RECENT CASES

"Simon and Simon" television show episode did not infringe nonfiction works concerning the death of John Dillinger

A Federal District Court in Chicago, after finding that Jay Robert Nash's writings about bank robber John Dillinger contained a limited amount of copyrightable material (referred to by the court as the Dillinger Story), subsequently determined that a 1984 episode of the CBS television series "Simon and Simon" did not infringe Nash's works (an earlier ruling in the matter was reported at ELR 10:11:11).

A Federal Court of Appeals has affirmed the District Court decision. Judge Easterbrook noted that the television episode apparently used Nash's idea that Dillinger survived an FBI shoot- out and retired to the West, and also referred to certain discrepancies cited by Nash between Dillinger's features and the description of the individual killed in the shoot-out. However, stated the court, Nash did not present his works as fiction and "the first person to conclude that Dillinger survived does not get dibs on history." The television episode did not use any words from Nash's books, and used a setting of its own with new exposition and development.

Judge Easterbrook then turned to the decision in Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950), in which, according to the court, it was held that the author of a biography of Hans Christian Andersen infringed the copyright of the author of an earlier biography by using a portion of Andersen's letters as well as some of the themes and structure. The decision in Toksvig was rejected by the court in Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (1980; ELR

1:24:4), but Judge Easterbrook pointed out that if all the work of individuals such as the authors of the Andersen biography and Hindenburg study could be used without compensation, "there will be too few original investigations, and facts will not be available on which to build." Recognizing that copyright law "does not protect hard work (divorced from expression), and hard work is not an essential ingredient of copyrightable expression ... to the extent Toksvig confuses work or ideas with expression, it has been justly criticized."

The producers of "Simon and Simon" used Nash's work as a source of facts and ideas, but used none of his expression, and the judgment of the District Court was affirmed accordingly.

Nash v. CBS Inc., 899 F.2d 1537 (7th Cir. 1990) [ELR 12:2:3]

Producers of "Cagney and Lacey" television series prevail in copyright infringement claim, but writer of story proposal may proceed with breach of contract claim

The "Old Ghosts" episode of the television series "Cagney and Lacey" did not infringe a "story line" written by James P. Brady, a Federal District Court in New York has ruled, although the court also found that Brady was entitled to proceed with his breach of contract claim against the producer of the series.

Judge Wood noted that "Old Ghosts" did not use any of the particular scenes or dialogue suggested by Brady, and that there were substantial differences in the details of the two works. "Old Ghosts" and Brady's proposal were similar only as to ideas and not as to expression, stated the court in granting Orion TV Productions' motion for summary judgment.

Judge Wood then found that Brady raised questions of fact with respect to the negotiations between the parties, the custom in the television industry regarding the submission of ideas for television episodes, and Orion's purported use of Brady's ideas in the "Old Ghosts" episode, such that summary judgment was inappropriate. Orion argued that Brady's ideas were not novel and thus were not protectible as a matter of law. But the court stated that the fact that Brady's proposal mentioned that an incident similar to the story line actually occurred in Brooklyn in the 1940s was not enough to establish that the proposal "was not a novel idea for a television episode" (emphasis by the court), and therefore declined to find that Brady's submission lacked novelty as a matter of law.

Brady v. Orion TV Productions, Inc., 1990 Copyright Law Decisions, para. 26,53 (S.D.N.Y. 1990) [ELR 12:2:3]

Producer of television game show loses breach of contract claim against producer of allegedly similar program

The California appellate court, in a decision bearing the notation "not to be published," has affirmed a trial court judgment of nonsuit in a breach of contract claim brought by William Derman against William Carruthers, The William Carruthers Company, Inc. and CBS, Inc.

Derman, a writer and producer, created a number of game shows, including "Beat the Odds." In 1974, Derman granted Carruthers an option to purchase certain rights in "Beat the Odds;" Carruthers did not exercise the option.

In 1983, the Carruthers parties broadcast a game show entitled "Press Your Luck;" one element of the show, known as "The Whammy" served to reduce a player's accumulation of material rewards. "Beat the Odds" had featured a cartoon figure called "Sammy the Whammie," or "Mr. Whammie;" the effect of a player encounter with the figure was somewhat different from an encounter with "The Whammy" of "Press Your Luck."

A trial court found that Derman was not entitled to proceed with his claims of express and implied contract, and found that there was no substantial similarity between the two game shows.

On appeal, presiding Judge Spencer first stated that Derman's claims were not preempted by the Copyright Act. The option was not a contract to pay for certain ideas in general, stated Judge Spencer, but "to pay for the manner in which those ideas embody the essence of a particular intellectual property."

The appellate court then pointed out that the trial court had ruled that Carruthers could not use either "Beat the Odds" or the show's essential concept without compensating Derman - the option contract created "at the least," stated the court, an implied-in-fact promise by Carruthers to compensate Derman for such use.

After discussing "the whammy" and other alleged similarities between the game shows in issue, the court concluded that the differences between the games were "so striking and significant, both quantitatively and qualitatively, that the trial court could, indeed, conclude as a matter of law that there was no substantial similarity between the two games.

Derman v. Carruthers, Case No.B037774 (Ca.Ct.App., Mar. 30, 1990) [ELR 12:2:4]

CBS Records fails to obtain preliminary injunction to prevent Grupo Mazz musicians from agreeing to record for Capitol-EMI

In March 1987, CBS Records signed a contract with the musical group Grupo Mazz pursuant to which the group was to record and deliver one album. CBS obtained options for up to nine additional albums; the options were available if the company sent written notice prior to the expiration date of the contract then in effect. Although CBS apparently did not send the requisite notice, the group recorded a second album, accepted advances from CBS to cover the cost of recording the album, and delivered the master recording to CBS in October 1988.

In 1989, the group entered into a letter of intent to record for Capitol-EMI Music.

A New York appellate court has affirmed a trial court decision denying CBS's motion for a preliminary injunction. The court found that the evidence did not establish that the musicians, by recording a second album for CBS, intended either to relinquish their right to written notice of the company's exercise of any options, or to otherwise undertake any further commitment to CBS. The court also rejected CBS's equitable estoppel claim, stating that the group's recording of a second album did not, as alleged by the company, "constitute a misrepresentation as to their obligation or readiness to record further albums." In order to prevail at trial, noted the court, CBS would have to demonstrate, "by evidence of the parties' contemporaneous intent and dealings," that the March 1987 contract continued in existence throughout the course of the production of the second album.

CBS Records Inc. v. Capitol-EMI Music, Inc., 549 N.Y.S.2d 689 (N.Y.App. 1990) [ELR 12:2:4]

Prior user of television program title may not claim common law right to use "You and the Law" mark throughout Florida

Tally-Ho, Inc. produced and distributed a program entitled "You and the Law;" the program was broadcast in Southern Florida on a public television station and on a cable television system. Tally-Ho registered its "You and the Law" trademark with the state of Florida in December 1985; the producer indicated that the mark was first used in January 1984.

In 1980, Coast Community College District produced an educational telecourse entitled "You and the Law."

The series, which consisted of twenty-six videotaped lectures and discussions, was shown at a limited number of community colleges.

In 1988, when Tally-Ho learned that a local community access cable channel planned to present the Coast series, the producer brought a lawsuit for declaratory and permanent injunctive relief and for damages under federal and state trademark and unfair competition laws. A Federal District Court denied Tally-Ho's motion for a preliminary injunction, finding that Coast was the first party to "use" the mark in Florida, and that the prior educational use of the mark gave Coast the right to use the mark in the related" broadcast market.

A Federal Court of Appeals has found that the District Court erred when it determined that Coast was not required to show actual competition with Tally-Ho in order to successfully assert a prior use claim, and that the District Court "ignored the geographic component of trademark protection that gives Coast priority only in limited geographic and product markets in which it did not compete with Tally-Ho."

The court first observed that neither Tally-Ho nor Coast had registered the "You and the Law" trademark under the federal registration system. In view of the fact that the Florida statute provides little additional protection beyond that provided at common law, the case primarily involved common law trademark principles. Under the common law, demonstrating actual or intended competition is required in a trademark infringement action. And the proper interpretation of the Florida Trademark Act and Florida case law, stated the court, was that a party claiming priority of use must establish that the prior use also was a competing use. The District Court's conclusion to the contrary provided Coast with greater protections than those provided at common law.

After reviewing the elements of a trademark infringement claim, the court concluded that Tally-Ho had priority of use of the "You and the Law" mark in the Dade County cable broadcast marketplace, and that the doctrines of related use and natural expansion did not serve to extend Coast's use of the mark to Dade County.

The Court of Appeals therefore reversed the District Court's denial of Tally Ho's motion for a preliminary injunction, and remanded the matter with instructions to the District Court to enter the injunction.

Tally-Ho, Inc. v. Coast Community College District, 889 F.2d 1018 (11th Cir. 1989) [ELR 12:2:4]

Court orders trial in dispute over musical based on life of Mike Todd

Whether the production of a play entitled "Mike" was a "workshop" or a "first class production" was a triable issue of fact, a New York trial court has ruled.

The part owner, identified only as Sacks, of rights to a literary work entitled "A Valuable Property" agreed to grant to an individual, identified only as Rubin, certain production rights in the work. Sacks waived his rights to share in the royalties from the musical, but was to receive $10,000 upon signing the June 1986 agreement and an additional $10,000 no later than October 2, 1986. If Rubin obtained full capitalization or if rehearsals for a production (other than rehearsals for a workshop production) began prior to full capitalization, Rubin agreed to pay Sacks an additional $40,000 (upon the earlier to occur of the two events). If Rubin did not obtain full capitalization and did not begin rehearsing a first class production, Sacks would receive no additional compensation.

Rehearsals for the production of "Mike," a musical based on the life of the late producer Mike Todd, began in March 1988; the show opened in April 1988 at a theater in Philadelphia and ran for at least 34 performances.

When Sacks sought additional compensation, Rubin argued that the show presented in Philadelphia was a "workshop" production which was "unfinished, incomplete, unresolved and not set" in its final form. A "first-class" production would involve a large budget and performances at a first class theater, according to Rubin.

Sacks presented evidence that the Philadelphia theater met industry qualifications as a first-class theater, and stated that all aspects of the production, such as the types of contracts used, the budget, admissions prices, and advertising and salary, indicated that the Philadelphia staging was a first class production, and that Sacks was entitled to the $40,000 contractual payment.

Judge Saxe denied both parties' applications for summary judgment.

Sacks v. Rubin, New York Law Journal, p. 22, col. 1 (N.Y. Cnty., June 15, 1990) [ELR 12:2:5]

Insurance company's failure to accept recommended settlement offer in "Beatlemania" case breached covenant of good faith and fair dealing

In July 1986, a Los Angeles trial court awarded damages of over $7.6 million to Apple Corporation Ltd. in the company's lawsuit against the producers of "Beatlemania" (ELR 8:2:13). Subsequently, Apple accepted a settlement from the producers' insurers amounting to $6 million plus post-judgment interest.

Pacific Indemnity Company had issued a primary errors and omissions liability policy for the Beatlemania stage play to the Beatlemania Company, Steven Leber, David Krebs, and other parties; the policy provided limits of $1 million. Employers Reinsurance Corporation issued an excess liability policy to Leber; the policy provided limits of $4 million in excess of the limits set forth in Pacific's policy. Pacific also had issued a primary errors and omissions liability policy to the producers of the Beatlemania film, and Continental Casualty Company had the excess liability insurance policy on the film.

When Apple filed its lawsuit alleging the violation of the Beatles' right of publicity and unfair competition, Pacific retained the Kaplan Livingston law firm to represent Leber; attorney Joel Boxer, then a member of the firm, undertook the primary responsibility for defending the insureds.

A Federal District Court recently rejected Pacific's third party claim seeking indemnification from Boxer in an action brought by Employers Reinsurance against Pacific.

Federal Court of Appeals Judge Pamela Ann Rymer (sitting by designation) reviewed the course of the Beatlemania litigation, noting, in part, that in 1985, the trial court had denied the Leber parties' motion for summary judgment, and that Boxer had recommended that it was in the best interests of the insureds and Pacific to accept a $1 million settlement offer from the Apple parties. Pacific did not accept the offer, and instead, substituted another attorney as trial counsel.

Judge Rymer stated that Pacific "did not consider in good faith the interests of its assured equally with its own, or evaluate the settlement offers received as though it alone carried the entire risk of loss," and commented that a prudent insurance carrier without policy limits would have accepted the Apple parties' $1 million settlement offer. The court found that Pacific's handling of the claim was "below the standard of care;" that the company's response to the $1 million offer was in bad faith; that Pacific had an obligation to follow counsel's advice when the company chose not to undertake an independent investigation of the facts and law; and that there was no evidence that Boxer's conduct was below the standard of care.

Pacific's failure to settle the Apple lawsuit caused Leber's loss, and Leber's causes of action against Pacific were properly assigned to Employers Reinsurance, continued the court. Under California law, a covenant of good faith and fair dealing is implied in every insurance contract, and an insurer must settle within policy limits where there is a substantial likelihood of recovery in excess of those limits.

Judge Rymer further observed that the fact that a judgment in excess of the settlement demands ultimately was returned against Leber was evidence that the likelihood of recovery in excess of policy limits was substantial for purposes of establishing Pacific's bad faith. There also was substantial evidence that Pacific deliberately ignored Boxer's advice (without seeking another opinion) and concluded, "without meaningful independent investigation, that liability was in its favor," and that such conduct was "more than merely negligent." Pacific failed to accept a reasonable settlement offer, and was subject to liability for such unwarranted rejection even in the absence of evidence showing actual dishonesty, fraud or concealment.

Employers Reinsurance had no duty to contribute to a settlement before the primary carrier's policy limits were exhausted, and was not estopped to assert its claim against Pacific. Pacific breached its covenant of good faith and fair dealing, concluded the court, and Boxer's conduct was not a superseding cause of any damages suffered by Leber or Employers Reinsurance.

Employers Reinsurance Corporation v. Chubb Group of Insurance Companies, Case No. CV87- 5370 (C.D.Ca., Feb. 20, 1990) [ELR 12:2:6]

Discharged university baseball coach may proceed with action claiming breach of implied-in-fact contract

Marvin E. Wood became the head baseball coach for Loyola Marymount University in 1969, and was terminated in June 1984. When Wood challenged his termination, he noted that each year, he had received a letter from the university notifying him that his employment was to be continued, that his salary had been increased, and that he would continue to be eligible for certain employee benefits. A 1971 memorandum by the president of the university stated, in part, that "the appointment of administrative staff personnel is continuous from the time of the original appointment, subject, of course, to the continuing mutual satisfaction from the part of the University and the staff member with regard to performance, salary, professional opportunities, and working conditions."

The university argued that the memorandum indicated that Wood's employment was at-will. But California appellate court Judge Fukoto, in reversing the trial court decision granting summary judgment to the university, stated that the memorandum, when read in conjunction with the university's staff handbook, was "consistent with a promise not to terminate except for good cause." Furthermore, noted Judge Fukoto, the university had the burden of proving that an implied-in-fact agreement to only terminate Wood for good cause did not exist.

The court also noted that Wood produced evidence of "repeated oral assurances of job security, meritorious job evaluations, [and] consistent salary increases and bonuses during the term of his employment." The university handbook provided that employees such as Wood would be dismissed only as a "last resort," and the dismissal would not be an arbitrary process." Wood was terminated without warning, advance notice or a hearing. Judge Fukoto found that "the totality of the circumstances" raised a triable issue of material fact as to whether there was an implied-in-fact agreement to terminate only for cause.

The university next argued that Wood was terminated because the baseball team lost 70 percent of its games during the last two years of Wood's employment; that four of the top five players on the baseball team who were eligible to return in 1984 decided not to do so, in part, because Wood allegedly lost control of the team. Wood presented evidence of other reasons why the team lost many games during the period in issue, including the fact that the construction of a new sports facility meant that the team played every game one year away from home.

In all, concluded the court, there was a triable issue of fact as to whether the university adhered to the termination procedures set forth in the handbook, and whether Wood would have been terminated at all if the university had followed the procedures, including "most crucially," a pretermination hearing.

Judge Gates concurred with the court's opinion to the extent of agreeing that there was a question of fact as to whether the university adhered to its own termination procedures, and if it did not, whether Wood suffered any compensable injury.

Judge Compton, in dissent, would decline to imply a binding contract of employment on the basis of "nothing more than satisfactory performance by the employee and praise and promotion by the employer..." For Judge Compton, simply faithfully performing the job for which the employee is paid does not constitute a recognizable detrimental change of position under the doctrine of estoppel. The correctness or wisdom of the university's decision in this case was not a question for a jury, declared Judge Compton, who concluded by noting that the only remedy available for breach of the "so-called" implied contract would be money damages, and that the ascertainment of those damages would be highly speculative.

Wood v. Loyola Marymount University, 267 Cal.Rptr. 236 (Ca.Ct.App. 1990) [ELR 12:2:6]

Individual claiming to be Elvis Presley's illegitimate daughter loses action seeking share of entertainer's estate

In Presley v. Hanks, Deborah Delaine Presley, claiming to be the illegitimate daughter of Elvis Presley, filed a petition to determine heirship in probate court. The probate court found that Presley did not establish that she was the daughter of Elvis Presley, and construed Elvis Presley's will to exclude any illegitimate children as beneficiaries.

A Tennessee appellate court first found that for the purpose of their summary judgment motion only, the co-executors of Presley's estate conceded that Deborah Delaine Presley was Elvis Presley's illegitimate daughter. The finding of the probate judge that Deborah Delaine Presley was not the daughter of Elvis Presley was vacated accordingly.

After carefully reviewing the relevant provisions of Elvis Presley's will, the appellate court agreed that the will excluded illegitimate children as beneficiaries.

The Tennessee Supreme Court denied an application for permission to appeal.

Presley v. Hanks, 782 S.W.2d 482 (Tenn.App. 1989) [ELR 12:2:7]

State of Tennessee, not co-executors of Elvis Presley estate, is entitled to unrefunded ticket proceeds from cancelled concert

Compared to other publications, the ELR has had infrequent Elvis sightings (9:6:8; 2:9:3; 1:22:1). However, two recent appearances in Tennessee involving the late performer have been reported.

Presley v. City of Memphis arose from a contract whereby promoter Jerry Weintraub, doing business as Management 111, agreed to rent the Mid-South Coliseum for two Elvis Presley concerts on August 27 and 28, 1977 for a rental fee of $8,000 for each show. About $325,000 worth of tickets were sold. Presley died on August 16, 1977. The Coliseum Board began giving refunds to the ticket holders for the two cancelled performances.

In 1982, Priscilla Presley, Joseph A. Hanks, and the National Bank of Commerce, co-executors of the estate of Elvis Presley, together with Management III, brought a lawsuit to recover the unrefunded ticket proceeds (plus interest) in the possession of the Coliseum Board.

The trial court denied the State of Tennessee's motion for summary judgment, finding that the unrefunded ticket proceeds did not constitute abandoned property under state law, and granted partial summary judgment to Presley and Management 111. A report prepared for the court found that the latter parties were entitled to about $320,000, and that the Coliseum Board was entitled to retain about $56,000; the trial court entered its final judgment according to the report.

A Tennessee appellate court has reversed the trial court decision, finding that the State of Tennessee was entitled to the fund, less any reasonable expenses incurred by the Coliseum Board in maintaining such fund. The unclaimed refunds were presumed abandoned by the owners under Tennesee law, stated Judge Highers. Each ticketholder's right to a refund vested when the contract represented by the ticket was voided on August 16, 1977; under the statute, a presumption of abandonment as to the unclaimed refunds matured on August 16, 1984.

Judge Highers concluded by finding that the Coliseum was entitled to receive compensation from the unclaimed ticket proceeds only for those expenses incurred in managing the fund itself. The court ordered the Coliseum to deliver all of the unclaimed ticket refunds and all of the accumulated interest thereon to the state treasurer.

The Tennessee Supreme Court has denied permission to appeal.

Presley v. City of Memphis, 769 S.W.2d 221 (Tenn.App. 1988) [ELR 12:2:8]

United States Supreme Court rejects separate protection for "opinion" under First Amendment

Michael Milkovich, Sr. was the wrestling coach at an Ohio high school in 1974 when the team was involved in an altercation at a wrestling match with another high school team. The Ohio High School Athletic Association, after a hearing, placed Milkovich's team on probation for a year and declared the team ineligible for the 1975 state tournament.

Several parents and wrestlers sued the Association seeking a restraining order against the ruling; an Ohio trial court overturned the probation and ineligibility orders on the ground that the Association's hearing denied the parties due process.

On the day after the court ruling, the News- Herald, owned by Lorain Journal Co., published, in its sports pages, a column by J. Theodore Diadiun. The heading of the column read: "Maple beat the law with the `big lie;'" Diadiun's photograph and the words "TD Says" appeared below the heading.

The column, in discussing the court ruling, stated, in part, that the "lesson" of the proceeding was "If you get in a jam, lie your way out ... If you're successful enough and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. The teachers responsible were mainly Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott ... Anyone who attended the meet ... knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth ... But they got away with it ... Is that the kind of lesson we want our young people learning from their high school administrators and coaches? I think not."

Milkovich sued Lorain Journal, claiming that the headline and comments accused him of committing perjury and therefore constituted libel per se. The trial court granted a directed verdict to the publisher on the ground that the evidence did not establish that the article was published with actual malice. An Ohio appellate court reversed and remanded the matter, holding that there was sufficient evidence of actual malice to require a jury trial. The Ohio Supreme Court dismissed an appeal by Lorain Journal, and the United States Supreme Court denied certiorari.

On remand, the trial court granted summary judgment to the publisher on the ground that the article was an opinion, and alternatively, that as a public figure, Milkovich did not present a prima facie case of actual malice. ne Ohio appellate court affirmed both findings. However, the Ohio Supreme Court reversed and remanded the matter, stating that Milkovich was neither a public figure nor a public official, and that the statements in issue were factual assertions and were not constitutionally protected as opinion. The Supreme Court again denied certiorari.

Scott had brought a separate proceeding against Lorain Journal. In 1986 the Ohio Supreme Court reversed its position on the article and concluded, citing Ollman v.

Evans, 750 F. 2d 970 (1984), cert. denied, 471 U.S. 1127 (1985; ELR 7:5:13) that the statements were protected opinion; the court upheld a lower court decision granting summary judgment against Scott.

Subsequently, an Ohio appellate court, noting the decision in Scott's case, affirmed a trial court decision in Milkovich's action granting summary judgment in favor of Lorain Journal. The Ohio Supreme Court dismissed Milkovich's appeal. The United States Supreme Court granted certiorari and has reversed the decision of the Ohio Supreme Court.

Chief Justice William Rehnquist, after citing Iago's comments to Othello and reviewing the development of First Amendment limits on the application of state defamation laws since New York Times Co. v. Sullivan, 376 U.S. 254 (1964), declared that if a statement implies a false assertion of fact, such implication is not eliminated by merely characterizing the statement as an opinion.

The "breathing space" required for free expression may be maintained "without the creation of an artificial dichotomy between " opinion' and fact," stated Chief Justice Rehnquist.

The court declined to recognize, as the basis for extending protection to opinion, the statement in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), reading as follows: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is not constitutional value in false statements of fact." Chief Justice Rehnquist described the statement as dictum.

The court pointed out that Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986; ELR 8:3:8) would require a statement on a matter of public concern to be provable as false before there can be liability under state defamation law, at least in situations, as in the instant case, where a media party is involved. For Chief Justice Rehnquist, Hepps would allow a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation to receive full constitutional protection.

Another line of cases, including, most recently the decision in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988; ELR 9:10:3), would, according to the court, provide protection for statements, such as "rhetorical hyperbole," that cannot reasonably be interpreted as stating actual facts about an individual. And the New York Times and Gertz culpability requirements will continue to ensure "uninhibited, robust, and wide-open" debate on public issues. Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals "must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." Where such a statement involves a private figure on a matter of public concern, the individual must show that the false connotations were made with some level of fault as required by Gertz. Given these protections, the court refused to recognize an additional separate constitutional privilege for opinion.

In the instant matter, a court would have to determine whether or not a reasonable factfinder could conclude that the statement in the column implied an assertion that Milkovich perjured himself in a judicial proceeding. Chief Justice Rehnquist responded affirmatively to the question. The column did not contain the "loose, figurative or hyperbolic" language which would negate a reader's impression that Diadiun maintained that Milkovich committed the crime of perjury. Furthermore, the connotation that Milkovich committed perjury was sufficiently factual so as to be susceptible of being proved true or false.

Justice Brennan, with whom Justice Marshall joined in dissent, agreed with the court that under the line of cases culminating in Hepps, only defamatory statements that are capable of being proved false are subject to liability under state libel law, and that the "statement that a party must prove false under Hepps is not the literal phrase as published, but what a reasonable reader would understand the author to have said. Justice Brennan, however, differed with the court's application to the instant case of the general rules of First Amendment protection, and would have found that the challenged statements could not reasonably have been interpreted as either stating or implying defamatory facts about Milkovich, and therefore were entitled to "full constitutional protection."

Justice Brennan noted that the court did not find that the statements in issue explicitly stated a false and defamatory fact, and pointed out that Diadiun's assumption that Milkovich must have lied at the court hearing was "patently conjecture." The majority, stated Justice Brennan, found that statements actionable on the basis of a conclusion that the statements implied a factual assertion that Milkovich perjured himself at the judicial proceeding. In disagreeing with the majority, Justice Brennan pointed out that Diadiun, who was not present at the court hearing, presented the facts upon which the writer relied, made it clear "at which point he runs out of facts and is simply guessing," did not impliedly assert, as fact, that Milkovich perjured himself, and focused on the court's reversal of the athletic association's decision, angrily supposing what must have led to it."

Other factors noted by Justice Brennan included the tone of the column - "pointed, exaggerated and heavily laden with emotional rhetoric and moral outrage" - and the format of the piece - a signed editorial column. While signed columns may include statements of fact, observed Justice Brennan, certain formats, such as editorials, reviews, political cartoons, and letters to the editor, signal the reader "to anticipate a departure from what is actually known by the author as fact."

In all, the complained-of statements, for Justice Brennan, neither stated nor implied a false assertion of fact and should not be considered libelous as a matter of law. Conjecture is a means of fueling a national discourse ... and stimulating public pressure for answers from those who know more," stated Justice Brennan. Diadiun may have been "guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech," concluded the dissent and although recognizing the need to redress injuries to an individual's reputation, "punishing ... conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate."

Milkovich v. Lorain Journal Co., Case No. 89- 645 (U.S., June 21, 1990) [ELR 12:2:8]

Lyrics of song broadcast by radio station either were substantially true or protected expression of opinion, rules Georgia appellate court in rejecting claim by towing service

In the summer of 1986, the towing of cars from publicly or privately owned property was an issue of public discussion in Savannah, Georgia. In early August, a disc jockey employed by WEIS Broadcasting played, during certain radio broadcasts, a recording of a song he wrote and performed. The title of the song was "Look at All Those Tow Trucks;" the song's lyrics referred, in part, to a towing service owned by Chris Bird. The lyrics included the following comments: "[I]t's like havin' a license to rob." "[I]f these guys weren't towing cars, they'd be politicians." "[T]hey so bad they even make my preacher want to cuss." At the end of the song, the singer shouted over the closing music: "Hey, you can't do that ... that's against the law, that's breaking the law."

When Bird sued the broadcaster, a trial court jury awarded Bird damages of $25,000 and punitive damages of $5,000. The court granted WEIS's motion for judgment notwithstanding the verdict.

A Georgia appellate court has agreed with the trial court's finding that the song lyrics either were substantially true or were "merely rhetorical hyperbole" and therefore an expression of opinion. Judge Pope noted that both truthful facts and opinion are protected speech, and the broadcast of the song thus was not actionable. It also was observed that evidence was presented that some of Bird's signs were posted improperly in violation of a city ordinance and that a parking official had received complaints that Bird towed certain cars in violation of state law. Because the facts contained in the song were substantially true, WEIS was entitled to judgment as a matter of law.

The other complained-of song lyrics constituted protected expressions of opinion about the car towing business, concluded Judge Pope.

Bird v. WEIS Broadcasting Corporation, 388 S.E. 2d 710 (Ga.App. 1989; certioriari denied Jan. 19, 1990) [ELR 12:2:10]

Globe magazine may sue Italian publication in dispute arising from false story about Yusuf Islam ("Cat Stevens")

In May 1984, R.C.S. Rizzoli Periodici published an article in its Italian language magazine "Novella 2000" entitled "Cat Stevens: Enough of Music, Now I Just Want to be an Ayatollah!" The article (as described by Federal District Court Judge Leonard B. Sand) reported that performer Cat Stevens had converted to the Islamic religion and adopted the Islamic name Yusuf Islam, described his life in Teheran and dedication to Islamic religious principles, and suggested that Stevens was developing a close relationship with the Ayatollah Khomeini.

In June 1984, the weekly magazine "Globe published an article entitled "Pop Superstar's Startling Conversion" which repeated the substance of the Rizzoli article.

When Mr. Islam sued Globe for defamation, the magazine discovered that much of the information in the Rizzoli article was false. Globe agreed to settle Mr. Islam's lawsuit.

Subsequently, Globe sued Rizzoli for intentional misrepresentation, contribution and equitable subrogation, seeking to recover the settlement costs and other expenses (totalling more than $300,000) incurred by the magazine.

Judge Sand first determined that Florida law would apply to the intentional misrepresentation claim. Although the wrongful conduct took place in Italy where the "Novella 2000" article first was published, the site of the injury was in the United States where the article was read. Whether the last event necessary to the misrepresentation claim was the decision by Globe to publish, the publication of the Globe article or the imposition of damages, noted Judge Sand, all three events occurred in

Florida where Globe has its principle place of business and where the magazine defended the initial lawsuit. Florida also was the site with the most significant interest in the tort alleged, observed the court.

The application of Florida law would not violate Rizzoli's constitutional right to due process, stated the court, noting that Rizzoli had 60 subscribers residing in Florida, repeatedly contracted with a United States distributor for the sale of its periodicals throughout the United States, and regularly sold issues of "Novella 2000" in this country.

Judge Sand then found that Globe sufficiently pleaded the elements of a fraud claim under Florida law; the only disputed issue was whether the complaint alleged the requisite intent to defraud. Under Florida law, as long as Globe was within the class of potential detrimental reliers, Rizzoli could be held liable. The court stated that Florida courts most likely would recognize a claim for fraud where a party had reason to expect another to act in reliance upon a fraudulent misrepresentation. In the instant case, Globe's complaint alleged that Rizzoli knew of the international press practice of reprinting the factual substance of newsworthy articles from other large-circulation magazines, and that Rizzoli knew or reasonably should have foreseen that a natural and probable consequence of the publication of the article would be the republication by Globe and the defamation action by Mr. Islam against Globe.

The denial of Rizzoli's motion to dismiss the complaint did not mean that the court was expressing an opinion as to whether Globe's claims would survive a motion for summary judgment, cautioned Judge Sand, emphasizing that Globe, in order to support its claim for intentional misrepresentation, would have to prove that Rizzoli had reason to expect that Globe would republish the substance of the Rizzoli article.

Globe Communications Corp. v. R.C.S. Rizzoli Periodici, 729 F.Supp. 973 (S.D.N.Y. 1990) [ELR 12:2:11]

Pakistani businessman may proceed with libel claim against Newsweek Magazine

A New York appellate court has affirmed a trial court decision denying Newsweek Magazine's motion to dismiss a libel action brought by Mahmood Khan.

The cover of the October 10, 1983 international edition of Newsweek featured a headline reading "The Secret Warriors," with a subtitle "The CIA is Back in Business." The accompanying article, entitled "The Afghan Connection," mentioned a "Pakistani businessman" who purportedly obtained financing from the CIA in order to conduct activities as a "free-lance arms merchant." There was no dispute that the article referred to Khan.

In refusing to find that the complaint was insufficient as a matter of law, the court concluded that the statements at issue were "reasonably susceptible of a defamatory connotation."

Judge Theodore R. Kupferman, in dissent, would have found the complaint insufficient as a matter of law, noting that the content of the article was a matter of legitimate public concern, that the language "was obviously not meant to be abusive of [Khan]," and that Khan was not actually accused in the article. Judge Kupferman pointed out that to be a free-lance arms merchant "is not necessarily to be in the export trade or smuggling" in violation of Pakistani law.

Khan v. Newsweek, New York Law Journal, p. 25, col. 1 (N.Y.App., Apr. 19, 1990) [ELR 12:2:11]

Cable company may not proceed in federal court in action to prevent town from enforcing license's rate freeze provision

When Nashoba Communications, the operator of a cable television system in the town of Danvers, sought declaratory and injunctive relief with respect to a proposed rate increase, a Federal District Court found that the action arose under federal law and that the Cable Communications Policy Act of 1984 preempted the field of cable television regulation. The court granted Nashoba's request for declaratory judgment as to the rate freeze provision of its franchise agreement (ELR 11:7:21).

A Federal Court of Appeals has reversed the District Court's decision, finding that the "well-pleaded complaint" rule precluded federal jurisdiction.

Judge Mayer stated that the Declaratory Judgment Act did not serve as a basis for "arising under" jurisdiction.

The town apparently planned to seek enforcement of the rate freeze provision on the basis of state contract law, observed the court. The cable company's assertions that the town sought an unlawful rate freeze in contravention of the Cable Act, and that the rate freeze constituted content-neutral regulation of speech in violation of the First and Fourteenth Amendments were "in the nature of a defense to a threatened state cause of action." In all, the allegations concerning the Cable Act did not amount to a sufficiently substantial element of an enforcement action by Danvers so as to sustain federal jurisdiction.

Judge Mayer further noted that the Cable Act did not provide an explicit right to sue to block rate action by a franchising authority; that there was no implied cause of action under the Cable Act to block allegedly impermissible rate regulation by a franchising authority; and that the doctrine of Ex parte Young, 209 U.S. 123 (1908), did not apply to provide a federal cause of action to enjoin state regulation of cable rates because of federal preemption.

It was pointed out that even if the Cable Act preempted state regulation of cable rates under certain circumstances, the state courts were available to decide federal statutory issues in those areas left open to them. Citing Cablevision of Boston Ltd. Partnership v. Flynn, 710 F.Supp. 23 (D.Mass. 1989; ELR 11:7:21), aff'd, 889 F.2d 377 (1st Cir. 1989), the court emphasized that " the supremacy clause of the Constitution, which is the basis for the preemption argument, is concerned with promoting the supremacy of federal law not federal courts."

Danvers and Nashoba entered into a contract as a result of a competitive bidding process, recalled the court. The town asked the cable license applicants whether they would honor a rate freeze for at least the first two years of operation; Nashoba said yes, and won the contract. Danvers intended only to enforce this aspect of the license agreement, not to assert any other authority affecting Nashoba's rates. This was not regulation, it was enforcement of a contractual commitment Nashoba proposed unilaterally, in full awareness of the Cable Act, stated Judge Mayer, who concluded that the difference between Danvers' enforcement of a limited contractual provision and Nashoba's reference to cases involving "a comprehensive scheme to scrutinize and pass on future changes in rates and services," was a difference "as profound as it is dispositive."

Nashoba Communications Limited Partnership No. 7 v. Town of Danvers, 893 F.2d 435 (1st Cir. 1990) [ELR 12:2:12]

Cable Act preempts enforcement of rate freeze provision in cable television franchise contract, rules Massachusetts Supreme Court

In a case decided one month after the decision was issued in Nashoba Communications v. Town of Danvers (above), the Supreme Judicial Court of Massachusetts found that a temporary rate freeze provision in a cable television franchise granted by the Town of Norwood to Adams-Russell Co., Inc. constituted "regulation" within the meaning of the Cable Communications Policy Act, and that the Cable Act preempted the enforcement of any such regulation after December 29, 1986.

Norwood, in 1982, granted a license authorizing Adams-Russell to construct and operate a cable television system in the town. The company agreed, in part, not to change the schedule of monthly rates for all cable and pay television services for at least twenty-four months after the cable system was "initially fully constructed and energized." In 1985, Adams-Russell, without having completed construction of the cable system, announced a rate increase on its "Supercable" service. Norwood sued the company in a trial court alleging the violation of the rate freeze provision and a claim of unfair or deceptive business practice in violation of state law.

In 1986, a Federal District Court in Massachusetts ruled that the town's action was removed improvidently and without jurisdiction from the trial court (ELR 8:5:19). A series of state court proceedings ensued. Most recently, Massachusetts Supreme Judicial Court Judge Greaney, citing, among other cases, Cablevision of Boston Ltd. Partnership v. Flynn, and the "plain language" of section 557(a), found that the town's rate freeze provision would conflict with section 543 of the Cable Act, and thus was preempted.

Judge Greaney noted that a franchising authority may not regulate rates unless an express exception is provided for in section 543 of the Cable Act; the exceptions permit a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition, and to enforce franchise provisions regulating basic cable service which antedate the enactment of the Cable Act for a two-year period following that enactment.

The court rejected the town's interpretation of the term "regulation" as being "in direct conflict with the unambiguous, pro-competitive intent manifested in the Cable Act." For Judge Greaney, adopting the town's position would result in "insulating the basic cable rates in that town from market competition, and for a potentially indefinite term. Such an interpretation would run directly counter to both congressional intent and the express language of the Cable Act." Noting that Congress was "clearly aware" that rate regulations in cable television franchises sometimes take the form of contractual provisions, Congress nevertheless did not indicate that the effects of such rate regulations were "any less pernicious" because they appeared as terms of a license - Congress did not intend to draw any distinction between the various technical forms a rate regulation might take, stated the court.

Again, the rate freeze provision in the franchise agreement was a "regulation" within the meaning of section 543 of the Cable Act, concluded the court, and therefore was preempted.

In a footnote comment, the court stated that its conclusion was consistent with the decision reached by the Supreme Court of Vermont in Burlington v. Mountain Cable Company, 559 A.2d 153 (Vt. 1988; ELR 11:10:12), cert. denied, 109 S.Ct. 3245 (1989). Judge Greaney then noted that Norwood had brought to the court's attention the decision in Danvers, but stated that the case did not support the town's position because the Danvers court decided only a "narrow threshold jurisdictional issue," and in deciding such issue, the court "expressly recognized that State courts can decide Federal statutory questions of preemption." The Court of Appeals recognized that the preemption issue in Danvers was an anticipatory defense to a state court contract action, and, stated Judge Greaney, the court "did not purport to pass on the merits of the defense." The language in Danvers on whether enforcement of a franchise was "regulation" thus was dictum which was irrelevant to the instant case, in Judge Greaney's view.

Town of Norwood v. Adams-Russell Co., Inc., 549 N.E.2d 1115 (Mass. 1990) [ELR 12:2:12]

Breach of contract and fraud claims involving "Conan the Barbarian" and "He-Man" toys present triable issues

In the 1930s, Robert E. Howard wrote a series of stories featuring the character Conan of Cimmeria; the stories originally were published in "Weird Tales" and came under the copyrights obtained for each issue of the magazine in the name of the Popular Fiction Publishing Co. When the copyrights lapsed after twenty-eight years, only seven of the seventeen copyrights were renewed.

Conan Properties, Inc., described by Federal District Court Judge Patterson as "the ultimate beneficiary of Howard's genius," owned the copyrights in eight Conan comic books published by Marvel Comics in the late 1970s.

In response to Conan Properties' claim that Mattel,Inc.'s "He-Man" toy infringed Conan's rights, Judge Patterson first found that although Conan Properties held a valid copyright in the Conan comic books, the copyright interest extended only to the company's original contribution to the character, i.e., a "uniquely styled musculature."

The court then stated that Conan Properties did not raise a question of fact concerning the infringement of the company's rights. Mattel denied that it had access to the Conan comic books. Even if access were inferred, stated the court, the protected elements of Conan and He-Man were not substantially similar.

With respect to the issue of trademark infringement, the court noted that to succeed in a claim under section 43(a) of the Lanham Act, Conan Properties was required to show that the Conan character functioned as a trademark - that the character had "secondary meaning" which identified its source - and that the similarities shared by Conan and He-Man were likely to confuse consumers about that source. Even assuming that Conan the Barbarian had secondary meaning, Judge Patterson found that Conan Properties failed to show consumer confusion.

The court also rejected Conan Properties' claims of unfair competition under New York common law and dilution in violation of the state's anti-dilution statute - there was no evidence that Mattel's He-Man blurred or tarnished the Conan trademark.

Conan Properties also claimed that Mattel breached a July 1981 agreement whereby Mattel obtained a license for a Conan doll. In late 1981, Mattel decided not to market any Conan "plastic action toy figures." By February 1982, Mattel had completed work on its He-Man doll. According to Conan Properties, the distribution of the He-Man doll violated the license agreement by displaying an image "damaging" to Conan's reputation.

The court found that questions of fact were present as to whether Mattel breached its obligation under the license to market toys "of high standard and of such style, appearance, and quality as to be adequate and suited to their exploitation to the best advantage and to the protection and enhancement of the name CONAN and the goodwill pertaining thereto."

Judge Patterson concluded by finding that both Conan Properties and Mattel were entitled to present their fraud claims to a jury.

Conan Properties, Inc. v. Mattel, Inc., 712 F.Supp. 353 (S.D.N.Y. 1989) [ELR 12:2:13]

Costume company's misrepresentation of its creations as "soft sculptures" invalidates copyright registration

A Federal Court of Appeals has upheld a District Court decision granting summary judgment to Rubies Costume Co., Inc. in a copyright infringement action brought by Whimsicality, Inc. However, Judge Timbers, although agreeing with the result reached by the District Court, affirmed the dismissal of the copyright claim and the denial of injunctive relief on other grounds than those relied on by the District Court.

Judge Timbers held that Whimsicality obtained its copyright registrations by the misrepresentation of the company's costumes to the United States Copyright Office; the court therefore did not reach the issue of copyrightability, since proper registration is a prerequisite to an action for infringement. Furthermore, the court found bad faith on the part of Whimsicality, and therefore remanded to the District Court the issue of an award of attorneys fees to Rubies.

Judge Timbers pointed out that Whimsicality, in its copyright applications, referred to the company's creations as "soft sculptures," and submitted photographs to the Copyright Office showing the costumes in flat form. But the only practical use for the copyrighted works was as costumes - there was no evidence of any actual use as sculpture. The Copyright Office, noted the court, considers costumes as noncopyrightable "wearing apparel."

The court did not agree that cases involving stuffed animals and toys would support Whimsicality's position that costumes may be registered as soft sculpture. Sculpture, stated Judge Timbers, implies "a relatively firm form representing a particular concept." Whimsicality's costumes, having no such form, did not constitute sculpture, and the company, because of its misrepresentations, did not have valid copyrights capable of enforcement. The court did not discuss Whimsicality's unfair competition claim which was pending before the District Court.

Whimsicality, Inc. v. Rubie's Costume Co., Inc., 891 F.2d 452 (2d Cir. 1989) [ELR 12:2:14]

Copyright Royalty Tribunal resolves conflicting claims by ASCAP and BMI to 1987 cable copyright royalty fees

The Copyright Royalty Tribunal has announced its final determination with respect to the distribution to music claimants of royalty fees paid by cable systems for secondary transmissions during 1987.

The primary controversy presented was ASCAP's claim to 67-72 per cent of the royalty fees, and BMI's claim for not less than 50 per cent of the fees.

After considering the evidence presented by the parties concerning the actual performances of music in the cable distant signal marketplace in 1987, revenues from analogous marketplaces, and other factors, the Tribunal determined that ASCAP was entitled to 58 percent of the music category and BMI was entitled to 42 percent of the category.

The music claimants received a 4.5 percent allocation of the 1987 basic cable copyright royalty fees available for distribution; the percentage allocation to other categories of claimants was as follows: program suppliers: 67.10; sports: 16.35; noncommercial television: 5.20; commercial television 5.00; devotional claimants: 1.10; Canadian claimants: 0.75; noncommercial radio: 0.18; commercial radio: 0.

1987 Cable Royalty Distribution to Music Claimants, Copyright Royalty Tribunal (Mar. 27, 1990) [ELR 12:2:14]

Court reduces $1.140 million damage award to owner of Salvador Dali illustrations in action involving allegedly unauthorized distribution of poster-size reproductions; owner may elect $718,000 or new trial on damage issue

In 1968, Werbungs und Commerz Union Austalt commissioned Salvador Dali to produce a series of illustrations based on Lewis Carroll's "Alice's Adventures in Wonderland." WUCUA and Maecenas Press, Ltd. agreed to produce two editions of books containing a specific number of lithographic reproductions of the original Dali water colors. The parties agreed to share the rights and income of the venture jointly. In a second agreement, WUCUA sold to Maecenas all its rights, title and interest in "the two editions" and "all earnings therefrom" in return for $60,000. WUCUA retained the thirteen original water colors.

In the mid-1980s, Collectors Guild, Ltd. acquired Maecenas' rights under the agreements. Collectors Guild commissioned new lithographic reproductions of the images in the two books and distributed millions of dollars worth of the poster-size reproductions, according to Federal District Court Judge Tenney.

WUCUA claimed that it was entitled to a one-half share in the profits of the sale of the lithographs. Collectors Guild argued that under the second agreement, WUCUA gave up not only the right to share in the profits of the sale of the books, but also any profits realized from the derivative use of the artwork.

In 1987, Federal District Court Judge Pierre Leval held that WUCUA and Collectors Guild were joint holders of a copyright interest in the subsequent reproductions (ELR 10:12:17); the court found that the complaint stated a valid cause of action for breach of contract, but dismissed WUCUA's copyright claims.

A jury then found that WUCUA had not relinquished its right to share in the profits of the subsequent reproductions and awarded damages to WUCUA in the amount of $1.140 million.

Judge Tenney has denied Collectors Guild's motion for a directed verdict, but stated that a new trial would be ordered unless WUCUA agreed to a remittitur in the amount of $422,085.

It was noted that the evidence presented seemed to confirm that at the time they entered into the two agreements, the parties did not foresee a derivative use of the books' illustrations, such as the marketing of the reproductions in issue; the court upheld the jury's finding that WUCUA only partially transferred the company's rights in the book and its illustrations.

In turning to the issue of damages, Judge Tenney first agreed with the jury's rejection of Collectors Guild's contention that the company experienced a loss from the sale of the Dali lithographs, and stated that the jury apparently found that the company had realized a profit of $2.280 million. The possibility that the jury used Collectors Guild's cost figures in calculating damages did not require disturbing the jury's findings as a matter of law.

However, although stating there was sufficient evidence in the record to support the jury's damage award, the court noted that if additional evidence concerning Collectors Guild's inventory of unsold lithographs had been admitted, the jury might have returned a smaller award. According to Judge Tenney's calculations, the jury's award "should equitably have been close" to a figure of $718,000, and the court granted WUCUA a new trial on the issue of damages unless the company agreed to the reduced amount.

Werbungs Und Commerz Union Austalt v. Collectors Guild, Ltd., 728 F.Supp. 975 (S.D.N.Y. 1989) [ELR 12:2:15]

Briefly Noted:

Completion Bond.

A New York appellate court has affirmed a trial court decision awarding Manhattan Film, Inc. about $185,000 in damages in an action against Entertainment Guarantees, Ltd. Although Manhattan Film completed a motion picture (unidentified by the court) in accordance with the company's contractual obligations, Entertainment Guarantees refused to remit the agreed-upon refund. The appellate court agreed that summary judgment was properly granted with respect to the cause of action alleging breach of contract, but found that the trial court erred in granting summary judgment on Manhattan Films' causes of action for fraud and conspiracy. The fraud claim was redundant, stated the court, and there was no indication that Beauclair Rogers, an individual associated with Entertainment Guarantees, acted in bad faith and outside of his authority so as to warrant holding Rogers liable for conspiring to induce a breach of the corporation's contract.

Manhattan Film, Inc. v. Entertainment Guarantees, Ltd., 548 N.Y.S.2d 200 (N.Y.App. 1989) [ELR 12:2:15]

Sales Tax/NCAA.

The Supreme Court of Kansas has ruled that the National Collegiate Athletic Association was an educational institution exempt from the payment of sales taxes on the association's purchases. The evidence showed that the NCAA spent between $750,000 and $1 million annually on athletic awards alone. Although the NCAA does not itself have regularly enrolled students, a faculty, a campus, or a qualifying curriculum, it was noted that the association works for the mutual benefit of its member institutions' educational programs. In reversing an order of the Board of Tax Appeals, the court stated that the NCAA was an extension of such universities and colleges, and that there was no legislative intent to deny the association the exemption available to the member schools.

National Collegiate Athletic Association v. Kansas Department Of Revenue, 781 P.2d 726 (Kans. 1989) [ELR 12:2:16]

Hockey Player Injury.

In 1988, professional hockey player Wayne Babych sued Ken McRae, a player for the Club De Hockey Les Nordiques, claiming that McRae struck Babych's right knee with a hockey stick during a game between the Hartford Whalers and the Quebec Nordiques. Babych alleged, among other claims, that McRae's action violated Rule 77 of the National Hockey League Rules, and negligently caused Babych physical injuries and financial losses.

McRae filed a motion to strike, arguing that the claim alleging the negligent violation of a safety rule by a professional athlete failed to state a cause of action.

A Connecticut trial court has found that Babych pleaded sufficient facts to state a cause of action in negligence and denied McRae's motion. The court commented that there was no Connecticut case law analogous to Turcotte V. Fell, 510 N.Y.S.2d 49 (N.Y. 1986; ELR 9:1:14), a case cited by McRae to support the position that negligence was not a legally sufficient cause of action when one professional participant in an event is injured by another.

Babych v. McRae, 567 A.2d 1269 (Conn.Supr.Ct. 1989) [ELR 12:2:16]

Workers Compensation.

Donald L. Cockroft was injured while employed with the Cleveland Browns. In late 1982, Cockroft applied to the State Industrial Commission for a permanent partial disability determination. The commission's medical advisor found a fifteen percent partial impairment. In a subsequent order, Cockroft obtained temporary partial compensation for a six month period in 1983, with compensation continuing "as long as claimant demonstrates both a wage and medical impairment."

The Supreme Court of Ohio found that Cockroft had not presented the requisite evidence of actual impaired earning capacity - the evidence relating to the extent of the athlete's medical impairment was not "some evidence" of actual impaired earning capacity. The commission abused its discretion in awarding compensation under the applicable statute, and the court affirmed that portion of the appellate court's decision vacating the Commission's order. The court, noting that vacating the Commission's order vacated the fifteen percent disability figure as well, found it unnecessary to remand the matter to the Commission for further proceedings and reversed that portion of the appellate court's judgment remanding the case for a second hearing.

State ex rel. Cleveland Browns, Inc. v. Industrial Commission of Ohio, 550 N.E.2d 177 (Ohio 1990) [ELR 12:2:16]

Student Athlete Eligibility.

A Federal Court of Appeals has affirmed a District Court decision (ELR 11:10:19) upholding the constitutionality of the Ohio High School Athletic Association's eligibility regulations for students participating in interscholastic soccer. The court found that the Association did not act under the color of state law in adopting the bylaws in issue and that the students did not present a cause of action cognizable under 42 U.S.C. section 1983 and the Fourteenth Amendment. Even assuming that the bylaws were adopted and enforced under color of state law, the court found "unsupportable" the claim that the bylaws infringed the students' First Amendment right to association by preventing the students from participating in certain independent soccer activities. The court cited Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987; ELR 9:5:16) in rejecting the students' claim that they were penalized for their association with the independent soccer groups; the Association did not prohibit the students from playing independent soccer, nor did it regulate that association, noted the court.

Burrows v. Ohio High School Athletic Association, 891 F.2d 122 (6th Cir. 1989) [ELR 12:2:16]

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Contracts/David Copperfield Commercial.

A Federal District Court jury in Illinois awarded David Copperfield damages of $154,000 in the entertainer's breach of contract action against an advertising agency and the agency's client, an electronic fund transfer service known as Cash Station. Copperfield agreed to appear in television commercials and print advertising for an automatic teller network, but Cash Station cancelled the advertising campaign prior to shooting.

The Cash Station parties moved for directed verdicts and for judgment notwithstanding the verdict on the ground that there was no written contract with Copperfield. A Federal Court of Appeals affirmed the District

Court's denial of the motions, finding that the parties did not intend the execution of a written contract to be a condition precedent to a binding and enforceable contractual relationship. It was noted that Copperfield presented evidence that it was customary in the entertainment industry for the execution of a formal contract to follow several months after performance had occurred. The jury could have reasonably concluded that the parties had reached an oral agreement to employ Copperfield in an advertising campaign and had assented to the essential terms of that agreement, and that a formal written contract was to be prepared only as a memorialization of the oral agreement.

David Copperfield's Disappearing, Inc. v. Haddon Advertising Agency, Inc., 897 F.2d 288 (7th Cir. 1990) [ELR 12:2:17]

Chicago Bears.

In 1988, the executor of the estate of George S. Halas, Jr. obtained court approval to sell certain shares of the stock of the Chicago Bears Football Club. An Illinois appellate court has found that the team properly exercised a right of first refusal in offering to purchase the shares, and affirmed a trial court decision denying a request for injunctive relief sought by Halas' children.

According to recent news reports, the Chicago Bears have settled a tax dispute with the Internal Revenue Service involving a 1981 reorganization of the team. The IRS had argued that the reorganization placed an artificially low value on the 49.35 per cent of the team's stock then held in the name of the team's founder George S. Halas.

Estate of Halas, 529 N.E.2d 768 (Ill.App. 1988) [ELR 12:2:17]

Art Storage.

A New York trial court has awarded damages of $270,000 to artist Leah Carol Reichman in an action against Warehouse One, Inc. Judge Charles L. Willis found that the warehouse's "contumacious conduct" justified, under the state's Truth in Storage Act, the trebling of the $90,000 damage award.

Reichman, who was evicted from her studio in November 1982, eventually discovered that Warehouse One was storing her possessions, including two oil paintings and several drawings and watercolors. In a prior ruling, it was found that the company, although not the initial "warehouseman," had an obligation under the statute to provide the artist with information such as the company's storage charges and an inventory of the goods. Warehouse One did not meet this obligation, and was ordered to release Reichman's goods - the company failed to do so. Judge Willis, in the hearing on damages, also found that Reichman was entitled to attorneys fees and did not have to pay about $3,500 in storage fees.

Reichman v. Warehouse One, Inc., New York Law Journal, p. 23, col. 2 (N.Y.Cnty., Oct. 16, 1989) [ELR 12:2:17]

Copyright Infringement/"Spuds MacKenzie."

Anheuser-Busch authorized Spencer Industries, Inc. to manufacture and distribute merchandise containing the beer company's marks, including "Bud," "Bud Light," and the name and likeness of "Spuds MacKenzie." The licensing agreement provided that Spencer was not an agent of Anheuser-Busch, and that Anheuser-Busch retained the right to approve in writing the subcontracting of any work. When Anheuser- Busch sued A.C. Printed Sportswear for copyright and trademark infringement arising from A.C.'s printing of allegedly counterfeit goods, A.C. claimed that Spencer had authorized the subcontract.

A Federal District Court in New Jersey has found that Spencer never obtained Anheuser-Busch's approval of the contract with A.C., and that A.C.'s activities constituted copyright infringement, trademark infringement and unfair competition. The court also found A.C.'s owner, Edward DeNicolantonio, liable, both personally and vicariously, for A.C.'s infringing activity, and granted Anheuser-Busch's motion for summary judgment on its claims of copyright infringement, common law and federal trademark infringement, and unfair competition with respect to another allegedly infringing entity, Tees for Two.

The court rejected various counterclaims. In particular, Chief Judge Gerry denied a wrongful seizure counterclaim on the ground that nothing was taken from A.C. pursuant to the execution of the seizure order, and therefore there was no actionable seizure under the relevant statute.

Major League Baseball Promotion Col-P. v. Colour-Tex, Inc., 729 F.Supp. 1035 (D.N.J. 1990) [ELR 12:2:17]

Gender Discrimination/Student Athlete.

Under a regulation of the West Virginia Secondary Schools Activities Commission, Erin Israel was barred from playing on her school's all-male baseball team; the school did have a girls' softball team. A trial court ruled that the Commission's regulation was valid. The Supreme Court of West Virginia has reversed and remanded the matter, first finding that the student's claims for injunctive and declaratory relief were not moot although Israel had graduated from high school. The court then noted that the games of baseball and softball were not "substantially equivalent," and that for a skilled player such as lsrael, "it would be deeply frustrating to be told she could not try out for the baseball team, not because she did not possess the necessary skills, but only because she was female. The entire thrust of the equal protection doctrine is to avoid this type of artificial distinction based solely on gender. "

Judge Miller proceeded to find that the state's constitutional equal protection principle was a part of the due process clause found in Article 111, section 10 of the West Virginia Constitution, and that a gender-based classification challenged as denying equal protection under Article 111, section 10 would be upheld only if the classification served an important governmental objective and was substantially related to the achievement of that objective.

Equal protection principles also applied to claims of gender discrimination involving interscholastic athletics under the state Human Rights Act. In all, the Commission's regulation with respect to the games of baseball and softball did not serve to provide equal athletic opportunities to boys and girls at the high school level. The matter was remanded for a determination of Israel's reasonable counsel fees.

Israel v. West Virginia Secondary Schools Activities Commission, 388 S.E.2d 480 (W.Va. 1989) [ELR 12:2:18]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Pirone v. Macmillan, Inc., 894 F.2d 579 (11:12:6); Weiner v. Doubleday & Co., Inc., 550 N.Y.S.2d 251 (11:12:12).

The opinion in Masson v. New Yorker Magazine, Inc. (11:4:7; 11:9:20) has been superseded by an opinion issued in February 1990 at 895 F.2d 1535 (9th Cir. 1989 (sic), noting the denial of a rehearing and rehearing en banc; Judge Kozinski would have granted a rehearing.

The opinion in Hal Roach Studios, Inc. v. Richard Feiner and Company, Inc. (11:6:15; 1:10:19) was amended in February 1990 and published, as amended, at 896 F.2d 1542. The court added a footnote statement as follows: Our reinstatement of "lack of copyright ownership" as an affirmative defense should not be taken as suggesting that Feiner & Co. bears the burden of proof on that issue for purposes of standing. For all standing questions, the burden of proof is on the plaintiff ... Thus, should the question of copyright ownership prove determinative of standing, Hal Roach Studios would be required to prove such ownership."
[ELR 12:2:18]

IN THE NEWS

Lucasfilm obtains preliminary injunction barring rap musician from using stage name "Luke Skyywalker"

A Federal District Court Judge in Los Angeles has granted Lucasfilm Ltd.'s request for a preliminary injunction barring musician Luther Campbell, a member of the rap group 2 Live Crew, from using the stage name Luke Skyywalker.

Lucasfilm claimed that Campbell's use of the name infringed the company's trademark in "Luke Skywalker," a character in the "Star Wars" movies.

Judge James Ideman also restrained Campbell's record label, Luke Skyywalker Records, from distributing, pending a hearing on the trademark infringement action, any products bearing the name in issue. [July 1990] [ELR 12:2:19]

Federal District Court in Florida rules that "As Nasty As They Wanna Be" by rap group 2 Live Crew is obscene

A Federal District Court in Florida has ruled that the group 2 Live Crew's album "As Nasty As They Wanna Be" is obscene. The rap music group brought a lawsuit seeking a declaratory judgment that the album was not obscene after county law enforcement officials warned retailers not to sell the sexually explicit recording.

Judge Jose Gonzalez, in an opinion not yet available to the Entertainment Law Reporter, stated that the album violated community standards for obscenity.

According to news reports, the court also ruled that the Broward County sheriff's threat to arrest music store operators was an unconstitutional prior restraint of free speech. However, in view of the ruling, individuals who sell the album may be prosecuted under a state law that sets a maximum penalty of five years in jail and a $5,000 fine for selling "harmful material" to minors and a one year, $1,000 fine for sales to adults. [July 1990] [ELR 12:2:19]

Peggy Lee is entitled to damages from Walt Disney Productions for allegedly unauthorized use of singer's voice in videocassettes of "Lady and the Tramp"

A Los Angeles trial court has ruled that singer Peggy Lee was entitled to receive damages from Walt Disney

Productions for the use of Lee's voice in videocassettes of the animated film "Lady and the Tramp."

Disney paid Lee $3,500 to provide the voices for four of the cartoon characters in the film; Lee also co-wrote and sang three of the musical numbers. The 1952 contract provided that Disney would control the right to use Lee's voice in movies and television and, according to news reports, in "all other improvements which might be used." However, Lee retained the right to approve, and receive royalties from, the distribution of any phonograph recordings or transcriptions from the soundtrack.

Judge William Huss did not issue a written opinion in granting summary judgment to Lee; there have been no further developments concerning the amount of damages. [July 1990] [ELR 12:2:19]

Four country western singers may continue to perform as "The Highwaymen"

Singers Johnny Cash, Waylon Jennings, Willie Nelson and Kris Kristofferson may continue to perform under the name Highwaymen, a Federal District Court in Los Angeles has ruled. The members of the 1960s folksinging group known as The Highwaymen claimed, in part, that the new group was using the name without permission. But Judge Robert M. Takasugi found that there was no probability of success on the merits of the claim; the ELR does not have a copy of the ruling. One member of the original Highwaymen was Stephen S. Trott, currently a Federal Court of Appeals judge. [July 1990] [ELR 12:2:19]

Japan increases protection of foreign recordings

The government of Japan has agreed to eliminate certain discriminatory practices with respect to foreign sound recordings, according to the Office of the United States Trade Representative.

Japan currently imposes a one year restriction on rentals of newly released prerecorded music by Japanese artists; it has been reported that this restriction will be extended to music released by foreign artists as well.

Furthermore, non-Japanese recordings produced before 1978 will be entitled to the same copyright protection as Japanese works, and Japanese copyright protection for foreign music will be extended from thirty to fifty years.

The Recording Industry Association of America has stated that the new measures, among other benefits, should help reduce the piracy of pre-1978 recordings. [July 1990] [ELR 12:2:20]

Tom Selleck's father and Globe International settle libel action

Robert Selleck, the father of actor Tom Selleck, has settled a longstanding (see ELR 7:2:15) libel action against Globe International. Although the terms of the settlement were confidential, it has been reported that a recent edition of the magazine contained an apology for falsely attributing certain statements to Selleck in a 1982 article. [July 1990] [ELR 12:2:20]

Disc jockeys obtain $105,000 jury award in age discrimination action; award is doubled upon finding of willful termination

A Federal District Court jury in Chicago has awarded about $105,000 in damages and back pay to three disc jockeys who brought an age discrimination action against Century Broadcasting in response to being fired from WXEZ-FM when the station changed its format from "beautiful music" to "easy listening."

It has been reported that the jury doubled the award upon finding that the firing was willful. [July 1990] [ELR 12:2:20]

Widow obtains $7.5 million jury verdict in wrongful death action against author of "In the Belly of the Beast"

A New York trial court jury has awarded $7.5 million to Ricci Adan in her wrongful death action against Jack Henry Abbott. In 1981, Abbott, just six weeks after being paroled on earlier convictions, killed Adan's then 22-year-old husband, and is serving a 15 year to life sentence for first degree manslaughter.

Abbott's letters to author Norman Mailer during the years 1978 to 1981 were published under the title "In the Belly of the Beast." Adan presumably will be entitled to an interest in Abbott's future earnings from his writing. [July 1990] [ELR 12:2:20]

DEPARTMENTS

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