RECENT CASES

"Tie Me Up! Tie Me Down" loses action challenging "X" rating by MPAA, but New York trial court "strongly advises" revision or elimination of rating system

The present system of rating motion pictures, "G," "PG," "PG-13," "R," and "X," is "an effective form of censorship. It is censorship from within the industry rather than imposed from without, but censorship nevertheless," according to a New York trial court.

Miramax Films Corp. and Pedro Almodovar challenged the "X" rating given their film "Tie Me Up! Tie Me Down" by the Motion Picture Association of America. Miramax claimed that the rating constituted arbitrary and capricious conduct by the MPAA's

Classification and Rating Administration Board. Each of the seven members of the Board found that two sexually explicit scenes in the film warranted giving the film an "X" rating. The Board also found the visual depiction of the sex acts and language accompanying one scene justified an "X" rating.

Miramax did not obtain the required two- thirds vote of the Rating Appeals Board; the "X" rating was upheld; and the company chose to distribute the film unrated.

In a strongly worded opinion, Judge Ramos described as "unwarranted" the MPAA's argument that its rating system served to prevent government censorship. The standard used by the MPAA to rate films, stated the court, was based upon the tastes of the average American parent ("AAP"), a standard which " restricts material not because it is harmful,but because it is not average fare." And the manner in which the MPAA rates films caused the court to question the integrity of the present rating system.

The court cited the fact that the initial Rating Board and the Ratings Appeals Board members have no special qualifications, and examined the MPAA's purported interest in protecting children in view of the fact that there are no doctors, child psychiatrists or child care professionals on the boards. Apparently the MPAA has not sought professional guidance to advise the board members regarding the impact on children of depictions of sexual activity or violence. "It may well be," stated Judge Ramos,"that the MPAA ratings are skewed towards permitting film makers huge profits [for] pandering to the appetite for films containing `hard violence' and `drug use' while neglecting the welfare of children intended to be protected by the rating system ... The industry that profits from scenes of mass murder, dismemberment and the portrayal of war as noble and glamorous apparently has no interest in the opinions of professionals, only the opinions of its consumers."

Judge Ramos next observed that the rating system censors serious films by the force of economic pressure. Miramax argued that "Tie Me Up" was stigmatized by a rating which has been "appropriated" by the pornography industry, and that for a film not intended for the pornography market, the rating limits advertising, distribution and income.

Notwithstanding the above, Judge Ramos found that Miramax did not set forth facts indicating that the MPAA acted arbitrarily, capriciously and without a rational basis in applying the "average American parent" standard. The court declined to view scenes from "Tie Me Up" and scenes from other films rated "R" in order to determine if the "X" rating was arbitrary, stating that it would "not dignify the present system by rendering an opinion on so frivolous a standard as the wishes of the

AAP. What is offensive is the unprofessional standard itself, not the manner in which the rating board applies it. The standard of the AAP is a marketing standard ... There is no basis in the record for the Court to conclude that the MPAA does not know how to label its products for market, there is only a question as to the significance of the labeling."

Miramax not only failed to substantiate the claim that the MPAA acted in bad faith or outside of its stated function in-rating "Tie Me Up," but, given certain circumstances noted by the court, may have instituted the instant action to obtain publicity for the film. However, cautioned Judge Ramos, if discriminatory practices by the MPAA towards foreign film producers or toward independent distributors were substantiated, such conduct might warrant relief.

Judge Ramos referred to the "dominant and preemptive" role played by the MPAA in the film industry, and the concomitant obligation to administer a film rating system fairly and with a "rationally based" foundation, and suggested that the MPAA review the above issues and consider changes in its methods of operations to "properly perform its stated mission." For "unless such concerns are meaningfully dealt with, the MPAA may find its rating system subject to viable legal challenge by those groups adversely affected herein, including organizations charged with the responsibility of protecting children," concluded the court.

Miramax's action did not adequately present a case for addressing the issues raised, and was dismissed accordingly.

Miramax Films Corp. v. The Motion Picture Association of America , New York Law Journal, p.18, col. 4 (N.Y.Cnty., July 27, 1990) [ELR 12:3:3]

2 Live Crew's record "As Nasty As They Wanna Be" is obscene, rules Federal District Court in Florida, but county sheriff's conduct in threatening music store owners with arrest for selling the record and presenting owners with a copy of a probable cause order is permanently enjoined as unconstitutional prior restraint

A Federal District Court in Florida has ruled that the recording "As Nasty As They Wanna Be (Nasty)" by the musical group known as "2 Live Crew" was legally obscene, but that Nicholas Navarro, as sheriff of Broward County, imposed an unconstitutional prior restraint upon the right to free speech of the members of, the group.

Luther Campbell, Mark Ross, David Hobbs and Chris Wongwon, the members of the group, and Skyywalker Records, Inc., solely owned by Luther Campbell, brought a section 1983 action against Navarro, claiming the unlawful deprivation of federal rights.

Judge Jose A. Gonzalez, Jr. first emphasized that the court's decision would not criminalize 2 Live Crew's conduct, or charge anyone with a crime, and would not determine whether "As Nasty as They Wanna Be" was criminally obscene.

Judge Gonzalez then reviewed the activities of the Broward County Sheriff's Office, which, in mid-February 1990, allegedly in response to citizen complaints, began an investigation of the recording. A deputy sheriff purchased a tape of the recording, transcribed six of the eighteen songs, and prepared an affidavit requesting that a local trial court find probable cause that the recording was obscene under section 847.011 of the Florida statutes; the court so found.

The Sheriff's Office then distributed copies of the order to retail stores that might be selling the "Nasty" recording. During visits to three record stores, a sheriff's deputy provided copies of the order to the store managers, suggested that they should refrain from selling the recording, and warned them that further sales would lead to arrest - sales to a minor would result in felony charges, and sales to an adult, in misdemeanor charges. Sheriff's deputies visited between fifteen and twenty different stores in the county, noted Judge Gonzalez.

Within days of the sheriff's warnings, all retail stores in the county stopped offering the "Nasty" recordings for sale; an unspecified number of stores which were not visited by the deputies ceased selling the recording upon hearing news reports about the visits. Even stores which had specially marked the recording with a warning and which did not sell the recording to minors refused to carry the work.

The group filed its action on March 16, 1990. On March 27, 1990, Sheriff Navarro filed an in rem proceeding in the county court seeking a determination that the "Nasty" recording was obscene under state law; there was no evidence of the status of the proceeding. Judge Gonzalez noted that there were no criminal proceedings pending against either the recording or the group.

In turning to the legal issues raised, Judge Gonzalez announced that "obscene speech has no protection under the First Amendment." There are many state prohibitions on sexually related conduct, and for the court, prohibitions on prostitution, incest, and rape were "no different than a ban on obscenity." The state's important interest in protecting minors and "unwilling or sensitive" adults from exposure to obscene materials also was cited by the court.

Florida's statutory scheme outlawing obscenity, in pertinent part, criminalizes "the distribution, sale, or production of any obscene thing including a `recording' which can be `transmuted into auditory ... representations.'" The statute makes it a crime for a person to knowingly have an obscene thing, including musical recordings, in his/her possession. And it is a criminal offense to transport obscenity into the state or to create, deliver, or publish obscenity.

Although 2 Live Crew argued that individuals should have the opportunity to decide whether or not to purchase the "Nasty" recording, Judge Gonzalez characterized this argument as an "absolutist" view which was contrary to Florida law.

In order to evaluate whether the recording was obscene under the test set forth in Miller v. California, 413 U.S. 15 (1973), the court first stated that the relevant community with respect to applying "contemporary community standards," was the area of Palm Beach, Broward, and Dade counties. Relying on the court's own personal knowledge, as the parties did not present evidence on the point, Judge Gonzalez found that the composition of the citizens of the area was "heterogeneous in terms of religion, class, race, and gender."

The court then considered which standards would apply in determining prurient interest and patent offensiveness in the counties, and found that the relevant community standard, apparently based on the court's personal knowledge of the community, reflected "a more (emphasis by the court) tolerant view of obscene speech than would other communities within the state." Nevertheless, the sheriff's office had received several complaints about the recording. The availability of other sexually explicit works in the community was discounted by the court; it was observed that there was no evidence that the purportedly comparable materials were not themselves obscene, and that evidence of depictions of sexual conduct in photographs or films was "not substantially equivalent to musical lyrics."

Judge Gonzalez stated that he would give some weight" to the following works which focused on a verbal message analogous to the format in the "Nasty" recording: the sexually explicit writing in various books and magazines; the audio tape entitled "Raw" by Eddie Murphy, and a tape by Andrew Dice Clay.

The group's argument as to the lack of a jury was "disingenuous," since the action was filed in federal court and sought only equitable relief. Furthermore, there is no constitutional right to trial by jury in obscenity cases, noted Judge Gonzalez, and neither party agreed to trial by jury.

The court also rejected the group's claim that expert testimony was required, and reiterated that the decision in the case would not be based on the court's personal opinion as to the obscenity of the work, but that the court would apply the law to the facts based upon the court's personal knowledge of community standards.

Proceeding to the first Miller test, Judge Gonzalez found that the recording "As Nasty As They Wanna Be" appealed to the prurient interest. The court observed that the recording's lyrics "and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning." Florida law defines "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse ... masturbation, ... sadomasochistic abuse; [or] actual lewd exhibition of the genitals." In all, the relevant statutory definitions covered most, if not all, of the sexual acts "depicted" in the recording.

Furthermore, noted Judge Gonzalez, "the frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity. The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book or in pictures in periodicals or films."

While agreeing that it would be difficult, although not impossible, to find obscene mere sound without lyrics, the focus of the recording in issue was its lyrics. The evidence indicated that the "goal" of the recording was "to reproduce the sexual act through musical lyrics. It is an appeal directed to 'dirty' thoughts and the loins, not to the intellect and the mind."

Another relevant factor in determining obscenity, even after Miller v. California, stated Judge Gonzalez, was whether 2 Live Crew intended to appeal to the prurient interest. The evidence presented, including the title of the recording, the names of many of the songs, and the illustration on the recording's insert, indicated to the court that "As Nasty As They Wanna Be" was commercially exploited so as to produce "a salacious appeal." The court commented on the fact that 2 Live Crew had prepared an identical album without using sexually explicit lyrics; the "Clean" album had sold 250,000 copies nationwide, whereas the "Nasty" version already had sold 1.7 million copies. And the court rejected the claim that the group needed the "salacious" lyrics to promote their message - the group's expert had testified that "rap" or "hip-hop" music does not require the use of such language.

In all, based on "the graphic deluge of sexual lyrics about nudity and sexual conduct," the court found that the recording appealed to a shameful and morbid interest in sex.

The recording also was "patently offensive," ruled the court, in addressing the second element of the Miller test. Reference again was made to the specificity of description of sexual conduct, and the frequency of the sexual lyrics. Judge Gonzalez also commented on the recording's depictions of female abuse and violence, which might not of themselves be sufficient to find the recording obscene, but which were entitled to consideration on the issue of patent offensiveness. Another factor relevant to the issue was the nature of the work - music is meant to be played and listened to, and citizens "do not have an obligation to buy and use ear plugs in public if the state legislature has chosen to protect them from obscenity."

The final factor under Miller was whether the "Nasty" recording, taken as a whole, possessed any serious literary, artistic, political, or scientific value - a factor not measured by community standards, but by whether a reasonable person would find serious social value in the material in issue. After reflecting that "the Phillistines are not always wrong, nor are the guardians of the First Amendment always right," Judge Gonzalez prepared to conduct an objective inquiry as to the social value of the recording.

2 Live Crew testified that the recording was not created to convey a political message. An expert on the culture of black Americans stated that the recording was political because the group used the work to express themselves, but the court observed that the nature of the group's background did not convert the "Nasty" recording into political speech or bestow upon it any sociological value.

Judge Gonzalez also declined to find that the recording had serious artistic value. It was not reasonable, in the court's view to argue that "the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art."

Florida's obscenity statutes extended to music, declared the court, and musical works are obscene if they meet the Miller test. As distinguished from more common recordings, the focus in "As Nasty As They Wanna Be" was predominantly on the lyrics, and those lyrics were "utterly without any redeeming social value."

Judge Gonzalez concluded that the "Nasty" recording, taken as a whole, was legally obscene, based on a preponderance of the evidence, and also concluded that the work was legally obscene under the Miller test by clear and convincing evidence.

In turning to the issue of prior restraint, the court first defined such restraint as any condition imposed by the government on the publication of speech - the condition " vests power in a nonjudicial official to make the final decision as to whether speech will be permitted at all or in what form." The prohibition on prior restraint, however, is not absolute, and speech may be limited prior to its publication when, for example, speech, such as obscenity, is unprotected by the Constitution. But it remains for the courts, not nonjudicial officials, to decide whether a specific work is obscene.

The court noted that while a state may criminalize obscenity, its regulation "must comport with the minimum procedural safeguards required by due process." Florida law has made obscenity a form of contraband, and the seizure of such material would not normally raise due process considerations. But music is a form of expression within the scope of the free speech guarantee, and the "Nasty" recording was entitled to the presumption of constitutionality not available to other "contraband" such as illegal drugs.

In this case, stated Judge Gonzalez, no concerns were raised in connection with the initial purchase of the "Nasty" recording by the sheriff's deputy or the submission of the matter to a court. But Judge Gonzalez questioned why the trial court judge issued an order finding probable cause that "Nasty" was obscene - there was no case or controversy before the court, and the sheriff's deputy did not seek an injunctive remedy, or a warrant to search for or to seize suspected obscene materials. Thus, the order was of no legal effect.

The sheriff's actions, upon receiving the order, constituted a seizure of presumptively protected speech within the scope of the First and Fourteenth Amendments, declared Judge Gonzalez, thereby violating the rights of 2 Live Crew, the music store owners, and the public's rights as an audience. There may have been no physical transfer of possession of the record inventories, but a seizure for prior restraint purposes did occur given the "direct relationship" between the sheriffs' visits, the surrounding publicity, and the store owners' decision to cease sales of the recording. If the deputies only gave advice to the store owners, without also threatening arrest while presenting a judicial order of probable cause, and had the store owners decided to accept the advice and remove the recordings, the case would have been different, in the court's view.

The ex parte application to a state judge for an order of probable cause and the issuance of the order were "insufficient to meet the minimum requirements of due process," concluded Judge Gonzalez. After careful review of the requisite safeguards, and the sheriff's conduct, the court concluded that the "Nasty" recording was subjected to an unconstitutional prior restraint, and entered permanent injunctive relief to prevent any future infringements of those rights. Stating its awareness of the " serious implications of interfering with integral state functions such as law enforcement," the court announced that "when the Constitutional liberties which we all hold sacred are threatened, this court has both the power and the duty to intervene."

Skyywalker Records, Inc. v. Navarro, 17 Media L.Rep. 2073 (S.D.Fla.1990) [ELR 12:3:4]

United States Supreme Court upholds constitutionality of Ohio statute prohibiting possession of child pornography, but orders new trial for individual on due process grounds

The United States Supreme Court has upheld an Ohio statute regulating the possession of child pornography.

Clyde Osborne was convicted of violating the statute and sentenced to six months in prison after the Columbus, Ohio police found four photographs in Osborne's home; each photograph depicted a nude male adolescent posed in a sexually explicit position.

The Ohio Supreme Court affirmed Osborne's conviction, denied a motion for rehearing and granted a stay pending appeal to the United States Supreme Court.

In finding that Ohio could constitutionally proscribe the possession and viewing of child pornography, United States Supreme Court Justice White first rejected Osborne's reliance on Stanley v. Georgia, 394 U.S. 557 (1969). In Stanley, the court struck down a Georgia law outlawing the private possession of obscene material, recognizing, according to Justice White that the statute "impinged upon Stanley's right to receive information in the privacy of his home;" Georgia's justifications for its law were found inadequate.

Justice White cautioned that Stanley was a narrow holding, and emphasized that even if Osborne had a First Amendment interest in viewing child pornography, the compelling interests underlying the prohibitions on such material "far exceed the interests justifying the

Georgia law at issue in Stanley." It was pointed out that "every court to address the issue has so concluded." Ohio enacted its statute to protect the victims of child pornography based upon the "reasonable" conclusion that the production of such pornography would decrease if the state penalized those who possessed and viewed the material.

The court then rejected Osborne's claim that the Ohio statute was unconstitutionally overbroad in that it criminalized an "intolerable " range of constitutionally protected conduct. The Ohio Supreme Court had narrowly construed the statute to avoid penalizing individuals for viewing or possessing innocuous photographs of naked children; the court also concluded that the state had to establish scienter in order to prove a violation of the statute.

Justice White, although finding the First Amendment claims raised "unpersuasive," reversed Osborne's conviction and remanded the matter for a new trial in order to insure that the conviction was based on a finding that the state proved each of the elements of the statute.

Justice Blackmun concurred in the court's opinion, but stated that he agreed with Justice Brennan that whether or not Osborne had objected at trial to the failure of the trial court to charge the jury concerning the "lewd exhibition" and "graphic focus" elements of the statute, the Supreme Court still possessed the authority to review the due process claim.

In dissent, Justice Brennan, with whom Justice Marshall and Justice Stevens joined, agreed with the reversal of Osborne's conviction, but would not have found that Ohio was free on remand to retry Osborne under the statute as written. In Justice Brennan's view, the statute, even as construed by the Ohio Supreme Court, still was "fatally overbroad," and the decision in Stanley would prevent Ohio from criminalizing Osborne's possession of the photographs in issue.

According to Justice Brennan, the statute used "simple nudity, without more," as a way of defining child pornography. The Ohio Supreme Court construed the statute to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." However, these tests, in Justice Brennan's view, did not cure the overbreadth of the statute, and created a problem of vagueness.

The statute cited by the majority, which was upheld in New York v. Ferber, 458 U.S. 747 (1982) differed significantly from the Ohio statute, and, noted the dissent, the Ohio statute "sweeps in many types of materials that are not child pornography,' as we used that term in Ferber, but rather that enjoy full First Amendment protection." Neither the statute nor the Ohio Supreme Court provided any authoritative definition of the phrase "lewd exhibition." Furthermore, stated Justice Brennan, there is "no longstanding, commonly understood definition of 'lewd,'" which would serve to save the phrase from impermissible vagueness.

The Ohio Supreme Court's addition of the "graphic focus" element to the nudity definition suffered from the same vagueness difficulty as "lewd exhibition," observed Justice Brennan, who would have held that Osborne should not be retried under the "impermissibly overbroad" statute.

Even if the statute was not overbroad, the decision in Stanley would prohibit the criminalization of Osborne's private possession in his home of the materials in issue, stated Justice Brennan, pointing out that the decision in Ferber referred to the production and distribution, rather than the private possession of child pornography. Again, the dissent commented that the authority of a state to regulate the production and distribution of such material is not dispositive of its power to penalize possession - and that "the distinction established in Stanley between what materials may be regulated and how they may be regulated still stands" (emphasis by the dissent).

Justice Brennan also questioned the need for the statute, given Ohio's "panoply of laws" prohibiting the creation, sale, and distribution of child pornography and obscenity involving minors. Although sharing the majority's concerns about the exploitation of children in the production of pornography, Justice Brennan expressed the belief that the court did not properly balance the First Amendment and Ohio's interests.

With respect to the due process issue, Justice Brennan agreed that Osborne's conviction should be reversed essentially due to faulty jury instructions. However, Justice Brennan proceeded to characterize as "apparently dictum" the majority's rejection of a separate due process challenge arising from the Ohio Supreme Court's addition of a scienter element. The dissent would have found that the overbreadth challenge was sufficient, as a matter of federal law, to preserve the due process claim arising from the addition of the scienter element. In all, "Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law," concluded Justice Brennan.

Osborne v. Ohio, Case No. 88-51986 (U.S.Sup.Ct., April 18, 1990) [ELR 12:3:7]

New York statute prohibiting procurement of child pornography extends to acquisition of material for private use

In February, 1990, just prior to the United States Supreme Court decision in Osborne (above), the New York Court of Appeals affirmed an appellate court ruling that the procurement of child pornography for personal use was within the scope of a statute criminalizing the promotion of a sexual performance by a child.

In 1986, according to news reports, Albany police conducted a sting operation after finding William Keyes' telephone number on the door of a video booth at an adult bookstore. Keyes purportedly purchased, from an undercover officer, magazines, photographs and a videotape, and was charged with five counts of promoting a sexual performance by a child. It was alleged that Keyes, knowing the contents thereof, procured child pornography through the mail and in his home; the material in issue depicted sexual activities by children as young as six to eight years old.

The indictment was dismissed by the trial court on the basis that the legislature meant to limit the term "procure" to the acquisition of child pornography for distribution, not for private use.

The appellate court reinstated the indictment. In affirming the order, Court of Appeals Judge Fritz W. Alexander 2d rejected Keyes' argument that the mere possession of child pornography was insufficient to constitute a crime absent any allegation that Keyes intended to distribute the material to others. Judge Alexander stated that such a "cramped" construction of the term " procure" was "inconsistent with both the language and the spirit of the statute."

The legislative history of article 263 of the state penal law indicated an intent to combat child pornography, and did not suggest that consumers of such material would be excluded from the reach of the statute, observed Judge Alexander. The court concluded that the term " procure" meant to obtain or acquire, and the purpose for which the child pornography might be acquired was irrelevant to the conduct proscribed by the statute.

Keyes, citing Stanley v. Georgia, 394 U.S. 557, argued that the statute was unconstitutional as applied to him because Keyes was charged only with the possession of child pornography. Judge Alexander declined to decide whether Keyes had a constitutional right of privacy which included the right to possess the material in issue in his home - Keyes, again was not charged with the criminal possession of child pornography but with procuring (emphasis by the court) child pornography and thereby promoting a sexual performance by a child. Keyes did not argue that procuring child pornography may not be constitutionally proscribed.

People v. Keyes , Case No. 19 (N.Y., Feb. 20, 1990) [ELR 12:3:8]

United States Supreme Court upholds Federal Communications Commission's minority preference policies

The United States Supreme Court, by a 5-4 vote, has ruled that a Federal Communications Commission policy which grants an enhancement for minority ownership in comparative proceedings for new licenses did not violate equal protection principles. The court also upheld a policy known as the minority "distress sale program" which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms.

Justice William J. Brennan, Jr., first reviewed the history of the Commission's antidiscrimination efforts and the background of the adoption, in May 1978, of the

"Statement of Policy on Minority Ownership of Broadcasting Facilities." The Commission announced that in order to expand broadcast diversity, minority ownership and participation in management would be considered in a comparative hearing as a "plus" to be weighed together with all other relevant factors. The "plus" would be awarded only to the extent of a minority owner's active participation in the day-today management of the station.

The Commission also proposed to allow broadcasters holding a license designated for a revocation hearing, or whose renewal application was designated for a hearing, to assign the license to a Commission-approved minority enterprise. The assignee would have to meet the Commission's basic qualifications and the minority ownership would have to exceed fifty percent or be controlling; the buyer must purchase the license before the start of the revocation or renewal hearing; and the price must not exceed seventy-five percent of fair market value.

Justice Brennan next described the two cases which were consolidated for the court's review. In the first matter, Metro Broadcasting and other applicants were involved in a comparative proceeding to select a party to construct and operate a new UHF television station in the Orlando, Florida area. An administrative law judge granted Metro's application. However, a review board found that Rainbow Broadcasting was a qualified candidate; granted Rainbow a substantial enhancement on the ground that it was ninety percent Hispanic-owned (Metro had only one minority partner who owned about twenty percent of the company); and determined that Rainbow's minority credit outweighed Metro's local residence and civic participation advantage. The Commission denied review of the board's decision.

Eventually, a Federal Court of Appeals affirmed the order awarding the license to Rainbow.

In the second proceeding, Faith Center, Inc., the licensee of a Hartford, Connecticut television station sought to transfer its license under the distress sale policy. The Commission rejected an equal protection challenge to the policy raised by Shurberg Broadcasting and reaffirmed an order granting the requested transfer. A Federal Court of Appeals invalidated the policy.

Justice Brennan emphasized the importance of the fact that Congress mandated the Commission's minority ownership programs, and held that "benign race-conscious measures mandated by Congress - even if those measures are not `remedial'... are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."

The minority ownership policies passed the above-cited test by furthering the important governmental objective of promoting broadcast diversity. Furthermore, the policies were substantially related to achieving the objective, and would benefit all broadcast audiences, regardless of racial composition. It was noted that the Commission had concluded that there was an "empirical nexus" between minority ownership and broadcasting diversity - the court chose to defer to the Commission's expertise.

After recounting the long history of congressional support for the minority ownership policies, Justice Brennan 'cautioned that both Congress and the Commission "maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity." The Commission devised its policies only after finding that race-neutral means would not produce adequate programming diversity. The policies remain subject to continued review by Congress, and do not impose impermissible burdens on nonminorities, declared the court, in affirming the judgment in the Metro Broadcasting matter and reversing the decision in Shurberg.

Justice John Paul Stevens' concurring opinion agreed with the court's determination that the instant proceeding was within the "extremely narrow" category of governmental decisions for which racial or ethnic heritage may provide a rational basis for disparate treatment. The public interest in broadcast diversity was " unquestionably legitimate," commented Justice Stevens.

Justice Sandra Day O'Connor, with whom Chief Justice William H. Rehnquist, Justice Antonin Scalia and Justice Anthony M. Kennedy Jr. joined in dissent, questioned the court's apparent abandonment of a "strict scrutiny" standard pursuant to which a racial classification would be upheld only if necessary and narrowly tailored to achieve a compelling state interest. Justice O'Connor stated that the precedents cited by Justice Brennan did not justify the application of any other standard to the policies under consideration, and expressed concern with the "renewed toleration of racial classifications" embodied in the court's standard of review, for "governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers."

The Commission's policies were not designed as remedial measures and were not narrowly tailored to remedy identified discrimination, observed Justice O'Connor. Under the strict scrutiny standard, only a compelling interest may support the government's use of racial classifications, and modern equal protection doctrine, stated the dissent, has recognized only one such interest - remedying the effects of racial discrimination. For the dissent, the interest in increasing the diversity of broadcast viewpoints was not a compelling interest, being "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."

Similarly, the means chosen to achieve the government's asserted interest "could not plausibly be deemed narrowly tailored," stated Justice O'Connor. The dissent questioned the Commission's assumption of a "particularly strong correlation of race and behavior," and pointed out that even if the Court's equation of race and programming viewpoint had some empirical basis, equal protection principles prohibit the government from relying upon that basis to employ racial classifications. It was further noted that there were readily available race-neutral and untried means of directly accomplishing the asserted governmental interests, such as, in part, providing "race-neutral" financial and informational measures, or developing an effective ascertainment policy to guarantee programming that would reflect underrepresented viewpoints. In all, stated Justice O'Connor, the "repeated" focus on ownership supported the inference that the Commission sought to allocate licenses based on race, rather than to increase diversity of viewpoints. A justification linking the use of race preferences to minority ownership rather than to diversity of viewpoints ensured that "the Commission's programs were not narrowly tailored to any goal..."

Justice O'Connor then declared that the challenged policies not only failed the other constitutional requirements, but also did not meet the independent requirement barring the use of race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups. The opportunity to purchase a broadcast property via a distress sale will depend entirely upon race or ethnicity, noted the dissent, and race also will be the "dispositive" factor in a substantial percentage of comparative proceedings. Justice O'Connor therefore rejected the court's determination "in essence, that Congress and all federal agencies are exempted, to some ill-defined but significant degree, from the Constitution's equal protection requirement."

Justice Kennedy, with whom Justice Scalia joined, also wrote a dissenting opinion in which he cautioned that the standard of review and its explication in Plessy v. Ferguson, 163 U.S. 537 (1896), had "disturbing parallels to today's majority opinion that should warn us something is amiss here." All that need be shown under the "new approach," according to Justice Kennedy, is that the future effect of discriminating among citizens on the basis of race will advance some "important" governmental interest. Justice Kennedy disagreed with the court that the Constitution would permit the government to discriminate on the basis of race in order to serve an interest as "trivial" as broadcast diversity, and regretted that "after a century of judicial opinion we interpret the Constitution to do no more than move us from separate but equal' to 'unequal but benign.'"

Metro Broadcasting, Inc. v. Federal Communications Commission ; Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Case Nos. 89-453; 89-700 (U.S.Sup.Ct., June 27, 1990) [ELR 12:3:8]

Florida appellate court finds that Copyright Act does not preempt advertising agency's state law claims against Burger King in connection with campaign proposal, and that factual issues as to novelty of agency's ideas preclude summary judgment

In 1985, The Garrido Group Advertising, Inc. presented a campaign proposal to representatives of Burger King Corporation. Garrido's suggested campaign themes were "It's my Whopper, it's by Burger King," and "It's my town, it's my Burger King."

When Burger King subsequently began an advertising campaign called "Burger King Town," Garrido filed a lawsuit alleging various causes of action. A Florida trial court granted summary judgment to Burger King on the ground that all the claims were preempted by the Copyright Act of 1976.

A Florida appellate court, after observing that the written and visual materials presented to Burger King were copyrightable, upheld the dismissal of Garrido's causes of action alleging conspiracy, conversion, and theft of the advertising campaign ideas conveyed to Burger King. But the court found that the allegations that Garrido's ideas were novel and were confidentially conveyed to Burger King with the expectation of payment for their use stated a cause of action for misappropriation.

The Copyright Act also did not preempt Gaffido's causes of action for breach of implied-in-fact contract and for misrepresentation - the misrepresentation claim raised the element of deceptive or fraudulent conduct in entering into a contract which is not an element covered by the Act.

The court then adopted the novelty requirement in cases involving state law causes of action based on the conveyance of an idea. In the instant matter, Burger King did not raise the novelty issue in the company's motion for summary judgment; the company argued that there was sufficient evidence in the record to uphold the trial court's ruling on the basis that Garrido's advertising proposal was not novel. According to Burger King, the proposal recycled a prior campaign aired by the company. Judge Nesbitt, however, stated that disputed factual issues were raised, declined to affirm summary judgment on the novelty issue, and reversed and remanded the case for further proceedings.

Garrido v. Burger King Corporation, 558 S.2d 79 (Fla.App. 1990) [ELR 12:3:10]

"Substantial competition" between two Chicago theaters precludes antitrust claim based upon distributor clearances

A Federal District Court in Chicago has ruled that the Chicago Ridge Theater and the Evergreen Theater were in substantial competition, and that the film clearances obtained by Evergreen over the Chicago Ridge were not an unlawful restraint on competition.

The court noted that the theaters were 6.1 miles apart, and had the same number of auditoriums, with similar seating capacities. The owners of the Chicago Ridge were aware of the wide radius of their market. And employees of various distribution companies testified that the Chicago Ridge and the Evergreen competed with one another. In all, the evidence presented showed that the theaters substantially competed; the clearances therefore were not illegal, and Judge Brian Barnett Duff entered judgment in favor of the Evergreen parties.

The court rejected, as untimely, Chicago Ridge's motion to reopen the case to present a different theory of liability, described as the " modern rule of reason." Although agreeing with Chicago Ridge that the proper way to have evaluated the Evergreen's clearances was under the rule of reason, Judge Duff noted that Chicago Ridge had at least three opportunities prior to trial to present the case in this way, but chose not to do so. The court expressed regret at being deprived of the chance to apply the "more appropriate" theory of law to the dispute.

Chicago Ridge Theatre Limited Partnership v. M & R Amusement Corporation, 732 F.Supp. 1503 (N.D.Ill. 1990) [ELR 12:3:11]

Football helmet manufacturer's antitrust and trademark infringement claims against competitor are rejected

In 1988, Riddell, Inc. and National Football League Properties entered into an agreement whereby Riddell would provide free helmets, pads and jerseys to each NFL team in return for receiving the exclusive right to display the company's logo during NFL games on the helmets of those players who chose to wear the Riddell brand. Manufacturers' logos other than Riddell's would remain covered during league play.

A competing helmet manufacturer, Schutt Athletic Sales Company, sued Riddell, alleging various causes of action. A Federal District Court in Chicago first rejected Schutt's claim that the NFL teams were engaged in a group boycott in violation of section 1 of the Sherman Act. Judge Zagel noted that NFL players remain free to wear any helmet they choose.

The "crux" of Schutt's section 1 claim was that the agreement denied Schutt a promotional opportunity that was essential to the company's ability to compete. The court pointed out that Schutt had other means of effectively advertising its helmets - the appearance of a manufacturer's trademark on NFL helmets during game play was not essential to Schutt's ability to compete effectively.

Upon finding that Riddell's conduct was not within a category of activity that would be conclusively presumed an unreasonable restraint of trade or anticompetitive, Judge Zagel turned to the rule of reason test to determine the actual or probable anticompetitive effects of the agreement. Schutt contended that the NFL was a "promotional tool" for the sale of varsity and youth helmets elsewhere. Although representing a different level of play from the rest of football, the evidence indicated to the court that for purposes of Schutt's Sherman Act claim, "the indicia of a distinct submarket are not present with respect to the NFL." Rather, for the purpose of selling football helmets, the area of effective competition was the overall varsity helmet market. Riddell had between sixty and seventy percent of the helmet sales to the NFL and about fifty percent of the varsity helmet market, and on the basis of the evidence presented, the court inferred that Riddell had market power in the varsity helmet market.

However, Schutt did not establish the requisite anticompetitive effect. The company presented no evidence of lost sales. Furthermore, although Riddell agreed to give certain equipment to NFL teams if ninety percent of that team's players wore Riddell helmets, Schutt did not demonstrate that professional football teams would require their players to wear the Riddell helmets. It also was noted that in light of the substantial operating budgets of NFL teams, the amount of free equipment was very small. The court was not persuaded that the direct effect of the agreement would be to increase substantially the number of Riddell helmets worn by NFL players.

The court again questioned whether the appearance of the Riddell trademark on NFL helmets during game play alone would influence the purchasers of varsity helmets, given the many other factors involved in such purchases. In all, concluded Judge Zagel, although Riddell had market power in the relevant market, Schutt did not demonstrate the requisite anticompetitive effect or any injury.

Schutt's claims under section 2 of the Sherman Act also were rejected since the agreement was not intended to, nor was likely to, frustrate or eliminate competition. And it was found that there was no "dangerous probability" that Riddell would succeed in monopolizing the varsity football helmet market.

The court also determined that the agreement did not violate the Illinois Antitrust Act, and rejected Schutt's trademark infringement claim and claim of tortious interference with prospective business advantage.

Schutt Athletic Sales Company v. Riddell, Inc., 727 F.Supp. 1220 (N.D.Ill. 1989) [ELR 12:3:11]

Creator of pitching statistics form loses copyright and trademark infringement action against Associated Press

In 1983, George Kregos created a "pitching form" to be published in newspapers. The form listed various statistics for upcoming starting pitchers and was arranged in a tabular format with a legend at the bottom to explain the categories. Kregos received two copyrights for the 1983 form.

Federal District Court Judge Gerard L. Goettel described the statistics contained in the Kregos form, noting that the first four categories appear "in virtually every form that has been created" and were not specifically at issue in the case. The remaining nine columns featured three general categories that then were divided further.

In 1984, the Associated Press began to publish its own pitching form; the statistics for the form were compiled by Sports Features Syndicate. The Associated Press form, stated Judge Goettel, was identical "in virtually every sense" to Kregos' form, except for the renaming of certain categories and sub-categories and for the slightly more detailed analysis in the legend in Kregos' form. In 1986, the Associated Press amended several aspects of its form.

Kregos brought a copyright and trademark infringement action against the Associated Press.

The court rejected Kregos' argument that the form was a copyrightable compilation of facts. It was observed that every statistic used by Kregos was readily available to a person willing to read the box scores of the preceding day's games, and that "virtually every nuance" supposedly created by Kregos existed in prior forms. The evidence indicated that Kregos' form was not sufficiently original in terms of selection or coordination, and protecting the form, stated Judge Goettel, would mean that "any mere reordering of the facts contained in a pitching form would give-rise to copyrightable interests."

Judge Goettel emphasized that the court relied on Financial Information, Inc. v. Moody's Investors Service, 808 F.2d 204 (2d Cir. 1986), cert.denied, 484 U.S. 820 (1987), and expressly distinguished the ruling in Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984; ELR 7:3:14). In Eckes, the court held that the selection of 5,000 baseball cards from a total of 18,000 to be included on a "premium" card list was a sufficient exercise of selection, creativity and judgment. In the instant case, stated the court, Kregos "did not exercise such creativity as most of the statistics, as well as the coordination of these statistics, had been established in previously existing forms."

The court next considered the "idea/expression merger" doctrine. The doctrine, an "extremely vexatious one to apply," in Judge Goettel's view, provides that "if the number of ways of expressing a particular idea are limited, the idea and expression are deemed to merge and neither one is copyrightable." Although agreeing with the theoretical possibility of including numerous statistics in a form and organizing them in multiple ways, the court pointed out that there are an extremely limited number of ways of practically expressing such statistics in an outcome predictive pitching form, primarily because of newspaper space restrictions, and that Kregos' form did not exhibit the requisite selection or arrangement to receive protection.

Judge Goettel also agreed with the Associated Press that Kregos' form failed to convey information and thus was sufficiently analogous to an unprotectable "blank form."

In all, under any of the above three tests, Kregos lacked a copyrightable interest in his pitching form, and the Associated Press' motion for summary judgment was granted accordingly.

Kregos' trademark infringement claim also was dismissed on the ground that the form was functional and that any restriction on the right to use the various categories included in the form "would exact a substantial limitation on competition."

Kregos v. Associated Press, 731 F.Supp. 113 (S.D.N.Y. 1990) [ELR 12:3:12]

Guggenheim Museum may proceed with action to recover Chagall work from good faith purchaser

Sometime in the mid-1960s, a watercolor painting, or gouache, by Marc Chagall was stolen from the Guggenheim Museum. The 1912 work, worth about $200,000, was a study for Chagall's oil painting "Le Marchand de Bestiaux" ("The Cattle Dealer").

Mrs. Jules Lubell and her late husband purchased the gouache in 1967 from an unidentified Manhattan gallery for $17,000.

When the museum brought an action for replevin in the mid-1980s, the trial court granted Lubell's motion for summary judgment based, among other reasons, on the statute of limitations. The court stated that the museum's efforts to locate the gouache were not reasonably diligent in that the museum did not report the loss to agencies such as the police, the F.B.I., Interpol, or the Art Dealers Association. The museum also did not notify Chagall and the cataloguer of the artist's works, both of whom were contacted by Jules Lubell when he purchased the gouache. The museum stated that it decided not to publicize the loss of the gouache in order to prevent "driving it further underground. "

A New York appellate court has ruled that the question of whether the museum was obligated to do more than it did in searching for the gouache "depends on whether it was unreasonable not to do more, and whether it was unreasonable not to do more is an issue of fact relevant to the defense of laches and not the statute of limitations." The action therefore should not have been dismissed as barred by the statute of limitations, stated Judge Richard W.Wallach Jr.

The trial court had relied on DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir.1987; ELR 10:1:6), cert. denied, 486 U.S. 1056, in which the court dismissed as time-barred a replevin action seeking to recover from a good faith purchaser a Monet painting that disappeared from

Germany at the end of World War II; the court in DeWeerth found that the party who had owned the painting from 1922 until 1943 did not use "due diligence" in attempting to locate the lost work.

Judge Wallach noted that the dismissal in DeWeerth appeared to have been based not on the lapse of any particular period of time, but on a theory of estoppel - although the painting's original owner had lawful title to the stolen property, the delay attributable to the lack of diligence in searching for the stolen work prejudiced the defense of the good faith purchaser (although no express finding of prejudice was made). In Judge Wallach's view, the circumstances present in DeWeerth constituted laches.

The court proceeded by observing that the rights of the parties did not depend upon the mere lapse of time, no matter how long. Lubell also had attempted to show prejudice by arguing that if the museum had taken certain measures when the gouache was lost, Lubell most likely would not have had the opportunity to purchase the work. Judge Wallach stated that the evidence presented was relevant for the purpose of showing prejudice, but not for the purpose of evaluating the reasonableness of the museum's response to the theft. The court declined to take a position on the factual question of the reasonableness of the museum's search measures.

Judge Wallach concluded by finding that summary judgment was precluded by the following issues of fact raised by the parties: whether the Lubells acted with "vigilance" in purchasing the gouache; whether the gouache was stolen (with the burden of proof on the issue on Lubell); and whether the museum, as argued by Lubell, had "deaccessioned" the gouache in 1974.

Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S.2d 618 (N.Y. App. 1990) [ELR 12:3:13]

Decision granting summary judgment to promoter of master art plate investments in dispute with Internal Revenue Service is reversed and remanded

Texanna Art Trading Company, Inc. purchased original lithographic or serigraphic plates from artists. The company acquired each plate for a small cash payment and a long-term promissory note; each plate cost between $44,000 and $85,000.

Texanna then sold the master plates to investors for prices ranging between $75,000 and $150,000 per plate. The investors, who would make a cash payment, execute one or more short-term promissory notes, and a long-term promissory note, could use the plate to produce art prints.

The Internal Revenue Service claimed that Texanna, Samuel Shuman, and Adrian Shapiro violated section 6700 of the Internal Revenue Code by participating in the promotion and sale of the master plates to various investors. The taxpayers, under protest, paid the penalties assessed and then filed refund claims, asserting that they did not grossly overstate the value of the master plates to the investors.

A Federal District Court granted summary judgment to the Texanna parties on the ground that the government failed to provide a foundation for its expert report as to the value of the master plates.

A Federal Court of Appeals has reversed the District Court decision, declaring that the expert witness for the government provided evidence that the art plates were valueless, as was the investment enterprise. The court noted that according to the expert's affidavit, the term " master plate" was "atypical to the legitimate art printing industry," and, basically, the plates had no value. The expert witness raised genuine factual issues for resolution by a fact finder, concluded the court in remanding the matter to the District Court for further proceedings.

Shuman v. United States of America, 891 F.2d 557 (5th Cir. 1990) [ELR 12:3:14]

Recipients of painting may proceed with fraud claim against art dealer, but breach of warranty claims were properly dismissed

In 1968, Frances Lipman purchased a John Singer Sargent painting entitled "The Misses Wertheimer" from the Ira Spanierman Gallery; the $15,000 painting was a gift for Norma and Hobart Rosen. Spanierman's invoice contained a warranty stating: "This picture is fully guaranteed by the undersigned to be an original work by John Singer Sargent."

At the Rosens' request, Spanierman subsequently provided appraisals of the painting. The 1986 appraisal estimated the value of the painting to be $130,000.

In 1987, when the Rosens placed the painting for auction, they were informed that it was not an authentic work of Sargent. The Rosens then sued Spanierman for common law fraud, negligent misrepresentation, and breach of warranty.

A Federal Court of Appeals in New York has agreed with a District Court decision dismissing the Rosens' breach of warranty claim on the basis of the statute of limitations, and dismissing Lipman's fraud claim. However, the court found that the Rosens stated a claim of common law fraud and remanded the matter for further proceedings.

Judge Meskill noted that under section 2-725 of New York's Uniform Commercial Code, the statute of limitations on an action for breach of contract is four years from the time the cause of action accrues. The cause of action for breach of warranty accrued when tender of delivery of the painting was made, unless the warranty explicitly extended to future performance of the goods. Contrary to the Rosens' claim, the warranty of authenticity did not necessarily extend to future performance, notwithstanding the fact that the warranty involved an "immutable quality." Furthermore, New York law does not deem a warranty explicitly to extend to the future "when the nature of the product implies performance over an extended period of time." And the Rosens failed to cite authority for the argument that Spanierman's various appraisals extended his warranty to future performance - the appraisals contained no warranties, and were completely separate transactions from the sale of the painting.

The District Court, noted Judge Meskill, went on to hold that even if the warranty had been explicit as to future performance, the Rosens' discovery of the alleged lack of authenticity did not necessarily await future performance because the Rosens could have discovered the defect immediately after the sale. A painting's lack of authenticity would be apparent to an art expert, and requiring a purchaser to obtain an appraisal from an expert other than the seller would not be "an onerous burden," stated the court.

In all, the cause of action was untimely. Judge Meskill declared that a contrary holding would provide purchasers of art with greater protection than purchasers of other types of goods, and would leave art dealers exposed to breach of warranty claims indefinitely.

In turning to the fraud claims, the court first upheld the ruling that Lipman failed to state a claim of fraud, finding that Lipman did not show the necessary element of reliance on Spanierman's alleged misrepresentations. The Rosens, however, made a sufficient showing to preclude summary judgment. Judge Meskill pointed out that the Rosens relied on Spanierman's alleged misrepresentations in selecting the painting as their gift and in directing Lipman to provide Spanierman with the purchase price. And the Rosens, although not the purchasers of the painting, sufficiently alleged injury because, in the circumstances of the case, the funds for the purchase were properly regarded as an asset of the Rosens - Lipman provided the Rosens with the opportunity to acquire an asset believed to be worth at least $15,000, and this opportunity was a "spendable asset." If Spanierman willfully deceived the Rosens as to the authenticity of the painting, and the court upheld the decision granting the art dealer summary judgment Spanierman would gain a windfall "due to the mere fortuity that Lipman was the source of the funds for the purchase."

Judge Meskill concluded by pointing out that the Rosens' claim for fraudulent inducement was separate and distinct from the claim for breach of contract under New York law, and that the Rosens were entitled to plead both causes of action - the claim of common law fraud was not barred as incidental to the claim for breach of warranty. (In a footnote comment, the court expressed the view that, for various reasons, the fraud claim appeared to be timely brought.)

Rosen v. Spanierman, 894 F.2d 28 (2d Cir. 1990) [ELR 12:3:14]

California Supreme Court rules that shield law extends to nonconfidential unpublished information, but holds that Los Angeles Times reporter and photographer were required to testify about their eyewitness observations of police search in order to accommodate criminal defendant's right to fair trial

The California Supreme Court has ruled that the state's shield law extends to nonconfidential unpublished information," but that in certain situations, newspersons may be held in contempt for refusing to disclose such information in a criminal proceeding.

In September 1987, as described at ELR 10:5:16, Los Angeles Times reporter Roxana Kopetman and photographer Roberto Santiago Bertero accompanied Long Beach police on patrol. Kopetman and Bertero observed the arrest of Sean Patrick Delaney; Delaney was charged in a misdemeanor complaint with possession of brass knuckles in violation of the penal code.

Delaney moved to suppress the brass knuckles as evidence, arguing that, contrary to the assertion of the police officers, he had not consented to the search of his jacket and that the seizure was illegal because the officers lacked a reasonable suspicion that he was armed. Delaney subpoenaed the newspersons to testify at the suppression hearing. Kopetman and Bertero moved to quash the subpoenas on the ground that they could not be compelled to testify because their observations of the public search and seizure constituted "unpublished information" protected by the shield law (article I, section 2, subdivision (b) of the California Constitution; Evidence Code section 1070). The motions were denied.

At the suppression hearing, the prosecution called the newspersons to testify. Although it was established that Kopetman and Bertero observed the events leading to the seizure and had an opportunity to hear whether the officers requested consent as well as Delaney's response, the newspersons refused to answer questions relating to whether Delaney consented to the search.

The municipal court held that the shield law did not apply to the newspersons' eyewitness observations of the nonconfidential, public circumstances of the search and seizure, and that, in any event, the need for the neutral testimony on the consent issue outweighed their claim under the shield law. The court cited Kopetman and Bertero for contempt.

On petitions for writs of habeas corpus, the Los Angeles Superior Court found that the shield law provided the newspersons with immunity from contempt, and granted the petitions.

The California Court of Appeal found that the shield law did not grant newspersons the right to refuse to testify as to observations of a public event, and ordered the superior court to vacate its orders granting the petitions for writs of habeas corpus filed by the newspersons and to deny those petitions.

Article I, section 2(b) of the California Constitution, noted California Supreme Court Judge David N. Eagleson, provides that a newsperson "shall not be adjudged in contempt ... for refusing to disclose the source of any information procured while so connected or employed [as a newsperson]... or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public" (emphasis added by the court).

Judge Eagleson described the above-cited language as "clear and unambiguous" with respect to the issue presented to the court. Article I, section 2(b) applies to all information obtained by a newsperson, regardless of whether it was obtained in confidence - the use of the word "any" means without limit and no matter what kind. The remaining language of the section also does not contain an explicit or implied restriction to confidential information. Judge Eagleson proceeded to reject Delaney's argument that observing a nonconfidential incident does not amount to "information;" expressed disapproval of those Court of Appeal decisions that held or suggested that the shield law protects only confidential information; and found it unnecessary to consider the public policy issues involved in protecting unpublished information. In all, stated the court, the definition of "unpublished information" includes a newsperson's nonconfidential, eyewitness observations of an occurrence in a public place.

The court then found that in order to overcome a prima facie showing by a newsperson that he/she is entitled to withhold information under the shield law, a criminal defendant must show a reasonable possibility that the information will materially assist his/her defense.

However, a criminal defendant is not required to show that the information goes to the heart of his/her case. Judge Eagelson set forth the factors a trial court may consider, so as to accommodate a criminal defendant's right to a fair trial, in reviewing the defendant's request for information.

If a criminal defendant meets the threshold requirements, the trial court then must consider the importance of protecting the unpublished information. The factors relevant in making this determination would include: whether the unpublished information is confidential or sensitive (i.e., whether its disclosure would somehow unduly restrict the newsperson's access to future sources and information); the interests sought to be protected by the shield law; the importance of the information to the criminal defendant; and whether there is an alternative source for the unpublished information. A trial court must balance the cited factors, stated Judge Eagleson, who declined to hold in the abstract that any factor or combination of factors would be determinative.

In the instant case, Delaney "was clearly entitled to the reporters' testimony as to whether he consented to the police search of his jacket," held the court. Judge Eagleson first pointed out that there was "a substantial certainty that the reporters' testimony will materially affect the outcome of the criminal proceeding." Furthermore, a review of the relevant factors indicated that the balance weighed "overwhelmingly" in favor of requiring the reporters to testify; the judgment of the Court of Appeal was affirmed accordingly.

Judge Stanley Mosk agreed that Delaney was entitled to the newspersons' testimony concerning their eyewitness observations of the police search, but did not concur in the balancing test proposed by the majority. In Judge Mosk's view, federal constitutional rights are "supreme," and if the newsperson's shield would deprive a defendant of information necessary to exercise Fifth and Sixth Amendment rights, then the defendant would be entitled to the information notwithstanding the newsperson's immunity. Thus, if a defendant showed a reasonable possibility that the information sought would assist the truth-seeking process, and that alternative sources of substantially similar information were unavailable, the defendant would be entitled to the information. The information obtained by a reporter who was, as in the instant case, "a percipient witness of a transitory event," would be unavailable from alternative sources, noted Judge Mosk, who therefore concurred in the majority's judgment.

In a footnote comment, Judge Eagleson pointed out that Judge Mosk's concurrence would provide "scant protection" to a newsperson, and "ignored" the newsperson's state constitutional rights under the shield law, rather than attempting to apply the shield law consistently with the federal Constitution.

Judge Allen E. Broussard's concurring opinion agreed with the majority's conclusion that the information sought by Delaney was unpublished information within the meaning of the newspersons shield provision of the California constitution, but would have referred to the entire background of the constitutional provision, or to the legislative history of the statutory shield provision, in reaching this conclusion, rather than relying solely on the plain language of the constitutional provision.

Judge Broussard supported the view that in determining whether the California shield provision may be constitutionally applied, the court may weigh a defendant's relative need for the information in the particular case against the relative strength of the state's interest in providing immunity under the circumstances of the proceeding.

Delaney v. Superior Court of Los Angeles County, Case No.S006866 (Cal., May 3, 1990) [ELR 12:3:15]

Briefly Noted:

New York Civil Rights Law.

A New York appellate court has affirmed a trial court decision granting summary judgment to Omni Magazine in an action brought under sections 50 and 51 of the New York Civil Rights Law. A photograph accompanying an article entitled "Caffeine and Fast Sperm" depicted the family of Joseph Finger. Under the photograph, which was published without consent, was the following statement: "Want a big family? Maybe your sperm needs a cup of Java in the morning. Tests reveal that caffeine-spritzed sperm swim faster, which may increase the chances for in vitro fertilization." The Finger family was not identified in the article by name.

The trial court agreed with the magazine's argument that the use of the photograph in conjunction with the article did not violate sections 50 and 51 because the picture was not used for trade or advertising, but to illustrate an article on a subject of legitimate public interest.

Appellate court Judge Mikoll noted that the article did not purport to depict a family conceived by in vitro fertilization, but merely illustrated the result of increased fertility - a large family - and thus dealt with a newsworthy subject of general interest.

Finger v. Omni Publications International, Ltd., 550 N.Y.S.2d 213 (N.Y.App. 1990) [ELR 12:3:17]

Copyright Infringement.

A Federal District Court in Connecticut has granted summary judgment to BMI on a counterclaim raised by 262 West, Ltd.; the court previously had awarded BMI damages and injunctive relief in the copyright infringement action. The counterclaim alleged, alternatively, abuse of process, equitable set-off, or attempted extortion. The court noted that there was no evidence that BMI sued 262 West in an improper manner or used the legal process primarily for a purpose for which it was not designed. And there was no genuine issue of material fact with respect to the claim that BMI attempted to "force" the club to execute a licensing agreement for any particular number of nights a week.

Broadcast Music, Inc. v. 262 West, Ltd., Case N. N-88-178 (D.Conn., Feb. 1, 1990) [ELR 12:3:17]

Racial Discrimination.

A Federal District Court in Maryland has ruled that the operators of a nightclub known as "The Penthouse" may proceed with a civil rights action against the lessors of the nightclub premises.

Yesteryears, Inc., which often booked bands with black musicians and served black patrons, stated that Tim S. Brown and Margaret P. Brown (who leased from Waldorf Restaurant, Inc. the property in which the nightclub was located) acted with the express stated intention to have the club change its format in order to appeal to a white clientele, to prevent Yesteryears from operating its business to service black patrons, or to cause Yesteryears to go out of business.

Senior District Court Judge Herbert F. Murray denied a motion for summary judgment on standing grounds. A review of the relevant case law indicated that a non-minority party, be it a corporation or an individual, has standing to bring suit under the Reconstruction Civil Rights Acts when racially discriminatory actions have injured the party due to a relationship with minority citizens. Yesteryears met the constitutional and statutory requirements for standing based in part on the nightclub owner's alleged injury due to the closing of the Penthouse club and on the fact that the black victims of discrimination, with only a "transient" interest in the nightclub, were unlikely to bring suit.

In December 1989, the court denied the Waldorf parties' motion for reconsideration.

Yesteryears, Inc. v. Waldorf Restaurant, Inc., 730 F.Supp. 1341 (D.Md. 1989) [ELR 12:3:17]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: CBS Inc. v. Ziff- Davis Publishing Co., 554 N.Y.S.2d 449, 553 N.E.2d 997 (12:1:14); Pirone v. Macmillan, Inc., 894 F.2d 579 (11:12:6); Tele-Pac, Inc. v. Grainger, 552 N.Y.S.2d 550 (11:12:7); Ward v. News Group International, Ltd., 733 F.Supp. 83 (12:1:18); In re Marriage of Zaentz, 267 Cal.Rptr. 31 (11:11:10).[ELR 12:3:17]

IN THE NEWS

Louisiana governor vetoes album warning label bill

Louisiana Governor Buddy Roemer has vetoed a bill that would have required warning labels for albums containing potentially offensive lyrics. The bill would have provided fines of up to $1,000 and jail terms of up to six months for retailers, distributors and manufacturers engaged in the sale of labeled albums to unmarried persons under the age of seventeen; producers of the albums also would have been subject to fines. [Aug. 1990] [ELR 12:3:18]

Publisher of "The Hunt for Red October" receives $43,000 damage award for premature sales of paperback edition

Federal District Court Judge Pierre N. Leval has awarded the United States Naval Institute damages of $43,000 in the publisher's action (see ELR 11:9:12) against the Berkley Publishing Group, the paperback publisher of Tom Clancy's novel "The Hunt for Red October." The Naval Institute claimed that the Berkley parties distributed the paperback edition prior to the scheduled October 1985 release date. [Aug. 1990] [ELR 12:3:18]

Court awards damages of $3,000 to producer of documentary film in action involving Geraldo Rivera program on Charles Manson

A Federal District Court in Los Angeles has awarded Robert Hendrickson $3,000 in the film maker's copyright and trademark infringement action against Geraldo Rivera and other parties involved in producing and exhibiting a 1988 television special on Charles Manson entitled "Murder: Live From Death Row."

The lawsuit claimed that the Rivera parties, without authorization, used portions of Hendrickson's 1972 documentary "Manson," including allegedly unique footage of the Manson family in their "habitat."

Judge Ronald S.W. Lew found that the Rivera parties did not violate the Lanham Act; the court also dismissed Hendrickson's claims against Rivera. [Aug. 1990] [ELR 12:3:18]

Court imposes noise level restrictions on Pacific Amphitheater

An Orange County trial court judge has ordered the Pacific Amphitheater in Costa Mesa to keep sound levels within five decibels of the county's sliding-scale noise ordinance; noise from the amphitheater may not exceed 55 decibels for more than 30 minutes, nor be louder than 75 decibels at any time.

The ruling, which ends a six year proceeding, authorized the county marshal to hire a sound monitor during concerts to ensure compliance. [Aug. 1990] [ELR 12:3:18]

Baseball Commissioner restricts George Steinbrenner's participation in New York Yankees baseball club; in separate matter, commissioner orders Yankees to pay fine of $225,000 due to Steinbrenner's statements about Dave Winfield trade

Baseball Commissioner Fay Vincent has barred George Steinbrenner from participating in the day-today operations of the New York Yankees.

It has been reported that the Commissioner found that Steinbrenner's dealings with a known gambler were not in the best interests of baseball. Vincent had conducted an investigation of Steinbrenner's $40,000 payment to Howard Spira.

Under the ruling, effective August 20, Steinbrenner must resign as the general partner of the Yankees, and reduce his financial interest in the club below fifty percent. Furthermore, Steinbrenner may take no part in player transactions; may not attend, vote or participate in major league meetings, or make personnel decisions; and will require the commissioner's permission to attend baseball games.

Steinbrenner has agreed not to appeal the commissioner's decision, or to challenge the decision in court.

The Yankee owner may remain a limited partner of the club and will be allowed to "consult upon and participate in major financial and business decisions of the New York Yankees solely in his capacity as a limited partner," with the permission of the commissioner.

In a separate decision in early July, Vincent ruled that comments made by Steinbrenner in a meeting with Dave Winfield after the Yankees had traded the player to the Angels were clearly improper," and ordered the Yankees to pay fines of $200,000 to the Angels and $25,000 to the Major Leagues' Central Fund. When the trade was announced, Winfield stated that he intended to go to arbitration; Steinbrenner then declared that he would take Winfield back if the player won his arbitration case and remained in New York. Winfield decided not to proceed with the arbitration and agreed to the Angels' offer of a three year contract extension worth about $9 million. Vincent found that Steinbrenner's statements harmed the Angels' bargaining position. [Aug. 1990] [ELR 12:3:18]

Arbitrator rules that Major League Baseball team owners acted in collusion to restrict free agent player movement and salaries after the 1987 season

The major league baseball team owners violated their collective bargaining agreement with the Major League Players Association by using an information bank in order to compare salary offers to free agents, arbitrator George Nicolau has ruled, in the third and final collusion case brought by the association (see ELR 10:8:19; 10:5:19; 9:5:19).

The owners, according to news reports, filed their offers to free agents with the Player Relations Committee, which then made the information available to other clubs. The data bank was formed during the proceedings in the second collusion case, was used for the free agent "class" of 1988, and then was discontinued upon Nicolau's order.

Seventy-six free agents from the winter of 1987-1988, including Dave Righetti, Mike Witt, Jack Clark and Paul Molitor, were involved in the most recent proceeding. Damages have not yet been determined for the second or third cases. [Aug. 1990] [ELR 12:3:19]

NCAA bars University of Nevada Las Vegas from 1990-1991 postseason competition

The National Collegiate Athletic Association has banned the University of Nevada Las Vegas from postseason competition during the 1990-1991 basketball season.

In 1977, the NCAA placed the university on probation for alleged rules violations, and ordered the school to "show cause" why it shouldn't suspend Coach Jerry Tarkanian for two years, or be penalized further. After a series of proceedings initiated by Tarkanian, (see ELR 11:11:19; 10:10:16), the NCAA and the coach agreed to settle their dispute.

The ruling of the Association's Committee on Infractions apparently was the final penalty for the rules violations, and will mean that the university will not be allowed to defend its national championship basketball title. [Aug. 1990] [ELR 12:3:19]

Federal District Court orders five month prison sentence, fine, and community service for Pete Rose upon guilty plea to charges of filing false income tax returns

A Federal District Court judge. in Cincinnati has sentenced Pete Rose to five months in prison and one year of supervised release upon the athlete's guilty plea to two felony counts of filing false income tax returns. Judge S. Arthur Spiegel also fined Rose $50,000 and ordered him to provide 1,000 hours of community service to inner city children.

According to news reports, Rose failed to declare about $355,000 in income from memorabilia sales, personal appearances, and gambling winnings from 1984 through 1987; during this time, Rose paid more than $2 million in taxes on reported income of $4.6 million, and has since paid $366,000 in back taxes, interest and penalties for that period. [Aug. 1990] [ELR 12:3:19]

DEPARTMENTS

Book Notes:

Art Law: The Guide for Collectors, Investors, Dealers, and Artists by Ralph E. Lerner and Judith Bresler

A 725-page, one volume desk reference is directed towards attorneys, accountants, trust officers, and the international art community who are involved in the legal and tax ramifications involved in the creation, purchase, sale, ownership, or transfer of a work of art. The book is divided into five sections: Dealers; Artwork Transactions; Artists' Rights; Collectors; and Tax and Estate Planning. It includes sample documents such as collector/gallery and artist/gallery consignment agreements; the bill of sale for galleries; auction contracts; commission agreements; copyright protection; and methods of estate planning.

The book is published by the Practising Law Institute, Department GNAO, 810 Seventh Avenue, New York, NY 10019 (212) 765-5700. It is available on 30-day approval for $85.00.

First Amendment Law Handbook by James L. Swanson and Christian L. Castle

This 1990 annual guide assembles law review articles, legal briefs, letters and short, practical articles on an ever-changing field of law.

It explores such wide-ranging subjects as the Conflict between Intellectual Property Law and the First Amendment; Free Speech on Campus; Defamation; Flag-burning: Political Protests; Press Censorship; the Religion Clauses; Government Funding; and Cable Television and the Freedom of Expression.

The First Amendment Law Handbook is published by Clark Boardman Company, Ltd., 375 Hudson Street, New York, NY 10014 (800- 221-9428 or in New York, 212-645-0215.)

It is priced at $65 and is available on 30 day approval. [ELR 12:3:21]

In the Law Reviews:

An Antitrust Analysis of Sports League Contracts with Cable Networks by Stephen F. Ross, 39 Emory Law Journal 463 (1990)

Cardozo Arts & Entertainment Law Journal has published its Volume 8 as a special issue with articles presented at a one-day conference entitled "Cable Television: The Race to Reregulate" as follows:

Congress, Free Speech, and Cable Legislation: An Introduction by Monroe E. Price, 8 Cardozo Arts & Entertainment Law Journal 225 (1990)

Amending the Oversight: Legislative Drafting and the Cable Act by Michael I. Meyerson, 8 Cardozo Arts & Entertainment Law Journal 233 (1990)

Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry Into Cable by Laurence H. Winer, 8 Cardozo Arts & Entertainment Law Journal 257 (1990)

Cable Television: Proposals for Reregulation and the First Amendment by Stuart Robinowitz, 8 Cardozo Arts & Entertainment Law Journal 309 (1990)

The FCC's Cable Inquiry: An Opportunity to Reaffirm the Cable Act by Frank W. Lloyd, 8 Cardozo Arts & Entertainment Law Journal 337 (1990)

Current Issues in Cable Television: A Re-Balancing to Protect the Consumer by Norman M. Sinel, Patrick J. Grant, Caroline H. Little, and William E. Cook, 8 Cardozo Arts & Entertainment Law Journal 387 (1990)

This Is the Picture-If You Don't Like It, Turn It Off: The Futility of Setting Cable Specific Obscenity Standards by Michael Bauman, 8 Cardozo Arts & Entertainment Law Journal 611 (1990)

The Gray Market After K Mart: Shopping for Solutions by Danielle G. Mazur, 8 Cardozo Arts & Entertainment Law Journal 641 (1990)

Art Forgery and Copyright Law: Modifying the Originality Requirement to Prevent the Forging of Artworks by Judith M. Nelson, 8 Cardozo Arts & Entertainment Law Journal 683 (1990)

Granting Foreigners Free Speech Rights: The End of Ideological Exclusions? by Leonard David Egert, 8 Cardozo Arts & Entertainment Law Journal 721 (1990)

Is This the End of American Indian Site Specific Free Exercise Claims?: Lyng v. Northwest Indian Cemetery Protection Association by Joseph Tomkiewicz, 8 Cardozo Arts & Entertainment Law Journal 761 (1990)

Determining Damages for Breach of Entertainment Agreements by Melvin Simensky, 8 The Entertainment and Sports Lawyer, Publication of the ABA Forum on the Entertainment and Sports Industries 1 (1990)

Sports and Antitrust: Should College Students Be Paid to Play? by Lee Goldman, 65 Notre Dame Law Review 206 (1990)

The Rationality of U.S. Regulation of the Broadcast Spectrum by Thomas W. Hazlett, 33 The Journal of Law and Economics 133 (1990)

When Is a Quote Not a Quote?: The Subjectivity of Truth in Masson v. New Yorker Magazine, Inc., 64 St. John's Law Review 150 (1990)

Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive by Paul Presburger and Michael R. Tyler, 13 Hastings International Law Journal 495 (1990)

Communications and the Law Volume 12, Number 2 has been published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880 with the following articles:

Pay Cable Television: A Regulatory History by Richard A. Gershon, 12 Communications and the Law 3 (1990)

Is Fame Ever Fleeting? Contemporary Mission v. New York Times Company by Hon. John A. Neuenschwander, 12 Communications and the Law 27 (1990)

Smart Shopping as Patriotism: Avoidance, Denial, and Advertising by Paul Siegel, 12 Communications and the Law 37 (1990)

The Role of Audience Ratings in Communications Policy by James G. Webster, 12 Communications and the Law 59 (1990)

Exploiting Stolen Text: Fair Use or Foul Play? by the Honorable Roger J. Miner, 37 Journal of the Copyright Society of the USA published at New York University Law Center 1 (1989)

Not the End of History: The Second Circuit Struggles with Fair Use by The Honorable Jon O. Newman, 37 Journal of the Copyright Society of the USA 12 (1989)

The Federal Communications Law Journal, formerly the Federal Communications Bar Journal, has published Volume 42 with the following articles:

Universal Telecommunications Infrastructure for Information Services by Warren G. Lavey, 42 Federal Communications Law Journal 151 (1990)

Cable Television and the Compulsory Copyright License by Fred H. Cate, 42 Federal Communications Law Journal 191 (1990)

The Scope of Copyright in Information: An Alternative to Classic Theory by Leon Dayan, 42 Federal Communications Law Journal 239 (1990)

Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson "Burns" a Confidential Source by Jens B. Koepke, 42 Federal Communications Law Journal 277 (1990)

Book Review: A Legislative History of the Communications Act of 1934, edited by Max D. Paglin, reviewed by William Malone, 42 Federal Communications Law Journal 319 (1990)

Nova Law Review has published a Symposium on Law and the Visual Arts with a section on Art, the First Amendment and the NEA Controversy as its Volume 14 with the following articles:

Where Are We Now? Some Thoughts on "Art Law" by Susan Duke Biederman, 14 Nova Law Review 313 (1990)

Tax-Paid Obscenity by Senator Jesse Helms, 14 Nova Law Review 317 (1990)

Art and Censorship by Richard Serra, 14 Nova Law Review 323 (1990)

Reauthorizing the National Endowment for the Arts by Bruce Fein, 14 Nova Law Review 333 (1990)

One if by Land, Two if by Sea by Arthur I. Jacobs, 14 Nova Law Review 343 (1990)

Art, Obscenity and the First Amendment by Judith Bresler, 14 Nova Law Review 357 (1990)

Art Funding: The Fight Over Sex, Money and Power by Nichols Fox, 14 Nova Law Review 369 (1990)

"Tilted Arc" Destroyed by Richard Serra, 14 Nova Law Review 385 (1990)

A Critique of the Visual Artists Rights Act of 1989 by Edward J. Damich, 14 Nova Law Review 407 (1990)

Federal Moral Rights Legislation: The Need for Caution by Robert A. Gorman, 14 Nova Law Review 421 (1990)

Moral Rights: The Long and Winding Road Toward Recognition , 14 Nova Law Review 435 (1990)

Drafting "Work for Hire" Agreements After Community for Creative Non-Violence v. Reid by Jean S. Perwin, 14 Nova Law Review 459 (1990)

Florida's Art Consignment Statute: A Trap for the Unwary Artist? by Cathryn Mitchell Heise, 14 Nova Law Review 473 (1990)

Art and the First Amendment Protection in Light of Texas v. Johnson, 14 Nova Law Review 487 (1990)

The General Practice of Art Law by Ira M. Lowe and Paul A. Mahon, 14 Nova Law Review 503 (1990)

Art and Income Taxes-The Changing Scene by Ralph E. Lerner, 14 Nova Law Review 533 (1990)

The Role of Creativity in Social and Political Processes by Gustave Harrow. 14 Nova Law Review 545 (1990)

Avant-Garde, Kitsch and Law by Anthony Chase, 14 Nova Law Review 549 (1990)

The Lawyer as an Artist by Roger I. Abrams, 14 Nova Law Review 573 (1990)

Of Bread and Roses and Copyrights by Linda J. Lacey, December Duke Law Journal 1532 (1989)

Berne-ing the Soviet Copyright Codes: Will the USSR Alter Its Copyright Laws to Comply with the Berne Convention? by William Scott Goldman, 8 Dickinson Journal of International Law 395 (1990)

Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties by Graham Zellick, 31 William and Mary Law Review 773 (1990)
[ELR 12:3:21]