephone messages. The District Court found that the "indecent speech" provision of the statute was overbroad and unconstitutional, and issued a preliminary injunction prohibiting the enforcement of section 223(b) with respect to any allegedly "indecent" communication.

Justice Byron White, after reviewing the history of "dial-a-porn" regulation, emphasized that while the First Amendment does not extend to obscene speech, "sexual expression which is indecent but not obscene is protected by the First Amendment..." The court rejected Sable's argument that section 223(b) created an impermissible national standard of obscenity. There is no constitutional barrier under *Miller v. California*, 413 U.S. 15 (1973) to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others, stated

Justice White, and Sable must bear the burden of complying with the prohibition on obscene message.

Furthermore, the regulation of constitutionally protected speech in order to promote a compelling interest, such as insuring the physical and psychological well being of minors, may be achieved only via carefully tailored means. Justice White, in distinguishing the instant case from the decision in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), noted, in part, that "placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."

The argument that nothing less than a total ban on indecent commercial telephone communications would

prevent children from gaining access to such messages was found " quite unpersuasive." The court noted that the Federal Communications Commission had found that credit card, access code, and scrambling rules were an effective way to serve the government's compelling interest in protecting children. Section 223(b)'s denial of adult access to telephone messages which are indecent but not obscene far exceeded "that which is necessary to limit the access of minors to such messages," concluded the court in affirming the judgment of the District Court.

In a concurring opinion, Justice Scalia expressed concern over "drawing the line" between the obscenity and the indecency portion of the statute, and cautioned that although section 223(b) was held unconstitutional, the court did not hold that the Constitution requires public utilities to carry indecent speech.

Justice Brennan, with whom Justice Marshall and Justice Stevens joined, agreed that a statute imposing

criminal penalties for making, or for allowing others to use a telephone under one's control to make, any indecent communication for a commercial purpose was "patently unconstitutional." In Justice Brennan's view, however, section 223(b)(1)(A)'s parallel criminal prohibition with regard to obscene commercial communications also violated the First Amendment. For Justice Brennan, the concept of obscenity was incapable of being defined with sufficient specificity and clarity to withstand an overbreadth attack; the statute's prohibition of all obscene commercial messages "admits of no construction that would render it constitutionally permissible;" and the statute curtailed freedom of speech far more radically than the government's interest in preventing harm to minors could possibly license on the record before the court.

Sable Communications of California, Inc. v. Federal Communications Commission, Case Nos. 88-515, 88-525 (U.S. Sup. Ct., June 23, 1989) [ELR 11:4:20]

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**Briefly Noted:**

**Copyright Infringement/Music.**

A Federal District Court in Kansas has granted summary judgment to Criterion Music Corp. in a copyright infringement action against Biggy's Inc., a Wichita nightclub. The court rejected the claim that the copyrighted compositions were not performed for profit because Biggy's never made a profit during its operation; the record demonstrated that the compositions in question were performed publicly for profit in view of the nightclub's admission charge and the sale of alcoholic

beverages. The nightclub's argument that it should not be held liable because performers were instructed not to play copyrighted songs also was unsuccessful, and Biggy's was permanently enjoined from playing the compositions involved in the action, and was ordered to pay \$4,000 in statutory damages to Criterion as well as attorneys fees and costs.

Criterion Music Corp. v. Biggy's, Inc., 701 F.Supp. 802 (D.Kans. 1988) [ELR 11:4:21]

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### **Broadcast Rights/Jurisdiction.**

A Federal District Court in New York has refused to set aside or vacate its judgment dismissing, on the ground of forum non conveniens, an action brought by Broadcasting Rights International Corp. against the



Societe du Tour de France. It appeared that a pending criminal investigation in France would establish certain facts concerning the contracts between the parties. A civil court in France stayed its proceedings pending the resolution of the criminal investigation, and Federal District Court Judge Sweet found that the delays in the alternative forum's judicial system were not "sufficiently harmful of due process" to prevent the dismissal of the broadcasting company's complaint.

Broadcasting Rights International Corp. v. Societe du Tour de France, 708 F.Supp. 83 (S.D.N.Y. 1989) [ELR 11:4:21]

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## **Previously Reported:**

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: *Hunt v. National Broadcasting Company, Inc.*, 872 F.2d 289 (11:2:5); *Klein v. Oakland Raiders, Ltd.*, 259 Cal.Rptr. 149 (11:2:1); *Silverman v. CBS Inc.*, 870 F.2d 40 (11:2:7); *United Artists Communications, Inc. v. City of Montclair*, 257 Cal.Rptr. 124 (11:2:12); *Von Beltz v. Stuntman, Inc.*, 255 Cal.Rptr. 755 (10:12:12).

The United States Supreme Court has let stand a jury verdict (ELR 8:4:20; 5:12:12) awarding \$14 million in punitive damages to entertainer Paul Winchell. Winchell sued Metromedia, Inc. for breach of contract arising from the company's destruction of tapes of the "Winchell-Mahoney Time" television program - the

\$17.8 million jury verdict included \$14 million in punitive damages. [ELR 11:4:21]

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## DEPARTMENTS

### **In the Law Reviews:**

The Colorization of Black-and-White Motion Pictures: A Grey Area in the Law by Michael B. Landau, 22 Loyola of Los Angeles Law Review 1161 (1989)

The Loyola of Los Angeles Entertainment Law Journal has published Volume 9, Number 2 with the following articles:

Artist/Management Agreements and the English Music Trilogy: Another British Invasion? by Michael I.

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Yanover and Harvey G. Kotler, Q.C., 9 Loyola of Los Angeles Entertainment Law Journal 211 (1989)

One Technological Step Forward and Two Legal Steps Back: Digitalization and Television Newspictures as Evidence and as Libel by Don E. Tomlinson, 9 Loyola of Los Angeles Entertainment Law Journal 237 (1989)

Is the Debtor Left "Standing" When the Music Stops: Assumption and Rejection of Executory Recording Contracts by Insolvent Musicians by Cherise M. Wolas, 9 Loyola of Los Angeles Entertainment Law Journal 259 (1989)

Equal Time Equals Unequal Treatment to Newscaster Candidates by Karen Sue Naylor, 9 Loyola of Los Angeles Entertainment Law Journal 283 (1989)

The Child Protection Act: A Blanket Prohibition Smothering Constitutionally Protected Expression by Sharilyn E. Christiansen, 9 Loyola of Los Angeles Entertainment Law Journal 301 (1989)

Exit Polling Statute Doesn't Measure Up to the First Amendment by Ali Soltani, 9 Loyola of Los Angeles Entertainment Law Journal 319 (1989)

All Puff and No Stuff: Avoiding the Idea/Expression Dichotomy by Karen L. Poston, 9 Loyola of Los Angeles Entertainment Law Journal 337 (1989)

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Who Has the Last Laugh? A Look at Defamation in Humor by Cary Dee Glasberg, 9 Loyola of Los Angeles Entertainment Law Journal 381 (1989)

Raiders: \$7.2 Million, City of Oakland: 0... Was That the Final Gun? A Story of Intrigue, Suspense and Questionable Reasoning by Leon F. Mead, 11, 9 Loyola of Los Angeles Entertainment Law Journal 401 (1989)

The Beck Decision: Will It Divide Entertainment Unions? by Brian E. Cooper, 9 Loyola of Los Angeles Entertainment Law Journal 425 (1989)

Monopoly Sports Leagues by Stephen F. Ross, 73 Minnesota Law Review 643 (1989)

Sports Injuries by Chris J. Carlsen, 25 Trial 76 (August 1989) (published by The Association of Trial Lawyers

of America, 1050 31st St. NW, Washington, DC 20007-4499)

Communications Workers v. Beck: Supreme Court Throws Unions Out On Street, 57 Fordham Law Review 665 (1989)

Spotlight on the Coaching Box: The Role of the Athletic Coach Within the Academic Institution by Steven G. Poskanzer, 16 The Journal of College and University Law 1 (1989)

The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation by Edward N. Stoner, 11 and Artie R. Nogay, 16 The Journal of College and University Law 43 (1989)

Haffer v. Temple University: A Reawakening of Gender Discrimination in Intercollegiate Athletics, 16 The Journal of College and University Law 137 (1989)

Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning by Timothy R.M. Bryant, 83 Northwestern University Law Review 473 (1989)

Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny by David R. Gabor, 36 UCLA Law Review 1005 (1989)

Look What They've Done to My Song by Jonathan L. Kirsch, 9 California Lawyer 43 (1989)

Intelligence Agents As Authors: A Comparison of the British Courts' Position on Attorney-General v.

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Heinemann Publishers and the United States Supreme Court Decision of *Snepp v. United States* by Nancy Alyce Jerian, 11 Loyola of Los Angeles International and Comparative Law Journal 345 (1989)

The Label "Political Propaganda": Content-Neutral or Semantically Slanted? An Examination of the Foreign Agents Registration Act as Applied in *Meese v. Keene* by Ari J. Lauer, 11 Loyola of Los Angeles International and Comparative Law Journal 399 (1989)  
[ELR 11:4:23]